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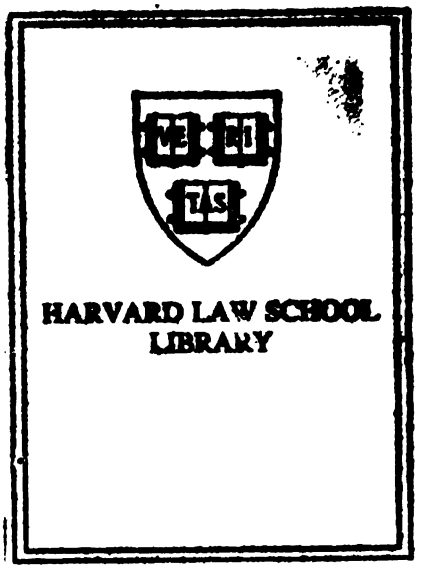
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ERRATA.

Syllabus, page 40, beginning of fourth line the word "and" should be "or."

Page 42, in sixteenth line from the top, the word "and," after the word sustained, should be "or."

In the fourth line of syllabus, of Jones' Adm'r v. I. C. R. R. Co., in paragraph 2, on page 481, the word "contention" should be "conclusion."

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COURT OF APPEALS OF KENTUCKY.

SOUTH COVINGTON & CINCINNATI RY. CO. v. SCHILLING, BY &c.

(Filed May 4, 1904—Not to be reported.)

Selection of jury—Where a jury, upon the trial of an action for damages, was selected from the panel selected for a previous term, upon a motion to discharge the panel and draw a new one as required to do by the statute, it was error in the lower court to overrule the motion.

Ernst, Cassatt & McDougal for appellant.

Robert C. Simmons for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

The appellee, Ella Schilling, in the month of September, 1901, was driving north on Madison avenue in the city of Covington, Ky. One of the cars of appellant, going in the same direction, came up behind her, and collided with her wagon, throwing her from her seat to the street, by which she received a severe injury on the head, inflicting painful, and, as she claims, permanent injury; to recover damages for which this action was instituted, she alleging that the collision, and her subsequent hurt, were the result of the negligence of the employes of appellant in charge of the car.

The answer placed in issue the material allegations of the petition, and, in the second paragraph, alleged that the injury received by appellee was the result of her own negligence, and but for which she would not have been hurt. The issues were completed by reply, and upon the trial of the case, the jury returned a verdict of $500 in favor of appellee, of which appellant now complain. The trial was had on the 12th day of May, 1903. When the cases was called on the docket, appellant objected to the whole panel of the jury on the ground that it was the regular panel selected for the April term, which had been carried over by the judge into the May term. The motion to discharge the panel, and to draw a new one, as required by the statute, was overruled, and this is the first error complained of. This precise question was presented in the case of the Covington & Cincinnati Bridge Co. v.

Jennie Smith, ante 2392; it was held in the opinion in that case that the formation of the jury was a prejudicial error, and the judgment reversed upon that ground alone.

It follows, therefore, that the judgment herein must be reversed upon the authority of the case cited. As this case must be retried upon its return to the court below, it is proper that we should determine the other mooted question of law involved in the record. The trial court did not err in overruling appellant's motion for a peremptory instruction, as the evidence was conflicting as to the cause of the injury, and the issue of fact thus raised was one properly referable to the jury. Appellant and appellee have conflicting theories as to the cause of the accident, and there was evidence adduced in support of both. Appellee's theory is that she was driving in the street, but on the right of way of appellant, and that the car was run recklessly into the rear end of her wagon as she was leaving the track. Appellant's theory is that appellee's wagon was on the carriage way in a perfectly safe position, so far as the car was concerned, until it got alongside, whereupon the horse, for some reason, suddenly turned toward the car, and brought the vehicle in such close proximity thereto, that the journal of the car came in contact with the front hub of the wagon, thus causing the accident in question, and appellees' consequent injury.

The facts in this case, in so far as they illustrate the respective theories as to the responsibility of the parties hereto, with reference to the accident in question, are in all respects similar to those in the case of the South Covington & Cincinnati Street Ry. Co. v. Pelzer, 19 Ky. Law Rep., 88, and the legal principals deducible therefrom, are aptly and succinctly stated in the opinion therein rendered; and, upon the return of this case to the court below (assuming that the evidence upon a new trial will be substantially the same as that contained in the present bill of exceptions), the instructions of the court should be made to conform to the law as laid down in the case cited.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

THUM, SURVIVING PARTNER v. CITIZENS BUILDING AND LOAN ASS'N'S RECEIVER.

(Filed May 10, 1904—Not to be reported.)

Attorney's fees—Where appellant and his co-counsel were allowed $6,150 for their services, other counsel having been paid $2,660 in the settlement of an estate where $90,000 have been collected, while the allowance appears to be small, the judgment of the chancellor having refused the allowance of a fee of $12,000 to appellant, his judgment will not be disturbed, because he knew all about the case from its inception and the time and character of services rendered.

Robt. L. Greene for appellant.

Burnett & Burnett and C. B. Blakey for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Jefferson Circuit Court for refusing to allow the appellant a fee of $12,000 for services in representing W. R. Logan, assignee of Kentucky Citizen's Building and Loan Association, in the settlement of its affairs. This settlement suit has been on the docket something like six years. The appellant and his co-council have rendered valuable services for which they were allowed the sum of $6,150. Other counsel engaged in the case were paid $2,660. The total assets which went into the hands of the assignee amounted to about $200,000 and only about $90,000 of which have been collected.

The proof shows that nearly one-third of what has been collected has been expended in the way of paying attorneys, the assignee and other expenses incurred. While, under the proof, the allowance to appellant appears small, considering all the circumstances connected with the settlement of this estate as shown by the record, and the further fact that the chancellor who tried this case knew all about it from its inception, and the kind and character of services rendered by the appellant, we do not feel inclined to disturb his judgment.

In the case of Germania Safety Vault Co. v. Hargis, 28 Ky. Law Rep., 874, the court said: "The only evidence as to the value of an attorney's services being their own testimony, the court is not concluded thereby, but must, while having full respect for their opinions, exercise its own judgment." In the case of Louisville Gas. Co. v. Hargis, 17 Ky. Law Rep., 1190, this court in substance said: In fixing the value of legal services, the chancellor need not be controlled entirely by the opinion of the witnesses, but may rely upon his own knowledge and experience of such matters.

Wherefore, the judgment of the lower court is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. MULFINGER'S ADM'X.

(Filed May 4, 1904—Not to be reported.)

1. Railroads—Negligent killing of brakeman—Evidence—The weight of the evidence in this case shows that deceased was knocked off the car or ladder he was using in the discharge of his duty as extra brakeman, by reason of a cross arm attached to a telegraph pole standing near the railroad track; the car he was attempting to climb on, being very wide and high it was hardly possible to reach his position on the car, dark as it was, without being hit or pushed off the ladder or car.

2. Reasonable inference—Dizziness—Under the proof in this case it is reasonable to infer that deceased did not lose his life by falling from the ladder, it being more reasonable to infer that he was knocked from the car by this cross arm, than by his becoming dizzy, as he was young, healthy, active, and strong, and not subject to dizziness.

3. Evidence withdrawn from jury—The fact that the lower court allowed a statement, made by one Fossett, to be given to the jury as part of the res gestæ, which the court afterwards withdrew as incompetent, and admonished the jury both by verbal and written instructions to disregard it as evidence, we must presume that the jury obeyed the court's instruction and disregarded the evidence so given.

4. Reading petition as evidence—The counsel for appellant having read the petition to the jury and commented on it, we know of no rule of law that would prevent the opposite party from likewise discussing it.

5. Excessive verdict—Expectany of life—Earning capacity of deceased—Although by a calculation of the life tables considering decedents' expectancy of life and his earning capacity at the wages he received at the time of his death, and deducting his living expenses, his estate was worth less than $8,000, the amount of the verdict given by the jury, the appellant overlooks the fact that the jury might take into consideration that a young, vigorous man like deceased, might not always be an extra brakeman, but that his earning capacity would increase with age and promotion.

J. A. Sullivan and Breckinridge & Shelby for appellant.

H. C. Rice, Smith & Bush, R. L. Greene and Hazelrigg, Chenault & Hazelrigg for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment for $8,000 for the alleged negligent killing of appellees' intestate in the month of October, 1901, in appellant's yards in Paris, Ky.

The deceased, Lewis Mulfinger, was in the employ of appellant as "extra brakeman," described to mean one who has no regular employment, but takes the place of a regular employe when off duty. It appears that appellant has in its yards at Paris several tracks or sidings running north and south. The freight train on which Mulfinger was employed was on the east track, or siding No. 10. It appears, without any contradiction, that there was, at the time Mulfinger lost his life, a telegraph pole standing 4 feet and 8 inches from the outer or east rail of this No. 10 track; that there was a cross arm on this pole of six feet in length, situated fourteen feet and three inches from the ground or base of the pole, and that this No. 10 track or siding was constructed with a slight curve, and for that reason the east rail or one next to the pole was from two to three inches lower than the west rail, which necessarily inclined the top of the passing car several inches nearer the pole. The car from which Mulfinger fell and lost his life was an L. & N. stock car, twelve feet high, nine or ten feet wide, the track being five feet wide. The car necessarily extended from two and one-fourth to two and one-half feet over the side of the rails. The cross arm on the pole extending out over the top of the car in passing, to the extent of near two feet, and two feet and three inches above the roof of the car. The only witness who saw the deceased immediately before he lost his life, was one Fossett, the rear brakeman. He testified that the train was started that night south in the usual manner; that he left the caboose and went along the cars loosening the brakes, and when he arrived at the front end of a gondola or coal car, the fourth car from the caboose, the deceased, the middle brakeman, climbed upon this gondola car from the West side and crossed it and passed to the east corner of the stock car immediately in front and caught hold of the ladder of the stock car which was on the east side and near the rear end of the car, and the last he saw of the deceased on the car was when he was climbing this ladder. Witness stated that he was standing upon an eight inch projection on the front end of the gondola car on the side of the car next to the telegraph pole, but about one and one-half or two feet from the outside or east side of the gondola car. It appears from the evidence that this gondola car was not as wide as the stock car by a foot or more.

While standing upon this projection, witness turned his face east, leaving his body fronting the south, when, without any warning to him, the deceased fell and brushed him down the front and nearly knocked him from the car. When deceased fell he fell between the cars and the front wheels of the gondola passed over his body and were thrown off of the track and moved about a car length. Mulfinger died within a few minutes, without uttering a word. Three witnesses testify, without contradiction, that this gondola car left the track at the telegraph pole; that the indentation of the wheels of the car on the ties began at that point. The witness, Fossett, did not know whether the deceased had reached the top of the car, but stated that he saw his lantern on top of the car. On cross-examination Fossett also stated that he saw the telegraph pole when he passed it, and that Mulfinger fell after passing the pole.

The appellant contends that the court erred in not giving a peremptory instruction to find for it, claiming that under the facts, as proven, it was not shown that the telegraph pole, or the arm caused the death of Mulfinger, but that the probabilities were equal that he was knocked off by the pole or arm or slipped from the ladder or missed his hold on the iron on top of the car, which was about two feet from the east edge of the car, or that he became dizzy and fell from the car. Apellant refers to the cases of Wintuska's Adm'r v. L. & N. R. R. Co., 14 Ky. Law Rep., 579; Louisville Gas Co. v. Kaufman, Straus & Co., 20 Ky. Law Rep., 1068; Hughes v. Cincinnati R. R. Co., 91 Ky., 596; L. & N. R. R. Co., v. Walton, 22 Ky. Law Rep., 85; Hughes, Adm'r v. L. & N. R. R. Co., 28 Ky. Law Rep., 2288, and Hughes, Adm'r v. L. & N. R. R. Co., 20 Ky. Law Rep., 1029, in support of their motion, and claim that in effect these cases decide that when, under the evidence, the inference that the injury was due to the defendant's negligence is no stronger than that it was due to the person injured himself or to other causes, a peremptory instruction is proper. This is the correct rule, and the cases referred to sustain it. The question to be determined is, whether this case comes within this rule. After a careful consideration of the facts proven, we are of the opinion that it does not. As stated, the proof is positive and without contradiction that the deceased was last seen ascending the ladder on this stock car before reaching the pole, and that the pole and its arm were so situated that it was hardly possible for him to reach his position on the car, dark, as it was, without being hit or pushed off the ladder or car. It is reasonable to presume that if he had slipped when on the ladder or missed his hold on the iron bar on top of the car, then he would have fallen backward, and not between the car he was on and the one following him. The witness, Fossett, stated that the deceased fell against him, and he was situated one and a half or two feet west of the east side of the gondola car. This, in connection with the fact that his lantern was on top of the car, shows that deceased fell from the top of the stock car. This fact, in connection with the admitted fact that the arm of this pole extended over the roof of this car about two feet, and only two feet and three inches above it, and the further fact, as proven by Fossett, that when the wheels passed over his body the wheels were thrown from the track (and all the witnesses testified that this occurred at the telegraph pole, as shown by the unmistakable fact that the indentations in the ties made by the wheels began at

that point,) is a convincing circumstance that the deceased was knocked or pushed off of the top of this car by the arm of this pole. We are not unmindful of the statement by Fossett that he saw this pole by the light of his lantern as he passed it, and that deceased fell after he passed it. Evidently Fossett was mistaken in this statement, or in the statement that the wheels, in passing over the body, were thrown off of the track. The physical facts corroborate the last statement. It was the province of the jury to weigh the evidence and give credit to that which comported with reason. To uphold the contention of appellant in this case would amount to the establishment of a rule that no case for damages could be made out by circumstantial evidence; that to maintain such a case there must have been one or more eye witnesses to the prime fact.

In the Wintuska case, above referred to, the proof only showed that when Wintuska was last seen he was walking on top of a car going in the direction of the engine, and he was afterwards found dead near the rock claimed to be the cause of his death, and it was supposed that he was descending the ladder on the side of the car and came in contact with this rock. In this case there is no supposition as to decedent ascending the ladder. It is a proven fact.

In the Kauffman, Straus & Co. case, supra, the court said, in substance, that the boiler gave way from one of two or more causes as shown by the proof. First, that it might be inferred that low water in the boiler caused it, and if this was the case the gas company was responsible. The court also said that the proof showed with reasonable certainty that the boiler was inherently weak from physical changes occurring secretly through long use, and which were not discoverable by ordinary and usual inspection, and that the explosion almost necessarily followed from the subjection of the boiler to the usual amount of pressure required in its customary operation, and that the gas company used the proper care to discover the defects in the boiler. The proof also showed that the boiler was managed and operated prudently, and the explosion was not the result of negligence, and the court concluded that as the proof showed that it was more probable that the boiler was destroyed from the latter cause than by reason of not keeping it full of water, the gas company was not liable,

In the Hughes case, supra, 91 Ky., 526, the court said: "In an action to recover for an injury arising from defendant's negligence, the burden of showing negligence is on the plaintiff; and if the evidence shows that the injury may have resulted from either one of two or more causes, only one of which was due to defendant's negligence, and the inference that the injury resulted from the one cause is no stronger than that it resulted from the other, the plaintiff has failed to make out his case, and the jury should be so told."

Under the proof in this case it is reasonable to infer that the deceased did not lose his life by falling from the ladder. It is more reasonable to infer that he was knocked from the car by this cross arm, than by his becoming dizzy and falling off, the proof showing that he was a young man twenty-three years of age, healthy, active and strong, and not subject to dizziness or fainting spells.

Appellee introduced as a witness one Cleveland, who stated that he was

the head brakeman on the train that night; that when the train stopped he went back hurriedly to where Mulfinger was lying, and as soon as he arrived there he asked Fossett what caused Mulfinger to get hurt. Fossett answered that the cross arm knocked him off. The appellant objected to this testimony; the court overruled its objection, and it excepted. During the trial, and before the evidence was closed, the court changed its mind as to the competency of this evidence, and excluded the same from the jury, stating to the jury that they must not consider it for any purpose. The appellant then moved the court to discharge the jury and continue the case. The court overruled this motion, to which action the appellant excepted. At the conclusion of the evidence the court gave written instructions to the jury, the first one being as follows: "The testimony of the witness, William Cleveland, as to what Fossett said to him, to wit: That Mulfinger was knocked off by the telegraph pole, is incompetent evidence, and that statement is excluded from your consideration, and you are instructed to wholly disregard that statement of the witness in considering what your verdict should be."

Appellee claims that this statement by Fossett to Cleveland is competent as part of the res gestæ; appellant claims that it is not, and the lower court so decided. As appellant is now complaining, we deem it unnecessary to pass upon the competency of this evidence, but will treat it, for the purposes of this case, as incompetent. Before the court excluded this statement of Cleveland, the witness, Fossett, denied having made any such statement to Cleveland, or any one. With this denial by Fossett and the oral and written instructions by the court to the jury not to consider this evidence for any purpose, we must presume that the jury obeyed the court's instructions, and that the statement did not have any effect on the jury in making up their verdict.

Appellant introduced as evidence the plaintiff's petition for the purpose of showing a variance between it and the proof introduced by appellee, and also that from the petition, appellee did not herself know what caused the death of her husband. She stated in her petition that his death resulted from one or two causes, but which one, she did not know. The appellant's counsel in his argument to the jury discussed this petition. Appellee's counsel in his closing argument also discussed this petition, and read to the jury that part which alleged that deceased came to his death by being knocked off the car by the cross arm, and stated that appellant had proven appellee's case for her by the introduction of this petition as evidence. Appellant objected to this, the court overruled its objection, and the appellant complains that this is error, and very prejudicial to it.

We must presume that the jurors had minds sufficient to give proper weight to this species of evidence. They had heard the whole petition read, and they knew from it and the other evidence in the cause that the administratrix, Mrs. Mulfinger, was entirely ignorant of the cause of her husband's death, except from report. For this reason the petition ought not to have been introduced, but as the appellant introduced it, and commented upon it, we know of no rule of law that would prevent the opposite party from discussing it. Under our law, the pleadings are for the court and not for the jury, and it is improper for counsel to read or discuss them before the jury,

unless introduced as evidence. In the case of L. & N. R. R. Co. v. Hull, 24 Ky. Law Rep., 879, the court said: "If it was desired to get before the jury the statements in the pleadings of the defendant, these pleadings should have been given in evidence on the trial, so that the defendant might have an opportunity to explain any inconsistencies. When this was not done, they should not have been referred to in the concluding argument, which should have been confined to the evidence heard before the jury and the law of the case as given in the instructions of the court."

Appellant also complains that the appellee's counsel, in his concluding argument, was guilty if improper conduct in discussing the criterion of damages different from the rule as prescribed in the instructions of the court. It does not appear from the bill of exceptions that appellant objected to this, and, therefore, we can not consider it. Appellant also complains that the verdict is excessive, and for that reason the case ought to be reversed; and makes some figures as to what deceased was earning as extra brakeman, considering his expectancy of life and deducting his probable living expenses. This calculation shows that the deceased was worth to his estate considerably less than $8,000. The appellant overlooks the fact that the jury might take into consideration that a young and vigorous man like Mulfinger, might not always be an extra brakeman; that it was reasonable to presume that he might be promoted to a higher and better paying position, if he had been permitted to live. This court has upheld verdicts in several cases in excess of $8,000 where the person's life was lost by negligence.

Perceiving no error prejudicial to the substantial rights of appellant the judgment of the lower court is affirmed, with damages.

Whole court sitting except Chief Justice Burnam.

SIZEMORE, &c. v. TRIMBLE, &c.

(Filed May 4, 1904—Not to be reported.)

Lands — Title of record—Tenancy—Adverse possessio n— The appellees having title of record from the Commonwealth to the land in controversy, on which appellant and her husband, Thomas Sizemore, resided up to his death in 1894, the husband occupying the land as tenant of the appellees, paying them rent up to the time of his death, and appellees having procured a judgment in the Breathitt Circuit Court, in which county the land lies, enjoining the husband from cutting or removing any timber from the land, which judgment was consented to by him in open court, to which action the wife was not a party, and in which it was adjudged that the husband was to occupy the land as appellees' tenant until January 1, 1889, the wife, Peggy Sizemore, could not have held the land adversely to appellees while her husband held for them, and the title he held must govern the possession unless collusion had been shown.

Dyke L. Hazelrigg and Thos. T. Cope for appellants.

W. W. McGuire, J. J. C. Bach and White & Ray for appellees.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Nunn.

This action was brought in the Breathitt Circuit Court in equity by ap-

pellees, children of Jerry W. South, against appellants, seeking to obtain an injunction to restrain them from committing waste by cutting and removing timber from the lands described in the petition, alleged to be the land of appellees, and in the possession of appellants as tenants. Appellants denied the title of appellees and the tenancy, and claimed the land as that of Peggy Sizemore, by patent to her father, and title bond from him to her and by adverse possession. Upon trial the injunction was granted and from that judgment this appeal is prosecuted.

It appears that many years ago Jerry W. South, ancestor of appellees, became the owner of a large body of land which had been patented by the Commonwealth of Virginia to one Franklin in the year 1784. There is proof showing that this land was deeded to South and Judge Breck under a tax sale, and the deed was recorded in the clerk's office of Breathitt county, but was destroyed by fire in the burning of the courthouse in the year 1878. Under this purchase and deed, South entered into the possession of the land so far back as 1850, at least that part of the land in controversy herein. For many years after 1850, South made divers and sundry leases to various tenants and one of his sons lived on the land as his tenant. This was continued from 1850 down to the time of the trial. In the year 1880 or 1881, one Davidson, the father of appellant Sizemore, caused to be surveyed about 180 acres of this land on Wolf creek and secured a patent for it from the Commonwealth. This 180 acres lies, as the court found, and it appears to be conceded, within the boundary of the old Franklin patent. About the time of this survey by Davidson, Tom Sizemore and his wife, Peggy, moved on this land and took possession of the house and some cleared land which had been vacated by some of South's tenants. This house and cleared land was within the boundary of the Davidson patent.

Sizemore and wife continued to live on the land until his death, which was after the year 1894. In the year 1888 or 1889, Tom Sizemore cut and undertook to remove some timber from this land, and the South heirs brought a suit to restrain him from committing this waste and for a recovery of the land, and on the 10th of February, 1886, the following order was made in that action:

"This day came the parties, and by consent it is adjudged that plaintiffs recover of defendant, Thomas Sizemore, the land in contest and same named in the petition, and that a writ of possession issue in the name of the plaintiffs, after 1st day of January, 1889, if called for by plaintiffs, and the injunction is made perpetual. It is further adjudged, by consent of parties in open court, that the defendant is to occupy the land in contest as tenant of plaintiffs until 1st of January, 1889, and the papers are filed away as to Sizemore.

"H. C. LILLY, Judge."

It appears from oral proof and written leases filed in the record that after January 1, 1889, Thomas Sizemore continued in the possession of this land as the tenant of appellees up to the time of his death.

Appellants claim that the judgment referred to was obtained by fraud, but even if valid that Peggy Sizemore was not a party to the action in which it was rendered, nor was she a party to the lease contract and the same was not binding upon her; that she was the owner of this land by gift from her father; that she had been in the peaceable, open, adverse possession of this

land since she first moved there with her husband in the year 1881, claiming the same as her own. There was no proof that the judgment was obtained by fraud. It is true she was not a party to that action and she did not sign the lease contract, and it is true she was in possession of this land from the year 1881 to the time of bringing of this action in 1898, but during this time she was the wife of Thomas Sizemore. She professes not to have known of this lease contract, but the evidence largely preponderates that she was apprised thereof. From all the facts and circumstances proven in this case it would be unreasonable to conclude that she was not aware of the fact that her husband occupied this land as a renter from appellees. There is not any proof that she claimed the land in her own right and adversely to appellees, except her own and the statement of a few near relatives or parties in interest with her, who claimed that she made such statements to them. Certainly if appellees, or their agent, had known of such claim on her part, they would have enforced the judgment copied above or would have taken steps to dispossess the family from the premises and not let her adverse claim ripen into title.

The Davidson patent, being laid upon land previously patented, was void and there can be no pretense that she had any right or title to the land except by adverse possession; and she claims such possession by reason of her joint occupancy with her husband who was undoubtedly a tenant of appellees. In our opinion her plea can not avail her in this action. She could not have held adverse to them and at the same time he hold for them. Thomas Sizemore was the head of the family and the title he held under, must govern the possession unless collusion had been shown on the part of her husband with the appellees. Certainly her claim was not very open and notorious as her husband did not recognize it, but paid rent to the appellees. Under the peculiar facts of this case she, appellant Peggy, being the wife of the tenant of appellees, can not maintain her claim of adverse possession without showing positive and actual notice to appellees that her possession of the land and claim thereto was in opposition and adverse to that of her husband and the appellees. This she has not done.

Wherefore, the judgment of the lower court is affirmed.

GARROTT, &c. v. RIVES, &c.

RIVES, &c. v. GARROTT, &c.

(Filed May 5, 1904—Not to be reported.)

1. Advancements—Where a father conveyed to his children by a former wife, a tract of land as a result of advancements which his father-in-law had made to him, which land was encumbered and a part of it subsequently sold in an action to enforce the lien upon it, but leaving a balance of the debt unpaid, the infants could not be charged with more than the residue of the land; as what they received was not the debt but the land, and it was proper to overrule exceptions to the report of the commissioner in which it was sought to charge them with the remainder of the unpaid debt.

2. Same—Evidence—Statements by a son that he had paid rent to his father incompetent, the father being dead, the son could not testify as to a transaction with him; and moreover, where an heir uses land of an intestate he must account for the use of it as an advancement.

C. H. Bush and Hunter Wood & Son for appellants and appellees on cross appeal.

James Breathitt and John T. Edmonds for appellees and cross appellants.

Appeals from Christian Circuit Court.

Opinion of the court by Judge Hobson.

The above two appeals from the same judgment will be determined together. Robert W. Garrott died intestate in Christian county in November, 1898, the owner of considerable estate, and the only question to be determined is as to advancements made to his children and grandchildren. He had a daughter, the wife of H. P. Rives, who died before he did, leaving several infant children. Her husband, H. P. Rives, about the year 1882, bought a tract of land of 304 acres and Robert W. Garrott lent or advanced to him three or four thousand dollars to pay for this land or improvements made on it. On September 7, 1896, this debt, with interest amount to $7,214.76, and in consideration of it H. P. Rives and his second wife conveyed to his three infant children by his first wife the tract of land referred to, at the request of Robert W. Garrott and in settlement of the debt. The land was then encumbered by a mortgage to the Fidelity Trust and Safety Vault Co. for $4,200, and interest. The mortgage was foreclosed and 137 acres of the land, which included the dwelling house and most of the improvements, was sold to satisfy the mortgage, leaving the three infant children with 167⅓ acres, the balance of the tract without improvements. The special commissioner to whom the case was referred charged the infants with an advancement of the 167⅓ acres of land at $25 an acre.

The other heirs at law filed exceptions to the commissioner's report because he did not charge the infants with $7,214.76, the full amount of the debt which Robert W. Garrott had against H. P. Rives. The court upon the hearing of the exceptions to the commissioner's report charged the infants with $5,448.93, which includes interest from the death of Robert W. Garrott. From this judgemnt both parties have appealed.

The amount of the debt which Robert Garrott had against H. P. Rives is entirely immaterial. The thing that the infants received was not the debt, but the land. H. P. Rives seems to have been influenced only by the idea of doing justice to the children of his first wife. He may have had some defense to part of the debt, or it may be that the debt could not have been made out of him. By section 1407, Kentucky Statutes, advancement shall be estimated according to the value of the property when given. The intention of the testator in making the advancement does not control, the cardinal object of the statute being to secure equity in the distribution of his estate. (Boles v. Winchester, 13 Bush, 1; Stevenson v. Martin, 11 Bush, 485.) We, therefore, conclude that the court properly refused to charge the infants with anything more than the value of the land they got, and on the appeal of Issac Garrott, &c. v. Harry A. Rives, &c., the judgment is affirmed.

The special commissioners' report which fixed the value of the 167⅓ acres at $25 an acre is supported by the weight of the evidence, or this is at least as high as the evidence warrants, considering the fact that the improvements were on the other end of the tract. The infants took the land encumbered by the mortgage. What they got was the value of the land less the mort-

gage. The mortgage was soon thereafter foreclosed and so what they really got was the 167⅓ acres that was left. This, at $25 an acre, amounts to $4,181.83, and is as much as, under the evidence, should be charged to the infants on account of the advancement to them.

L. O. Garrott, one of the sons, for five years before his father's death, occupied a tract of land belonging to his father of the fair rental value of $500 a year. The infants insist that he should be charged with this rent as an advancement. He admits using the land, but claims that he paid his father the rent. He produced four receipts from his father, given from time to time, aggregating $209.89. The commissioner credited him by this amount and charged him with the remainder of the rent as an advancement. The court sustained his exceptions to the commissioner's report and refused to charge him with the rent. His statements that he had paid the rent to his father are incompetent, as he can not testify for himself to a transaction with the decedent. We do not find any competent evidence in the record that he paid the rent to his father. It has been often held that where one of the heirs uses land of the intestate he must account for the use of it as an advancement. (Hamilton v. Moore, 24 Ky. Law Rep., 982, and cases cited.) Under the proof L. O. Garrott must be charged with the use of this land as an advancement as reported by the special commissioner.

Judgment reversed on the appeal of H. A. Rives, &c. v. Isaac Garrott, &c., and cause remanded, with directions to overrule the exceptions to the commissioner's report above indicated and enter a judgment pursuant to the report.

COMBS v. JOHNSON, &c.

(Filed May 5, 1904—Not to be reported.)

1. Lands—Ejectment—Where it is sought to recover possession of land sold a sheriff under a judgment, where the possession was obtained pursuant to section 1689, Kentucky Statutes, where it is claimed that the judgment was obtained by fraud, the remedy is by action under subsection 4 of section 518, Civil Code, in a proceeding to vacate or modify the judgment, and not by proceeding in ejectment.

2. Same—Where proceedings are had under section 1689, Kentucky Statutes for the possession of land, as between the parties thereto it is conclusive as to the right of possession so long as that judgment remains in force and effect.

W. C. Eversole and J. J. Fiztpatrick for appellant.

J. J. C. Bach for appellees.

Appeal from Perry Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Polly Ann Combs, brought this action in ejectment against the appellee to recover the possession of a small lot of land in Hazard, Ky. The answer of the defendant alleged that J. M. Marcum recovered a judgment against the appellant and others for $450, with interest and cost in the Perry Circuit Court; that he had sued out an execution thereon which was levied by the sheriff of Perry county on the lot sued for as the property of

appellant, and after having advertised the time, place and terms of sale, as required by law, sold it at public outcry, when J. J. C. Bach became the purchaser at more than two-thirds of the appraised value thereof, which he paid in full; and that the sheriff thereupon executed and delivered to him a deed to the lot; that on the 11th day of September, 1902, he caused a notice to be served upon the appellant that he would move Perry Circuit Court for a possession of such lot; and that on the 21st of September, 1902, the motion was duly made before the court and a judgment entered thereon to the effect that the plaintiff in the motion, Bach, was entitled to the possession thereof, and a writ of possession awarded to him therefor with cost, as provided by section 1689 of the Kentucky Statutes. Copies of the judgment and writ of possession were filed with and made a part of the answer. The answer alleges that this judgment was still in full force and effect; that subsequently Bach sold and conveyed this lot to the defendant, Johnson; and that by reason of such conveyance he was the legal owner and in possession of the lot.

Appellant, in her reply, admitted most of the affirmative allegations of the defendant's answer, but denied that the sheriff of Perry county levied the aforesaid execution upon the lot of land in controversy, and affirmatively alleges that the lot on which the execution was levied, was described in the levy and advertisement for sale thereunder, as being bounded on the north by A. H. Johnson's lot, on the east by Main street, on the south by the Baptist Church, and on the west by the Kentucky river, which did not cover the lot in controversy. A plat showing the location of the lot actually levied upon and sold, and that in controversy is as follows:

MAIN STREET.

Johnson's lot.		Baptist Church lot.	Fitzpatrick's lot.
		Lot in controversy.	

KENTUCKY RIVER.

That subsequently to the sale, Bach, with Johnson's knowledge, had a survey made which included the lot in controversy, and procured the sheriff to execute to him a deed therefor, although both Bach and the sheriff well knew that it was not included in the levy or sale; that Bach had represented her in the litigation with Marcum as an attorney; and that when the notice was served upon her in the proceeding for a writ of possession, Bach assured her that he was seeking to get possession only of the lot described in the levy and advertisement of sale; and that it did not cover the lot in controversy; and that relying upon his representations she did not resist the motion for judgment and writ of possession. A demurrer was sustained to her reply by the trial court and her petition dismissed, and she has appealed.

The judgment of the Perry Circuit Court in the proceedings had, under section 1689 of the Kentucky Statutes, for the possession of the lot, as between the parties thereto, is conclusive as to the right of possession to the lot in controversy, so long as that judgment remains in full force and effect. (McGee v. Southerland, 84 Ky., 198; Phelps v. Jones, 91 Ky., 244.)

If, as claimed by appellant, the judgment was obtained by fraud, her remedy is by action under subsection 4 of section 518 of the Civil Code, in a proceeding to vacate or modify the judgment on the motion for writ of possession. (Bell County v. Foley, 23 Ky. Law Rep., 885.)

Judgment affirmed.

ILLINOIS CENTRAL R. R. CO. v. McINTOSH.

(Filed May 5, 1904.)

1. Railroads—Section men—Collision on hand car—Negligence of section foreman—Proximate cause of injury—Appellee, a section laborer, was on a hand car by order of his foreman, on the time of a freight train coming meeting them, when, on turning a curve, they discovered the freight train approaching within seventy-five or one hundred yards, and, after they all got off the hand car, the foreman ordered them to take the hand car from the track, which they did very hurriedly to avoid a collision, in which effort appellee was ruptured by the strain. There was a public crossing some rods in front of the hand car, over which the freight train had passed without giving the statutory signals. Held—In view of the emergency that wa presented, and the consequences that might ensue to the train and to them selves by a collision, it was a question for the jury whether the appellee exercised such care as might be ordinarily expected of a person of usual prudence, situated as he was, and whether the injury that resulted to him in obeying the orders of his superior was the natural and proximate cause of the negligence in running on the freight train's time, or that of the freight train men, in failing to give the signals at the public crossing.

2. Contributory negligence—Ordinary risks assumed—While the appellee assumes the risks incidental to riding on a hand car, where ordinary care is used in its management, he did not assume the risk incidental to the gross negligence of the foreman in running the hand car on the freight train's time, nor that of the freight train in failing to observe the statutory signals at the public crossing.

Gordon, Gordon & Cox, Pirtle & Trabue and J. M. Dickinson for appellant.

Fox & Morrow and C. J. Waddill for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, Charles McIntosh, was in the service of appellant as a laborer in a section gang working under a foreman named Monroe Ray, who had charge of the force. On or about November 7, 1901, they were working above Ilsey, a station on the road. After dinner the foreman ordered the men to put the hand car on the track, saying they had to go to Ilsey. They went down to Boxtown, and there stopped a minute or two while he went into a store. When he came out of the store and got on the car he directed them to pull out. This they did, and when they had gone a short distance, as they

rounded a curve they saw a freight train approaching them, about seventy-five or one hundred yards off. They all jumped from the car. The foreman ordered the car to be taken off the track. There are four hand holds on the car for four men to take hold of it. Appellee and three other men took hold of the car, as ordered by the foreman, and quickly got it off the track as the engine came right beside them. The car had on it two or three jacks, twelve or fifteen tamping picks, about the same number of shovels, two or three claw bars, two or three line bars, dinner buckets, and other things. The usual way of moving the hand car from the track was to unload it, and then take the car off, but on this occasion they had to take the car off with the load on it to prevent collision with the train, and hardly had time to get it off in that way. They also had to lift it up very hurriedly and move off with it quickly to avoid the collision. In doing this, appellee McIntosh was badly ruptured, and his capacity to labor was seriously impaired. He also suffered pain and lost time while suffering from the injury. The train was on time and the section foreman was running on the time of the train. There was a public road crossing a few rods west of them, over which the train passed as it approached them and it failed to whistle or give the statutory signal for the road crossing, by reason of which its presence was unknown to the men on the hand car, until they rounded the curve and were very near it. McIntosh filed suit to recover for his injuries, alleging negligence on the part of the section foreman and also on the part of the trainmen. The proof introduced on the trial by him tended to show the facts above stated. The evidence for the defendant tended to show that his injuries were not as serious as claimed by him, and that the proper signals were given for the crossing by the engineer as the train approached it. The jury found for the plaintiff in the sum of $650.

At the conclusion of the plaintiff's evidence the defendant moved the court to instruct the jury peremptorily to find for it. The court overruled the motion, holding that the sole ground upon which he would submit the issue was as to whether or not "it was negligence for the freight train to approach the public crossing at the same time the section men did, without giving the statutory warning." The defendant then announced that it was surprised and was unprepared to meet the case on these views, and moved the court to set aside the swearing of the jury and grant it a continuance, which motion the court overruled. The ground of this motion, as we are informed in the brief, was that in overruling the demurrer to the petition filed by the defendant the court had held the petition good on the ground of the negligence charged on the part of the section boss and the defendant had prepared its case only on this ground. But there is nothing in the record showing that the court had misled the defendant in any way in its ruling on the demurrer at the previous term, and in the absence of evidence we must presume that he ruled correctly in overruling the motion to set aside the swearing of the jury or continue the case. The defendant made no showing that any proof could be had if the case was continued which it did not then have, and no affidavit was filed to show that the ends of justice required a continuance of the case.

At the conclusion of the evidence the court refused the following instruction asked by the plaintiff: "The court instructs the jury that if they believe

from the evidence that the section boss, Monroe Ray, by gross negligence ordered the hand car to be run from the place of work near Boxtown to Ilsey, without proper precaution to protect his crew from collision with trains, and if they further believe from the evidence that Charles McIntosh was with said crew and that he was injured in a reasonable effort to remove said car from the track to prevent a collision with a train, and they further believe from the evidence that said injury was the natural result of the said gross negligence, then the jury will find their verdict for plaintiff. Gross negligence as here used means the absence of slight care."

He then gave the following instruction, to which the defendant objected: "The court instructs the jury that if they believe from the evidence, that the engine mentioned by the witnesses, approached a public road crossing near where plaintiff claims to have been injured without sounding its whistle or ringing its bell, and that by reason of a failure of the defendant's employes in charge of said engine to either ring the bell or blow the whistle while approaching said crossing, a hand car and section hands on same ran into dangerous proximity to the approaching train, which rendered it necessary for plaintiff and others to speedily remove said car from the track, and that plaintiff in assisting to remove said car from the track, and while exercising ordinary care for his own safety, was injured in his person or ruptured, and that such injury was the direct and proximate result of such failure by those in charge of the engine to blow the whistle or ring the bell on approaching the crossing, then the law is for the plaintiff, and the jury will so find."

It is insisted for appellant that, as to a section hand on a hand car, the failure of the train to whistle at a public crossing as required by the statute, is not negligence; that a section hand assumes the risk incidental to riding on hand cars, including the risk of being overtaken by a train; that the peril of throwing off the hand car was one of the ordinary risks of the service which was assumed by the plaintiff; and that the hernia suffered by him was not the natural or proximate result of the negligence of the defendant. It is also insisted that the instruction given by the court is not warranted by the allegations of the petition.

Section 786, Kentucky Statutes, requires that each locomotive shall have a bell and whistle, and that outside of incorporated towns the bell shall be rung or whistle sounded for a distance of at least fifty rods from the place where the railroad crosses at grade any public highway, and that the bell shall be rung or whistle sounded continuously, until the engine has reached such highway crossing. Section 793 provides a penalty for a violation of the statute, and by section 466 a person injured by violation of the statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty for the violation is thereby imposed. In Cahill v. Cincinnati, &c., R. R. Co., 92 Ky., 345, it was held that the failure of a railroad train to give the signal of its approach to a public crossing, is negligence as to one at a private crossing near by, and thus lawfully upon the track. This case has been followed in subsequent cases and the principle thus decided seems to apply equally to persons on a hand car, rightfully using the track, as to one on a private crossing. (L. & N. R. R. Co. v. Servant, 19 Ky. Law Rep., 1576; L. & N. R. R. Co. v. Bodine, 23 Ky. Law Rep., 147; Wilmuth v. I. C. R. R., 25 Ky. Law Rep., 671.)

A section hand assumes the risks incidental to riding on a hand car where ordinary care is used in its management; but he does not assume the risk incidental to the gross negligence of the section foreman in running the hand car. It is the duty of the section foreman not to expose his men to risks of collisions with trains, thus imperilling their lives, without exercising proper precautions for their safety. In the case before us he was running on the time of the freight train. He stopped at Boxtown, and without taking any precautions for the safety of his men, instead of waiting there for the train to pass, went on until he met the train. Such conduct warranted the jury in finding him guilty of gross negligence, and while the section men assume all risks incidental to ordinary negligence on his part, the company is liable for his gross negligence. (L. & N. R. R. Co. v. Collins, 63 Ky., 114; I. C. R. R. Co. v. Coleman, 22 Ky. Law Rep., 878; Cincinnati, &c., R. R. Co. v. Cooke's Adm'r, 113 Ky., 162.)

In Long's Adm'r v. Illinois Central R. R. Co., 24 Ky. Law Rep., 567, it was held that where the section foreman ordered his men to proceed with the hand car and one of them was killed in a collision by reason of his negligence, there could be a recovery, although he knew they were running upon the time of the train. The court said: "The section foreman, under whose direction he worked, represented the master and it was Long's duty to obey his orders in the usual course of business. When he received an order it was not his duty to sit in judgment upon its propriety, or to enter into a discussion with him as to the facts upon which it was based. He had a right to presume that improper orders would not be given, and to assume that the section foreman could not direct him to take risks that were improper. If he was injured while obeying the orders of his superior, and by reason of his negligence, he may recover, unless the risk was such that a person of ordinary prudence, situated as Long was, would not have taken it."

The court adheres to the rule thus laid down. In that case Long was killed and there might be a recovery under the statute for his death, if only ordinary negligence was shown. But in this case as death did not result, and the common-law rule declared by the court has not been changed by statute in cases where death does not result, there can be no recovery on account of the negligence of the section boss in operating the hand car unless gross negligence is found. The ordinary way of taking the hand car from the track was to unload it and then lift it off. In the case at bar, by reason of the proximity of the train, there was no time to unload the hand car, and when the section boss gave the order to take it off the track, it was, under the circumstances, an order to take it off as it was without unloading it, and to take it off quick, before the train reached it. It is a matter of common knowledge that hernia is liable to be produced by a sudden, violent strain, and the removal of the hand car loaded as it was, quickly from the track would naturally cause such a strain, especially as there were only four hand holds on the car for four men to lift it. The emergency requiring this strain which brought about the injury to appellee was due to the negligence of the foreman as well as to the want of signals of the approach of the train.

In I. C. R. R. Co. v. Langan, 25 Ky. Law Rep., 500, it was held that it is the duty of the railroad company to furnish its employes engaged in hand-

ling heavy weights adequate assistance to enable them to handle the weights with safety. In view of the emergency that was presented and the consequences that might have ensued to the train and to themselves from a collision by the train with the hand car, it was a question for the jury whether appellee exercised such care as might be ordinarily expected of a person of usual prudence situated as he was, and whether the injury that resulted to him in obeying the order of his superior was the natural and proximate result of the negligence of the defendant above referred to. The order of the boss was, in effect, an order to each of the men to remove the hand car from the track, and it was the duty of each of them, not to wait for another, but to seize the hand hold nearest to him and obey the order to avoid a collision. The circuit court erred in not submitting to the jury the question of gross negligence on the part of the section boss as above defined.

It remains to determine whether the allegations of the petition are sufficient to warrant the instruction given by the court as to negligence on the part of the trainmen.

In the original petition the plaintiff alleged that his injury was proximately caused by the gross negligence of the defendant's section boss in the operation of the hand car, and by the gross negligence of the trainmen in the operation of the engine and train approaching them. The defendant entered a motion that he make his petition more specific, and this being sustained, he filed an amendment alleging as to the train, that it was at the time being run in a rapid, reckless, negligent and dangerous manner, and without giving proper signals. The defendant filed a general demurrer to the petition, which was overruled, and without further motion filed an answer controverting its allegations. On the trial without objection, proof was given by the plaintiff as to the location of the crossing, and as to whether or not the train gave the statutory signals as it approached it. The rule in this court is that where a matter is defectively alleged and evidence is given on it by both the parties without objection on the trial, the court will treat the defective averment as cured by the proof. We would apply this principle here, but for the motion and statement made by the defendant at the close of the plaintiff's evidence, which shows that it did not understand that the case was rested on this ground, and was in effect an objection to the evidence. The allegation that the train was run without proper signals was a mere conclusion of law. A denial of it raised no issue of fact to be determined. Appellee can not complain of the speed of the train. The petition should have charged that the crossing was a public one sufficiently near by for the signals there to have apprised the men on the hand car of the approach of the train, in time to have avoided the disaster, and should have stated facts showing that the statutory requirement as to signals, was not complied with. In the condition of the pleadings, instruction 1 should not have been given. There is another objection to this instruction. The failure of the trainmen to whistle at the crossing was not the proximate cause of the plaintiff's injury, although it was a link in the chain of circumstances causing it. If the foreman had not run his hand car negligently on the time of the train, there would have been no trouble from the failure to give signals of the approach of the train to the crossing. On the other hand, if these signals had been given, the consequences of his negligence

might perhaps have been avoided. If the train had struck the hand car and injured the plaintiff, from either of these causes he would have a right of action, or if in jumping out of the way he had ruptured himself, when placed in peril either by the gross negligence of his foreman or by the negligence of the trainmen in not giving the signal, he might recover. But in the case at bar he got off the hand car after it was stopped and if nothing more had occurred, he would not have been injured. His injury was due, as one of his witnesses expresses it, to the fact that they had to throw the hand car right off and just had time to get out of the way when the train dashed by. This was done at the order of the section boss given after the train had passed the crossing, and it would seem that the rupture of the plaintiff might not have occurred but for the car's being loaded. The order of the section boss for them to throw the car off was proper to avoid a collision, but if by reason of the emergency thus negligently produced the plaintiff was injured in obeying the order of the second boss to prevent a collision or loss of life or property and his injury was the proxmate result of his obeying the order of his boss and was not due to negligence on his part in overstraining himself to get the car off, of which the jury are to judge, he may recover. On the return of the case to the circuit court the plaintiff will be allowed to amend his petition, and on another trial the court in lieu of the two instructions quoted will give one instruction as herein indicated.

Judgment reversed and cause remanded for a new trial and further proceedings consistent herewith.

ILLINOIS CENTRAL R. R. CO. v. HEATH.

(Filed May 5, 1904—Not to be reported.)

Railroads—Putting off passenger at wrong station—Signing paper releasing damages—The appellee, with her four small children from three to twelve years of age, in coming from Mattoon, Ill., to Kentucky, was, by mistake of the conductor of appellant's train, put off the train at Caneyville, Ill.; instead of Caneyville, Ky., her destination. The conductor learning his mistake had her brought to Paducah, Ky., paying her board there and sent her to her home at Caneyville, Ky. While at Paducah she signed a paper in consideration of $2 paid her by the conductor, releasing him and the railroad company from all damages for being put off, which the company relied on as a settlement in her suit for damages. Held—That the evidence conclusively shows that she understood the paper when she signed it, and that no fraud was practiced in procuring her signature to it, and she not having been in any way injured, is bound by the settlement, and the court should have peremptorily instructed the jury to find for the defendant.

J. S. Wortham and Pirtle & Trabue for appellant.

J. C. Graham, Bennett H. Young and M. W. Ripy for appellee.

Appeal from Grayson Circuit Court.

Opinion of the court by Judge Hobson.

On July 14, 1901, appellee purchased a ticket of appellant's station agent at Mattoon, Ill., for Caneyville, Ky. She had with her four children, aged twelve, nine, five and three years. When she reached Carbondale, Ill., she changed cars and boarded a mixed train composed of a sleeper, one day

coach and a number of freight cars. This was after midnight. The conductor on that train took up her ticket. About 4 o'clock the next morning, and just before light, they reached a station called Caneyville, in Illinois. The conductor did not know there was such a station as Caneyville, Ky., and supposed he had reached the place where appellee was to get off. He went in the car and told her so, helped her to wake up the children and get off. He had overrun the station a little, and she and the children walked back to the platform. She objected to getting off, saying it did not look like Caneyville, but the conductor said it was Caneyville, and the place for her to get off. She says that she there said to the conductor that she wanted to go to Caneyville, Ky., and he was very crabbed to her, and rude, but this he denied. She stayed a while at the platform and then at the advice of a man there, walked with the children down to the next station, which is two and two-third miles off. This was a telegraph station; the agent telegraphed to the conductor; he looked at his tickets and found he had made a mistake; the plaintiff and her children were then put on the next train and carried to Paducah, Ky., reaching there in the afternoon. The conductor met them at the station, took them to his boarding house, gave them lunch, supper and lodging, and the next morning put them on the train for Caneyville, where they arrived safely. The conductor, when he met her at the station, apologized for his mistake, explaining how it had occurred, and at the boarding house again talked the subject over with her, saying that he regretted the mistake, and that he was afraid it would cause him to lose his job. He asked her what she had spent, she said 75 cents, and he then handed her a dollar, and proposed to pay her any reasonable sum that she would say to settle the matter. She then said if he would pay her one dollar more it would be all right. He drew up the following writing, which was twice read over to her in the presence of two witnesses, and she then signed it:

"Know ye all men by these presents that I, Martha J. Heath, and children, of Mattoon, Ill., for and in consideration of $2 in hand paid hereby release Oscar Craig, a conductor employed by the Illinois Central R. R., and the Illinois Central R. R. Co., from all damages incurred by myself and four children, by reason of Conductor Craig putting me off at wrong station by mistake.

"Witness my hand and seal this 15th day of July, 1901.

(Seal) "MRS MARTHA J. her x mark HEATH."

"MRS. MOLLIE CALISSE,
"MRS. MINNIE PERKINS,
"OSCAR CRAIG,
"Witnesses."

On January 18, 1902, she filed this suit to recover damages for her eviction from the train by the conductor at Caneyville, Ill. The defendant relied upon the written release above quoted, and she replied that the paper was obtained from her by fraud; that she could not read or write, and that she signed the paper in utter ignorance of its real contents or purpose, when she was suffering great mental distress, being unaccustomed to travel, illiterate, ignorant of law, and not knowing that she had a cause of action against the railroad company, her sole purpose being to render a kindness

to the conductor and prevent his losing his employment. Her testimony in regard to the paper on the trial was as follows:

"Q. What did he say to you?"

"A. He says, are you the lady and the four children I set off last night in the dark? I says, I am the one; he says, I beg your pardon, it was all done through a mistake by me; he says, you will have to lay over here until 7 o'clock in the morning and I will pay your hotel fare; he says, have you had any dinner? I says, no, sir; well, he says, come and go with me to my hotel; he says, I am very sorry I did this. I went with him to the hotel and it was too late for dinner, and he went and got a lunch for me and my children; then I went up stairs to wash my little children, and while I was up there Mr. Craig came up into the room; he talked a little bit before he named anything, and then he says. I am very sorry I did this crime, and he says, if I ever get out of this I will never be guilty of any such again."

"Q. What did he say then?"

"A. He says it will cost me to lose my job for that; he says, have you got any money? I says, some."

"Q. How much money did you have?"

"A. I had between three and four dollars."

"Q. What did Craig then say?"

"A. He says, I can help you out some to get your children something to eat; he says, will $2 get you what you want?" I says, yes, sir. He says, well, I have paid your fare here, now will you please sign this writing in order for me not to lose my job. I was crying and in trouble, and I says, yes, sir."

"Q. Did he ask you to sign this paper so he would not lose his job?"

"A. Yes, sir."

"Q. Who was crying, he or you?"

"A. I was crying."

"Q. What was he doing?"

"A. Standing there begging me to sign this paper."

"Q. Did you sign it then or later on?"

"A. Later on."

"Q. Tell us all about this paper?"

"A. I washed my children and went down stairs; when I got down stairs he had a piece of writing wrote."

"Q. Was he waiting at the steps for you?"

"A. He was at the writing desk, I believe, in the hall."

"Q. Did he have the letter fixed up when you came down?"

"A. Yes, sir; but he tore up that piece and says to these women, I didn't get that right; he tore up one piece and wrote another, and he says, will you sign this? I says, I can't read nor write."

"Q. Was this paper read over to you?"

"A. He read over about him losing his job, but if it was anything else I don't remember it."

"Q. Did he read anything in that paper about letting the I. C. R. R. Co. out?"

"A. If he did, I have no recollection of it, because I didn't know I had anything against the railroad company."

"Q. Did you know at that time that you had any legal cause against the I. C. R. R. Co.?"

"A. No, sir, I did't know I did."

"Q. Did you understand this part, 'For and in consideration of $2 paid, I hereby release Craig, conductor on the I. C. R. R. Co., and the I. C. R. R. Co.,' did you understand at this time that you had any cause against the I. C. R. R. Co. why you should be releasing the railroad company?"

"A. I did not; no, sir."

"Q. Tell us why you signed that paper?"

"A. For sympathy for Mr. Craig. I thought he had treated me well after putting me off the train, and for sympathy to keep him from losing his job as he told me."

"Q. Did he tell you that?"

"A Yes, sir."

"Q. Was $2 all he gave you?"

"A. Yes, sir."

When this occurred she had gotten her ticket back, and was in Kentucky. She was hurt in no way, was under the influence of no anodyne, and from her own testimony, as well as the testimony of the other witnesses who were present, it is apparent that the conductor practiced no fraud on her at all; that the only thing he did was to treat her kindly and considerately, apologizing profusely for his mistake, and appealing to her womanly kindliness of heart to settle the matter and not cause him to lose his job, which he was obviously in great danger of doing. She was not overreached by the conductor, she simply allowed her feelings to induce her to return him kindness for kindness after he showed such regret for his mistake, and was so kind to her and the children in the strange city of Paducah. She understood that she was releasing the conductor when she signed the paper; but he was only the representative of the railroad company, and to release him and not release the railroad company would have been no service to him in holding his job. What he wanted was a release of the railroad company which would show the company that he had settled with the woman and fixed up the wrong which he had committed. Although appellee could not read or write, and although she was ignorant of travel or the ways of the world, her testimony on the trial shows that she is a woman of good common sense, and such a woman could not fail to understand that what the conductor wanted to settle with her was his wrongfully putting her off the train; and that any settlement to enable him to hold his job, or help him to hold it, must be a complete settlement. It is true she settled for a very inadequate consideration, but the amount of the consideration is not material, except as it may be a badge of fraud. But the facts here show plainly the entire want of fraud, and that the plaintiff fixed the amount to be paid herself low because she was touched by the kindness of the conductor and his apprehension that the transaction would get him also into serious trouble. Persons who make settlements can not be relieved from them because they do so upon an inadequate consideration from feelings of kindness in return for kindness shown. There being no fraud in the settlement, appellee was bound by it, and the court should have instructed the jury peremptorily to find for the defendant.

Judgment reversed and cause remanded for further proceedings consistent herewith.

COMMONWEALTH, BY, &c. v. UNION REFRIGERATOR TRANSIT CO.

(Filed May 5, 1904.)

1. Taxation—Domestic corporations—Refrigerator cars—In use out of State—Under section 4020, Kentucky Statutes, providing "that all real and personal estate within this State, and all the personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, shall be subject to taxation unless the same shall be exempt by the Constitution," and Id., section 4022, providing that "for the purposes of taxation, real estate shall include all lands within this State and improvements thereon, and personal estate shall include every other species and character of property," the appellee being a corporation organized under the laws of this State, all of its refrigerator cars which it leases out to various parties, whether in this State or out of it, are subject to taxation.

2. Constitution—Uniform taxation—Under section 171, Kentucky Constitution, providing that "taxes shall be uniform on all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws," does not limit the power of taxation to property actually within the territorial limits of the taxing jurisdiction. The subject matter of this section is uniformity, and it does not attempt to enumerate the subjects of taxation, but Id., section 172, does provide what property shall be taxed, viz, "All property not exempted from taxation by the Constitution shall be assessed for taxation."

3. Discrimination—Fourteenth amendment—Equal protection—The fact that all of appellee's cars are taxed, whether in this State or not, while in assessing the property of railroads the cars in use out of the State are omitted, is not an unjust discrimination against appellee, or in violation of the Fourteenth Amendment of the Federal Constitution as to the "equal protection" of the law, as railroad corporations occupy an unique position in our fiscal system, and are, by the express language of the Constitution, taken out of the category of other property as to the manner in which they are to be taxed.

H. L. Stone and Samuel B. Kirby for appellants.

Forcht & Field, Humphrey, Burnett & Humphrey for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

The appellee, Union Refrigerator Transit Co., is a corporation organized under the laws of this Commonwealth, having its home office in Crescent Hill, Jefferson county, Kentucky, and its principal place of business in St. Louis, Mo. It is the owner of two thousand refrigerator cars, which it leases out to various parties needing them for the preservation of their goods while in transit throughout the United States, Mexico and Canada. These cars are about the value of $200 each.

This proceeding was instituted by the auditor's agent of Jefferson county, under section 4241, Kentucky Statutes, for the purpose of forcing appellee to list its cars for State and county taxation; this was resisted by the appellee before the county court, with the result that a judgment was rendered requiring it to list such a proportion of its cars as, under a system of averages, were shown to be used in the State of Kentucky during the fiscal year; the remainder were held not to be subject to taxation here. From this judg-

ment, the Commonwealth appealed to the Jefferson Circuit Court where the judgment of the county court was affirmed. To reverse these judgments this appeal is prosecuted.

There is no complaint in this record of a want of regularity in the proceedings, the question for adjudication being, whether or not all of the cars owned by appellee, whether in or out of this State, are subject to taxation here. It is insisted by appellee that such of its cars as are used in foreign commerce, are not subject to taxation in Kentucky under the language of the statute; and that, if they are so taxable, then the statute is void, because violative of the State Constitution and of the Fourteenth Amendment of the Federal Constitution. Of these, in their order.

The following sections of the Kentucky Statutes are applicable to the subject in hand:

"Section 4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

"Section 4022. For the purpose of taxation, real estate shall include all lands within this State and improvements thereon; and personal estate shall include every other species and character of property, that which is tangible as well as that which is intangible."

The slightest examination of these sections show that they leave nothing for construction. Appellee being a corporation organized under the laws of this State, its personal property, whether tangible or intangible, and whether in or out of the State, must be taxed here by the terms of the law. With the question of whether or not the modern tendency of legislative enactment and judicial construction is to trench upon the legal maxim mobilia sequuntur personam, we have nothing to do; and it may be, therefore, freely conceded, for the purposes of this case, that all that is said in this regard by counsel for appellee is true. Our State upholds and enforces the ancient fiction in all its original severity; and we do not understand that it is open to us to destroy, by construction, the integrity of a statute, the words of which are so plain that "he who runs may read." And whatever may be said as to the judicial utterances of other jurisdictions, our court has uniformly held, that for the purpose of taxation the situs of personal property of every description is the domicil of the owner. The case of Wren v. Boske, Sheriff, 24 Ky. Law Rep., 2d part, page 1780, presented this state of facts: The appellant, Wren resided in Scott county; he owned a farm in Kenton county, upon which he had horses, mules, cattle and sheep, which had been there for eight years. This personal property he listed with the assessor of Scott county, where he resided, but, notwithstanding this, it was assessed for taxation in Kenton county, and he instituted an action to restrain the sheriff of Kenton county from selling it for taxes. This court said: "It is conceded that the stock had obtained a situs in Kenton county, and if personal property in this State which has obtained a situs in a county

other than that of the owner's residence, may be assessed in that county, although the owner gives it in for taxation in the county of his residence, then the judgment of the circuit court dismissing the plaintiff's petition is right. We are referred to a number of decisions holding that personal property of nonresidents of the State, which has obtained a situs in the State, may, if the legislature so provides, be taxed in that State, and the same rule no doubt would apply between the different counties of the same State if the legislature so provided. But the question after all is one of legislative intent."

The court then held that the property could only be taxed at the domicil of the owner.

In the case of Langdon Creasy Co. v. Trustees of Owenton Common School District, &c., 25 Ky. Law Rep., part 1st, page 823, it appears that the corporation had its domicil in Covington, Ky.; it also had a retail grocery store in Owen county, Ky., where its goods were sought to be taxed for local purposes. This court held, approving Wren v. Boske, Sheriff, that the personal property of the corporation was only taxable in the county of its residence. It was said: "As appellant corporation has a legal residence, and not being in the class of corporations which are required to report to the auditor, it must be assessed in the same manner as that of a natural person. It seems to us that there is no escape from this conclusion. The legislature has the unquestioned authority to fix the situs of property for the purpose of taxation. * * * The case of Wren v. Boske is made to turn upon the legislative intent, and this case is likewise made so to turn."

In the case of Gates v. Barrett, 79 Ky., 295, it is said: "In general, movable property is to be assessed for taxation at the place of the owner's residence." (Boske, Sheriff v. Security Trust and Safety Vault Co., 22 Ky. Law Rep., 181; Covington v. Wayne, 22 Ky. Law Rep., 826; City of Louisville v. Shirley, 80 Ky., 71.)

In Cooley on Taxation, 3d edition, volume 1, page 86. the rule is stated: "If a person is domiciled within the State, his personalty, in contemplation of law, has its situs there also, and he may be taxed in respect of it at the place of his domicil. * * * However, the maxim mobilia sequuntur personam is not of universal application, does not rest on any constitutional foundation, and gives way before express laws; and a State may, at its option, impose taxes on tangible personal property within its limits irrespective of the residence or allegiance of the owner, although this would not be true of property merely passing through the State and not having a situs therein."

Id., 673: "The proper place for the taxation of a corporation in respect of its personalty is the place of its principal office, unless some other rule is prescribed by statute."

In Burroughs on Taxation, page 186, the rule is thus stated: "A corporation is taxable for its personal property at its domicil, which is the State of its creation, and within that State, in the town where it has its principal office or place of business."

In the Am. and Eng. Encycl. of Law, 1st edition, volume 25, page 133, it is said: "In the taxation of personal property, two inconsistent doctrines often come into conflict, the one mobilia sequuntur personam, demanding

that the property shall be taxed at the owner's domicil on the theory that personalty has no other situs; the other, that it should be taxed like real property, where it is situated. Ordinarily the first rule will prevail, and, as a general rule, personal property is taxable at the domicil of its owner. This is often so provided by statute. The State may, however, and often does, make it taxable at its actual situs. The fact that double taxation may result from the assessment in two States does not affect the validity of the assessment."

It is urged, however, that the statute which requires movable personal property, situated in a different jurisdiction, to be taxed at the domicil of the owner is invalid, as being in controvention of the provisions of section 171 of the Constitution, which is as follows: "The general assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

It is said that the language "they shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax" limits the power of taxation to property actually within the territorial limits of the taxing jurisdiction. This, we think, is erroneous. The subject-matter of the language in question is uniformity. There is no attempt to enumerate the subjects of taxation. Nor can the language be read as if it was said that taxes shall be uniform upon all property within the territorial limits of the authority levying the tax. The language is, that taxes shall be "uniform upon all property subject to taxation," leaving the question as to what property is subject to taxation undetermined. Section 172, however, does provide what property shall be taxed. It is as follows: "All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale." * * * This language needs no construction, and it requires that all property of which the State has jurisdiction, except that which is exempted, shall be taxed; and, instead of limiting the subjects of taxation to personal property having an actual situs within the territorial limits, the section extends the zone of taxation, until it equals that of jurisdiction.

Nor can it be maintained that the statute is invalid for the reason that it denies to the owners of such personal property "the equal protection of the laws." This precise question arose in the case of Coe v. Errol, 116 U. S. Rep., 524. There the question was, whether certain logs, which were situated within one State, could be taxed therein, when they were also taxed in the State where the owner resided. And it was said by the court: "We have no difficulty in disposing of the last contention of the question, namely, the fact (if it be a fact) that the property was owned by persons residing in another State; for, if not exempt from taxation for other reasons, it can not be exempted by reason of being owned by nonresidents of the State. We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory, which do not

belong to some other jurisdiction; such as the representatives of foreign governments with their houses and effects, and property belonging to or in the use of the government of the United States. If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary. The fact, therefore, that the owners of the logs in question were taxes for their value in Maine, as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case, and may be laid out of view."

In the case of Blackstone v. Miller, 188 U. S. Rep., 202, the question for adjudication was, whether a law which taxed the succession to a tangible chattel at the situs of the chattel was valid, when it appeared that the same subject was taxed at the domicil of the owner. The court said: "To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicil, or that by the law of the domicil the chattel is a part of a universitas and is taken into account again in the succession tax there. * * * No doubt this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing, on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in succession after death, mobilia sequuntur personam and domicil governs the whole. But these inconsistencies infringe no rule of constitutional law."

In the case of Kidd v. Alabama, Id., 730, the question was, whether or not the fiscal laws of Alabama, which undertook to tax shares of stock in railroads held by residents of the State (the railroads being situated in other States), were inimical to the Fourteenth Amendment of the Constitution of the United States. In answering the argument that they were invalid, the court said: "We say that the State, in taxing stock, may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed because they are not taxed by the State in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the State of Alabama is not concerned. No doubt it would be a great advantage to the country, and to the individual States, if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far. * * * The State of Alabama is not bound to make its laws harmonize in principle with those of other States. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all."

These opinions of the Supreme Court of the United States not only clearly recognize the right of the State to enforce the maxim mobilia sequuntur personam in fiscal matters in its original vigor, but they clearly deny that,

in so doing, it contravenes the provisions of the Fourteenth Amendment of the Constitution of the United States.

It is said that the fact that all of appellee's cars are taxed, whether in this State or not, while in assessing the property of railroads, the cars in use out of the State are omitted, is an unjust discrimination against it, and is violative of the Fourteenth Amendment as to the "equal protection" of the laws. Railroad corporations occupy an unique position in our fiscal system. They are, by the express language of the Constitution, taken out of the category of other property as to the manner in which they are taxed; but, in so doing, it is not intended to violate the fundamental principle of the Constitution as to uniformity in taxation, but on the contrary, to enforce and secure it; and it is confidently believed that the system devised does accomplish the end desired as nearly as may be. We will not burden this opinion with any attempt to show the reasons for the distinction in the fiscal law as to railroads, nor the fact that they are not unduly favored in their isolation; these are obvious, and this court has uniformly upheld the validity of the statutes which provides and enforces the anomalous mode of taxation applicable to them. Kidd v. Adams, supra, and the Kentucky Railroad Tax Cases, 115 U. S. Rep., 321, are conclusive of the Federal question.

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

GAMBREL v. COMMONWEALTH.

(Filed May 6, 1904—Not to be reported.)

Criminal law—Instructions—Upon the trial of appellant upon an indictment which charged him and others with "unlawfully confederating and banding themselves together for the purpose of intimidating, alarming, disturbing and injuring" M. and others, it appears from the evidence that in passing along a public highway, appellant and party were attacked by a dog when they fired at it and were fired upon by persons in the house, and in turn fired themselves at the persons who shot at them, the court erred in failing to give the whole law of the case, and should have further instructed the jury that if they believed from the evidence that if appellant and his party, without any purpose to intimidate, alarm or injure Mrs. M. or others of her family, while passing her residence, were attacked by a bull dog in the public road, and shot him to prevent his biting them, and were then fired upon by persons in the house or yard, which fire they returned, believing it was necessary to do so to protect themselves from injury or apparent injury, such shooting on the part of appellant did not authorize his conviction.

J. M. Robinson for appellant.

N. B. Hays and Lorraine Mix for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Galloway Gambrel, was indicted in the Knox Circuit Court, jointly with Nelson Gambrel, Silas Gambrel, John Taylor and Jacob Taylor for the crime of "unlawfully confederating and banding themselves together for the purpose of intimidating, alarming, disturbing and injuring" Margaret Messer and others; and having been accorded a separate trial, appel-

lant was found guilty by the jury, and his punishment fixed at confinement in the penitentiary for one year.

He complains that his conviction was illegal, and asks that the judgment of the lower court be reversed and a new trial granted him. One of the grounds for a new trial in the lower court, and now urged for a reversal, is that that court erred in refusing to peremptorily instruct the jury upon the conclusion of the Commonwealth's evidence, to find the appellant not guilty. It appears from the bill of evidence that appellant and his brothers, Nelson and Silas Gambrel, after attending a log rolling at the home of their father, started together and in company with the wife of Silas Gambrel, about dark, to go to Silas Gambrel's home, in doing which they had to pass the residence of Margaret Messer, who lived upon the public road. When they reached the house of Mrs. Messer, one or more of the party fired two or three pistol shots out in the road near the house at a dog, which howled and ran into the yard, and was found the next morning near the house with a bullet hole in his back, dead. Other shots were then fired from the house of Mrs. Messer and by the Gambrels out in the road. The only persons in the Messer house were C. T. Messer and one Hubbard, the latter being somewhat sick and in bed. Margaret Messer was then only a short distance from home, on her return from Barbourville, where she had been that day on horse back. When the shooting began, A. Messer, who lived near his mother, and a man by the name of Hart, who was at his home, ran to the residence of Margaret Messer. The shots from the Messer house were fired by C. T. Messer, A. Messer and Hart at the persons who were shooting from the road. On the following morning bullet holes were found in the Messer dwelling smoke-house, wellhouse, and a tree in the yard. According to the evidence, from twenty to fifty shots altogether were fired.

The witnesses all agreed that not less than two shots were fired out in the road before the dog howled. Some of the Commonwealth's witnesses say three shots were heard by them just before or about the time the dog howled. It is evident that these shots, whether there were two or three of them, were fired at the dog. The shooting that followed the howling of the dog was, as already stated, done by those in the house or yard, and the Gambrels out in the road. All the parties on the ground were armed with pistols, except Hubbard, the sick man, and the wife of Silas Gambrel. The evidence is conflicting as to whether the shooting that occurred after the dog was wounded was commenced by the persons in the house or yard, or those out in the road. Two or three of the Commonwealth's witnesses testified that the house was shot at by the Gambrels before any shooting was done from the house or yard. Upon the other hand, appellant and his associates testified that none of them shot into the yard or toward the house until after they were shot at from the house or yard. They further testified that they were peaceably passing the Messer house when they were attacked by the Messer dog out in the road; that the dog belonged to the breed known as the bull dog, and was a very large, strong and vicious animal; that when he attacked the Gambrel party, appellant attempted to keep him from biting by kicking him, to which the dog seemed to pay no attention; thereupon appellant, to prevent himself and party from being bitten and maimed or killed by the dog, and for no other reason, according to his testimony, shot at him

twice with his pistol, the last of which shots struck and wounded the animal, and caused him to howl and flee toward the house. Appellant and his brothers and the wife of Silas, also testified that after the shooting of the dog they were shot at by persons in the Messer house and yard, whose fire they returned, but only in their necessary self defense, and for the purpose of protecting themselves from death or great bodily harm.

Thus it will be seen that it is hard to determine from the evidence whether the shooting on the night in question after the wounding of the dog, was commenced by the Gambrels or the Messers. The matter was a question of fact that should have been and was properly left to the determination of the jury. The only evidence relied upon by the Commonwealth as tending to show that there was a confederating or banding together of the appellant and his brothers for the unlawful purpose of intimidating, alarming or injuring the Messers, or any of them, was that for several years there had existed ill will between the Gambrels and the Messers, though it was not proved that there had been any fighting or other trouble between them. Also that each of the Gambrels was armed with a pistol on the night of the shooting. In addition, two or three of the Commonwealth's witnesses testified that they found, on the morning after the shooting, a place in the bushes near the Messer house where a horse appeared to have been hitched or standing. They judged it to be a gray horse because of the gray hair found on the bushes at the place, and no doubt inferred that the horse had been hitched because of the many tracks appearing to have been made by a horse confined to a limited space. In addition, it was stated by Taylor, a Commonwealth's witness, that he saw the Gambrels that night before they reached the Messer house; one of them asked him to go with them, at which time one of the party was riding or leading a gray horse. But the Gambrels all testified that none of their party had a gray horse, and that there was but one horse with them on that occasion, a bay mare, that was ridden by the wife of Silas Gambrel. They further testified that the mare was not hitched near the Messer house that night; that she became frightened when the shooting began; that she threw her rider, Mrs. Silas Gambrel, to the ground.

We very much doubt whether the evidence relied on by the Commonwealth as showing the alleged confederating and banding together of the defendants named in the indictment, for the purpose of intimidating or injuring the Messers, was sufficient to establish that fact; but it will not do to say there was no evidence whatever on that point, and the trial court was not authorized to give a peremptory instruction unless there was a total failure or absence of proof. We are of opinion, however, that the trial court in instructing the jury failed to give the whole law of the case. In addition to the instructions given, the jury should have been further instructed by the court that if they believed from the evidence that appellant and his brothers, without any purpose to intimidate, alarm or injure Mrs. Messer or others of her family, while passing her residence on the way to the home of Silas Gambrel, were attacked by the Messer bull dog in the public road, and they shot him to prevent his biting some of the party, and were then fired upon by persons in the Messer house or yard, which fire they returned, believing at the time, and having reasonable, or apparently reasonable, grounds to believe, that it

was necessary for them to do so in order to protect their lives or persons from injury, or apparent injury, at the hands of such persons, then such shooting on the part of appellant or those with him did not authorize the conviction of appellant under the charge in the indictment, and the jury should so find.

Wherefore, for the failure of the court to properly instruct the jury as indicated, the judgment is reversed and cause remanded, with directions to the lower court to grant appellant a new trial and for further proceedings consistent with this opinion.

Whole court sitting.

ILLINOIS CENTRAL R. R. CO. v. JONES' ADM'R.

(Filed May 6, 1904.)

1. Federal court—Jurisdiction of, in removable cases from State court—To give the United States Circuit Court jurisdiction of a suit begun in the State court between citizens of different States, and where the amount in controversy is over $2.000, the petition for removal must affirmatively show such facts (not legal conclusions) or the facts must otherwise affirmatively appear in the record, entitling the petitioning defendant to have the case removed. Otherwise the Circuit Court of the United States will not acquire jurisdiction of the case for any purpose. Its jurisdiction depends not only upon the existence of such facts, but upon their being affirmatively shown upon the face of the record when the removal is sought. The Federal court has no jurisdiction to hear evidence as to additional facts in order to give it jurisdiction, where the record did not affirmatively show a removable case when the motion was acted on in the State court.

2. Same—Practice—Such facts properly pleaded must be taken as true by the State court. It has jurisdiction to adjudge whether such facts show a removable cause, but not as to whether such facts are true. The decision of the latter question is exclusively within the jurisdiction of the Federal court.

3. Same—Appeal—From the judgment of the State court ordering such removal, an appeal will lie to the Court of Appeals.

4. Same—Jurisdiction of, can not be conferred by consent—Where necessary jurisdictional facts do not appear on the face of the record, no presumption of their existence will be indulged. Nor can such jurisdiction be conferred by consent; nor can the lack of jurisdiction be waived by appearance, or motion, or even a trial on the merits.

5. Case overruled—Stephenson v. I. C. R. R. Co., 25 Ky. Law Rep., 442, in so far as in conflict with this opinion, overruled.

6. Master and servant—Negligence—Flying switch—To make a flying switch, forbidden by the rules of a railroad company because dangerous to those engaged in it, in such manner as to disregard the safety of the brakemen doing the work, and by failing to exercise ordinary care to avoid injuring them, is actionable negligence on the part of the master and the superior servants ordering and permitting the work, although the brakeman voluntarily engaged in it.

7. Same—Contributory negligence—If the brakeman doing such work was himself guilty of negligence, but for which the injury would not have occurred, he can not recover damages for his injury, unless those in charge of the train knew of his danger in time to avoid it, in which event his contributory negligence is immaterial.

8. Same—Instructions—An instruction submitting the question of plain-

tiff's contributory negligence as above defined, but adding that if the defendnat did not know of plaintiff's danger, but might have known of it in time to avert it by the exercise of ordinary care, is erroneous. Defendants were not bound to anticipate that the servant might be negligent. They were, therefore, not bound to be diligent to ascertain whether by his negligence he was in danger.

E. H. James, F.A. Wilson, John C. Gates, P. H. Darby, J. M. Dickinson and Pirtle, Trabue & Cox for appellants.

Hendricks & Miller and Mulloy & Utley for appellee.

Appeal from Lyon Circuit Court.

Opinion of the court by Judge O'Rear.

On a former appeal, we held that the petition by appellant Illinois Central R. R. Co. for the removal of this cause into the United States Circuit Court did not show, nor did the whole record show on its face, a separable controversy, and, therefore, that the lower court did not err in refusing to order the removal. After the motion for removal had been overruled in the State court, appellant filed a transcript of the record in the United States Circuit Court for the district of Kentucky at Paducah. Appellee appeared in that court and moved to remand the case. The order of the court overruling the motion to remand recited that it was upon evidence heard. What the evidence was, the record does not show. Time was given by the order in that court to appellee to file a bill of exceptions, and to the defendant to file its answer, and to the plaintiff, appellee, time thereafter in which to reply. At a subsequent term of that court appellee appeared, and dismissed his petition without prejudice. In the meantime the case in the State court was being proceeded with. Upon the return of the case from this court, appellant offered to file a supplemental answer, alleging the filing of the transcript in the U. S. Circuit Court, and the various steps taken therein, including the dismissal of the petition without prejudice. The court refused to permit the amendment, or the exhibits, copies of the proceedings in the Federal court, to be filed. This action is one of the grounds now urged for a reversal of the judgment.

Appellant contends that as there was but the one action, when it was removed into the U. S. Circuit Court by the filing of the transcript, and by the overruling in that court of the motion to remand, thereafter an appearance by the plaintiff (appellee) was a waiver of the question of jurisdiction over his person, if there was such question, and the subsequent dismissal of the action without prejudice was actually a dismissal of the identical action now being tried. On the other hand, appellee contends that unless the United States Circuit Court had jurisdiction of the subject-matter, to wit, a controversy involving more than $2,000 wholly between citizens of different States, or was separable so that when separated it would constitute such an action, jurisdiction could not be conferred upon that court, by waiver or consent; that, therefore, all proceedings there were void.

Under the act of congress (sections 2 and 3, Act of March 3, 1875, chapter 137, sections 1-10, as amended, 1887, 1888), if the petition for removal be filed in the State court in due season, and be accompanied by sufficient bond and motion, and if the petition states facts showing, or if it and the record

together then show a prima facie right to the removal by the petitioner, it is the duty of the State court to proceed no further than to satisfy itself as to the sufficiency of the bond. The proper practice then is for the other party, if dissatisfied, to controvert in the Federal court the facts alleged in the petition for the removal, and have the case then remanded if improperly removed. If the State court orders this removal upon an insufficient petition, the party aggrieved may also prosecute an appeal at once to the State Appellate Court to have the order reviewed.

In recent years the right of removal has been more frequently and stubbornly resisted. And without doubt artful subterfuges have been resorted to by pleaders to control the question of jurisdiction. When that question depends upon a fact properly made an issue, the ascertainment of such facts is necessarily within the sole jurisdiction of the United States Courts, and their determination of jurisdictional facts is conclusive, binding alike upon the parties and State courts. If the facts properly alleged in the petition for removal of this case showed such a separable controversy between appellant, railroad company, a citizen of Illinois, on the one side, and appellee, a citizen of Kentucky, on the other, which could and ought to be tried without regard to the presence of, or right to have, either of the other defendants joined in the suit, then the Federal court had jurisdiction of this case. But whether upon the facts stated in the petition and record there was presented a Federal case, was within the jurisdiction of the State court to adjudge. (Kansas City &c., R. R. Co. v. Daughtry, 138 U. S., 298; McDonald v. Salem Capital Flour Mill Co., 31 Fed., 577; Burlington C. R. & N. Ry. Co. v. Dunn, 122, U. S., 513; Stone v. South Carolina, 117 U. S., 430.)

While the State courts can not inquire whether the facts alleged in the petition for removal are true, yet, when the petition for removal and the record do not show a prima facie right to the removal, the State courts may refuse to surrender the case, and will proceed to its trial. Filing a copy of the record in the Federal court upon such an insufficient petition does not, in our opinion, give the latter court jurisdiction to try the question of jurisdictional facts. If both the State and Federal courts could try the same facts as to jurisdiction, different conclusions might be reached, and unseemly conflict and confusion result. To avoid these, the congress has wisely made the condition of the Federal court's jurisdiction to depend upon the filing in the State court in due time of a petition, in which, according to the unbroken current of the decisions of the Federal courts construing the act, all necessary facts to show prima facie a right in the petitioner for the removal must be set out, not as conclusions of law; or, such necessary facts must affirmatively and explicitly appear elsewhere in the record when the application to the State court for the removal is made. (Crehore v. Ohio, &c., R. R. Co., 131 U. S., 240; Freeman v. Butler, 39 Fed., 1 (opinion by Barr, district judge); Seddon v. Virginia T. & C. S. & I. Co., 36 Fed., 6; Jackson v. Allen, 132 U. S., 27; Smith v. Horton, 7 Fed., 270; Amory v. Amory, 95 U. S., 186; Weed Sewing Machine Co. v. Smith, 71 Ill., 204; Chester v. Chester, 7 Fed., 1; Burlington, &c., Ry. Co. v. Dunn, 122 U. S., 517; Railway Co. v. Ramsey, 22 Wall., 322; Grace v. American Central Ins. Co, 109 U. S., 278; Gold W. & W. Co. v. Keyes, 96 U. S., 199; Carson v. Dunham,

121 U. S., 421; Removal Cases, 100 U. S., 457; Yulee v. Vose, 99 U. S., 539.)

The truthfulness of these facts may then, and not till then, be inquired into in the Federal court. As the petition for the removal and the record in this case did not in our opinion, state facts sufficient to confer jurisdiction upon the United States Circuit Court, that tribunal had not the right to inquire into their truthfulness, nor to hear evidence as to other facts not alleged in the record or the petition for removal, and by adding such evidence to the insufficient allegations, find the needed jurisdictional facts. Applying these principles to this case, the United States Circuit Court never had jurisdiction of this action for any purpose. Nor can such jurisdiction be conferred by consent, or appearance, or even a trial therein without objection on the merits of the case. (Pepper v. Fordyce, 119 U. S., 469; Mexican National R. R. Co. v. Davidson, 157 U. S., 201; Southword v. Reed, 36 Fed., 451; Kingsbury v. Kingsbury, 3 Biss., 60.; Re Hopkins, 18 Bank Reg., 389.)

The recent case of Stephenson v. I. C. R. R. Co., 25 Ky. Law Rep., 442, seems to be in conflict with the conclusion now reached, and the reasons assigned therefor. The question of jurisdiction herein discussed was not considered nor presented in that case. But in so far as it is in conflict with the principles of this opinion, it will no longer be regarded as authority. It follows that the ruling of the trial court was correct in refusing the amended or supplemental answer setting up the proceedings in the United States Circuit Court, as the matter thus attempted to be pleaded did not constitute a defense, and was wholly immaterial to the case. This suit charges appellant railroad company and the conductor and engineer of one of its trains, with negligently killing appellee's intestate. The negligent acts charged are, that in attempting a running or flying switch, appellees' intestate, a brakeman on the train, while uncoupling the cars to be switched off, was run over by being thrown under the cars, by the negligence of the company's engineer and conductor in starting up the engine too suddenly and without warning.

There was evidence to show that the train crew, with the concurrence of the engineer and conductor, were attempting what some of the witnesses called a flying or running switch. This was prohibited by a rule of the company because of its danger to those who engaged in it; that the decedent voluntarily took part will not alone prevent his recovery, if his superiors ordered it, and then negligently failed to take ordinary care required by the circumstances to avoid injuring him. To start the train suddenly and without warning, and without a signal from him while he was trying to uncouple the cars, whereby he was injured, presented a case of actionable negligence. Whether he was guilty of contributory negligence is not so clearly shown, though it should have been and was submitted to the jury. The motion for a peremptory instruction was properly overruled. But we are of opinion that the court erred in defining the law of contributory negligence to the jury. After telling them that if the decedent was himself at the time of his injury guilty of such negligence that but for it he would not have been injured, notwithstanding defendants' negligence, if they were negligent, yet the court said to the jury that if the defendants knew of decedent's peril, or by the exercise of ordinary care might have known of it, in

time to avoid injuring him, then his contributory negligence was unavailing as a defense.

If the defendants knew of the peril of the decedent in time to have avoided injuring him, unquestionably his contributory negligence was immaterial. Appellants were not aware, so far as anything in the record shows, that decedent was between the cars, or was required to be between them. It merely showed that he was to uncouple and did uncouple, the two cars from the rear of the slowly moving train. This was done, or could have been done, by a lever worked from the side of the car. Whether he had unnecessarily and negligently gone between the cars, or was negligently leaning his weight on the front car when he was doing the work, is not shown to have been known to either the conductor or engineer. Nor were they required to suspect it and to look out for it. One is not bound to anticipate that another may be negligent.

For the error indicated the judgment is reversed and the cause is remanded for a new trial.

Whole court sitting.

BURKS, &c. v. FERRIELL.

(Filed May 6, 1904—Not to be reported.)

Roads and passways—Where a road was changed from one side of a creek to another on account of washes, its use for a long period of years amounts to a dedication; and where the owner of land which it traversed sought to obstruct it so as to prevent its use by the public, the circuit court erred in not granting the prayer for the removal of the obstructions.

H. W. Rives for appellant.

Ben Spalding for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Nunn.

In the month of October, 1903, the appellants, C. B. Burks, and five other citizens of Marion county filed their petition in equity in the Marion Circuit Court against appellee, alleging that they, as citizens of Marion county, had a special interest in the public county road known as the Greensburg and Bardstown road by the way of Hardin's creek; that when the Greensburg and Bardstown road by the way of Hardin's creek was established, and for some years thereafter, that portion between Burks' mill and the Hickory Camp Branch was located on the west bank of Hardin's creek and very close to the creek. But about fifty years ago the creek, by washes of its western bank, so encroached upon the road in places that public travel was forced to the eastern bank of the creek; that since that date this road on the eastern bank has been used by the public as a public highway and as a matter of public right, to shortly before the institution of this action. Within two months prior to the filing of the action, the appellee, actuated by an unlawful purpose and motive, and with the intent to stop public travel over this road, erected a fence directly across it, extending to and into the creek, and to further accomplish his unlawful purpose, felled a tree across the road. He alleged that many citizens in Marion and Washington counties, as well as

themselves, had no other outlet than by this road to the church, depot and postoffice, and asked that the court grant an order directing these obstructions to be removed and enjoining the further obstruction of it.

The appleee denied that it was a public highway, but admitted the obstruction of it and claimed that he had a right to obstruct it. The evidence showed that the Greensburg and Bardstown road was established long prior to the civil war, and that this road in passing from Burks' mill to Hickory Camp Branch, a distance from a quarter to half mile, passed on the west bank of Hardin's creek and very close to it; that some time during the war the waters in the creek washed the west bank away and made it impossible for the traveling public to pass upon that side of the creek, and the travel crossed the creek and came down upon the east bank.

From the close of the war the surveyor with his hands, worked and kept up this road on the east bank to shortly before the bringing of this action. The persons owning the land on the east bank (the land which appellee owned and has now owned for about seven years), with their hands living on the lands, worked this road on the east bank under the surveyor of the road. If there was ever any order changing this highway from the west to the east bank, it was made prior to the close of the civil war, as the records were burned during the war. The evidence conduces to show that the persons owning this land prior to appellee's purchase assented to the change and by working upon the road, being called out by the surveyor, and doing this without any objection, is evidence of a dedication of it to the public; and the working of it by the surveyor and hands and the using of it by the traveling public, is evidence of an acceptance of it by the public. When both of these exist for more than fifteen years (in this case fifty years) the evidence of both the dedication and the acceptance is conclusive. See the case of Riley v. Buchanan, 25 Ky. Law Rep., 863, in which all the decisions in this State and in many other States are referred to and revived, and this case settles the questions involved herein.

The lower court seems to have erred upon the idea that it was necessary to show an order of the county court changing this road from the west to the east side of the creek, and that a public road could be established in no other way than by an order of the county court. In this, the lower court was mistaken as expressly decided in the case referred to. The court should have granted appellant's prayer and ordered the obstructions removed and enjoined appellee from further obstructing it.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

BURKS v. FERRIELL.

(Filed May 6, 1904—Not to be reported.)

1. Criminal law—Mistake in warrant—Appellant, who made an affidavit for a warrant charging a certain offense, should not be held responsible for the mistake of the officer in issuing a warrant which charged another offense.

2. Same—Malicious prosecution—Where the evidence showed that one had probable cause for believing that another had committed a public offense, it matters not how malicious he was at a time he sought and secured a war-

rant of arrest for the latter, because if he had probable cause to believe that the offense had been committed, he can not be made responsible for taking out the warrant. If the law was otherwise it would be a great hindrance in enforcing the criminal law of the Commonwealth.

H. W. Rives for appellant.

Ben Spalding for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Nunn.

The appellee filed his petition in the Marion Circuit Court in the month of October, 1903, in which he alleged that appellant, on the 31st of July, 1902, in Marion county, did wrongfully and maliciously, without legal authority or probable cause, procure a warrant of arrest to be issued against appellee by the police judge of the town of Lebanon, charging the appellee with having obstructed a passway by building a fence across same and cutting a tree across it; and that on the hearing and at the conclusion of the Commonwealth's testimony, the court dismissed the warrant; that he was greatly humiliated and distressed and damaged in the sum of $2,500.

The issues were made, a trial had and a judgment was rendered in favor of appellee against appellant for the sum of $200. The court refused to grant appellant a new trial and he has appealed. The evidence showed this state of case; that the Greensburg and Bardstown public road passed along Hardin's creek between Burks' mill to Hickory Camp Branch, a distance between a quarter and a half mile. This public road passed along the creek along the west bank until some time during the civil war when the waters of the creek washed away the west bank and the road. Then the travel turned across the creek and along the east bank between these two points. The owners of the land along the east bank appear to consent to it and they, with the other hands of that road precinct, worked this road on the east bank as the public highway. Appellee purchased this land about seven years prior to the institution of this action, and a few months prior thereto he set his fence out across this road and felled a tree across it, thereby stopping the public travel altogether. For further particulars as to this road see the opinion this day rendered in the case of Burks, &c v. Ferriell, ante, page 35.

When appellee obstructed this road, as stated, the appellant applied to the police judge of Lebanon for a warrant against appellee, and make an affidavit before this officer that appellee Ferriell had committed this offense of obstructing a public road by building a fence and cutting a tree across it. It appears that by some oversight, Thomas, the police judge, issued the warrant against appellee for obstructing a passway, and on the trial the county judge who tried the case, after hearing the evidence for the Commonwealth, entered an order dismissing the warrant for the reason that the proof showed that he had not committed the offense of obstructing a passway, but was guilty of the offense charged by the appellant in his adffiavit of obstructing a public road; and the judge, upon his own motion upon this evidence, issued a warrant for this offense. This warrant was, for some cause or defect, afterwards dismissed. Appellee, in his pleadings, expressly avowed that he did not claim any damages for the wrongful issual of the last warrant, but

rested his claim for damages alone upon the wrongful, and malicious issual of the first warrant, charging the obstruction of a passway.

We are at a loss to understand upon what principle appellee can sustain his claim. His effort was to obtain a warrant for the obstruction of a public road and his affidavit so stated. The officer, by mistake, issued it for obstructing a passway and the appellant ought not be held responsible for the mistake of the officer. The evidence in this case, and as decided in another case between these same parties, shows that appellant not only had probable cause for believing that appellee had committed the offense charged, but he had actual grounds to believe it. as appellee was in fact guilty. It matters not how malicious appellant was at the time he sought and secured the warrant, if he had probable cause to believe that the appellee had committed the offense, he can not be made responsible for the conduct.

In Masker v. McCourt, 19 Ky. Law Rep., 1897, the court said: "Where one, through malice, procures a wararnt for the arrest of another, he is not liable to an action therefor if he acted on reasonable or probable cause." To the same effect is the case of Redman v. Stivers, 11 Ky. Law Rep., 428.

The dismissal of appellee on the trial of this warrant, did not relieve the appellee from proving on the trial of this case a want of probable cause on the part of appellant. See Lancaster v. Langston, 18 Ky. Law Rep., 2-9, in which the court said: "The fact that on the trial of the case, wherein the order of arrest was obtained, the judgment was for the defendant herein, does not create the presumption on the trial of this case that the suit was prosecuted maliciously and without probable cause. As the plaintiff must prove malice, the proof of the want of probable cause devolves on him. Even if appellee had actually been innocent of the offense charged, yet if appellant, when the warrant was obtained, had actually reasonable grounds to believe and did believe that appellee was giulty of the offense, he can not be mulched in damages for having procured the warrant. If the law was otherwise it would be a great hindrance and almost an impossibility to have the criminal law of the Commonwealth enforced. Individuals would be afraid to put the criminal law in motion for fear that they would be made responsible in damages, if perchance, it turned out that the party prosecuted was innocent.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

HELLARD v. COMMONWEALTH.

(Filed May 6, 1904—Not to be reported.)

Homicide—Self-defense—Instructions—Abandonment of combat—It appearing from the evidence that appellant shot at deceased twice, with a pistol, as he passed defendant's house, about seventy-five yards off, that deceased, after firing at appellant with a gun, threw the gun down and walked to appellant's house, got his axe at the woodpile, went into his yard and ran him around the house once or twice, appellant as he ran fired two or three times, the last shot killing deceased. The court, in its instructions on self-defense, refused to qualify the instruction by adding thereto, "unless you believe from the evidence that defendant in good faith abandoned the

difficulty or mutual combat, before he shot deceased." We think this was error. The court should have permitted the jury to determine whether or not appellant had, in good faith, given up the intention, if he had such, of further attempting to harm deceased.

C. C. Williams for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Nunn.

The appellant was tried at the February, 1904, term of the Rockcastle Circuit Court on the charge of murder by shooting and killing one Abe Drew. He was convicted of the crime of voluntary manslaughter and sentenced to a term of twenty-one years in the penitentiary.

Appellant complains of the action of the lower court in refusing to allow him to prove by J. J. Drew, a cousin of the deceased, that when he went to Hellard's house after the dead body, he stated to R. M. Johnson and family, that from what Ralph Drew told him immediately after the shooting, Hellard ought to be acquitted; that he, witness, would have done the same thing that Hellard did. The court was right in refusing to allow this statement to go to the jury. It amounted only to an opinion of the witness and that formed from hearsay, which was clearly incompetent. The only witness introduced for the Commonwealth who professed to have been present at the killing, was Ralph Drew, a son of the deceased. He stated that he and his father were walking up the public road which passed appellants' house, and when about seventy-five yards from the house, they saw appellant chopping wood on the side of the road immediately in front of his house; that when appellant saw them coming, he at once went to his door and his wife handed him a pistol; that he then took a rest on the fence and fired two shots at the deceased; that deceased then took from witness a shot gun which he was carrying, cocked it and fired. Witness thought it went off accidentally. Then the deceased threw the gun down and walked slowly to appellant's gate, picked up the ax, went into appellant's yard after him, with the ax raised in a striking position, and ran him around the house once or twice. Appellant, as he ran, fired two or three shots at deceased, the last one killing him.

Appellant contended that the court erred in adding the following to the instruction on self-defense: "Unless you should further believe from the evidence beyond a reasonable doubt that the defendant sought and brought on the difficulty with the deceased, in which the shooting occurred, in the use, or the threatened use of a deadly weapon; or that the defendant and the deceased mutually and willingly entered into a combat with each other with deadly weapons, in either of which latter state of case, the defendant can not be excused on the grounds of self-defense."

We are of the opinion that the court did not err in making this addition to this instruction, but did err to appellant's prejudice, is not also adding, "unless you believe from the evidence that he, in good faith abandoned the difficulty or mutual combat before he shot Drew." (19 Ky Law Rep., 418.)

We are of the opinion that, under the proof introduced, it was prejudicial to the substantial rights of appellant not to give him the benefit of this

addition to the instruction. According to Ralph Drew's testimony, after the appellant fired the two first shots, his father walked slowly the seventy-five yards, picked up the ax and entered appellant's yard, running him around his house when he fired the last two or three shots. From these facts, and others in the record not necessary to mention, we think the court should have permitted the jury to determine whether or not appellant had in good faith given up the intention, if he had such intention, of further attempting to harm the deceased. According to the theory of appellant and his witnesses, he had a clear case of self-defense. But we refrain from further discussing the evidence or expressing an opinion thereon for the reason that the case will have to be tried again.

Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

MESSER v. COMMONWEALTH.

(Filed May 6, 1904—Not to be reported.)

Indictment—Forgery—Two offenses charged—Demurrer—Where an indictment charges two offenses, one for forgery and one for uttering and publishing a forged instrument, a demurrer thereto should have been sustained and the attorney for the Commonwealth required to elect which of the offenses in the indictment he would prosecute.

Phillips & Fugate for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Knott Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Flem Messer, was convicted and sentenced to the penitentiary for a term of two years under the following indictment found against him by the grand jury of Knott county, at the November term, 1903, of the Knott Circuit Court: "The grand jury of Knott county in the name and by the authority of the Commonwealth of Kentucky accuse Flem Messer of the crime of forgery committed as follows: The said defendant on the 10th day of November, 1903, in the county and circuit aforesaid did unlawfully, willfully, maliciously and feloniously forge William Roberts' name as presiding judge of the Knott County Court to an order directed to J. H. Amburgey, who was then clerk of the Knott County Court, directing said Amburgey to issue to said Messer a land warrant for one hundred acres of land; also forging said Roberts' name as judge of the Knott county court to a receipt for $5 in payment for the above-mentioned land warrant, he, the said defendant, uttering and publishing same to be true, when in fact each and both of said instruments were forgeries and fraudulent, and were so known to be by the defendant at the time, and the same was done for the purpose of perpetrating a fraud against the said Roberts and the Commonwealth of Kentucky, against the peace and dignity of the Commonwealth of Kentucky."

The defendant is charged in this indictment with three separate and distinct offenses. First, for forging the name of William Roberts as presiding

judge of the Knott County Court to an order directing Amburgey, who was then clerk of the Knott County Court, to issue to defendant a land warrant for one hundred acres of land; second, with forging Roberts' name to a receipt for $5 in payment for the land warrant, and, third, with uttering and publishing as true each and both of these instruments. The instructions given to the jury closely follow the indictment, and authorize the conviction of defendant if the jury believe beyond a reasonable doubt that he was guilty of either of these separate offenses. They are as follows:

"Instruction No. 1. The court says to the jury that if they believe and find from the evidence beyond a reasonable doubt that the defendant, Flem Messer, in Knott county, Kentucky, and before the findling of the indictment herein, forged the name of William Roberts, as presiding judge of the Knott County Court, to an order directed to J. H. Amburgey, clerk of the Knott County Court, to issue a land warrant to the said Flem Messer, for one hundred acres of land, of date July 29, 1903, they will find him guilty and fix his punishment at confinement in the State penitentiay at hard labor for a period of years, so it be not less than two nor more than ten years, in the discretion of the jury.

"Instruction No. 2. The court says to the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, Flem Messer, in Knott county, Kentucky, and before the finding of the indictment, forged the name of William Roberts, as presiding judge of the Knott County Court, to a receipt for $5, for a land warrant for one hundred acres of land in Knott county, Kentucky, they will find him guilty, and fix his punishment by confinement in the State penitentiary for any period of time, so it be not less than two nor more than ten years, in the discretion of the jury.

"Instruction No. 3. The court says to the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, Flem Messer, in Knott county, Kentucky, and before the finding of the indictment herein, knowingly uttered and published as true and genuine the order and receipt referred to in instructions one and two, knowing at the same time that said order and receipt were forged, they will find him guilty, and fix his punishment by confinement in the State penitentiary for any period of years at hard labor, so it be not less than two years nor more than ten, in their discretion."

To each and all of these instructions the defendant objected and excepted.

Section 126 of the Criminal Code is as follows: "An indictment, except in the cases mentioned in the next section, must charge but one offense, but if it may have been committed in different modes and by different means, the indictment may allege the modes and means in the alternative."

Section 127 sets out the offenses which may be charged in one indictment.

Section 262 provides that convictions may be had for any degree of an offense charged in an indictment included in or lower than that charged. Section 263 specifies the degrees of offense referred to by section 262. While counsel for the State does not deny that forgery and uttering a forged instrument are separate and distinct offenses, and can not properly be joined in an indictment, and it has been so decided by this court (Huff v. Commonwealth, 19 Ky. Law Rep., 1064), he relies upon an unpublished opinion (Rawlings v. Commonwealth, a syllabus of which is found in 7 Ky. Law

Rep., 595) as authority for the contention that as the indictment has but one count, and in the naming part thereof the only offense designated is forgery; that it only charges one offense, notwithstanding it also described the offense of uttering a forged instrument; and that the evidence being sufficient to support a conviction for forgery, the defendant was not prejudiced by the instructions given to the jury authorizing them to find him guilty if they believed he either forged or uttered the order or receipt. An examination of the manuscript opinion discloses the fact that a demurrer to the indictment was sustained in that case, and the language of the opinion relied on was pure dicta, and is, in our opinion, wholly unsound, misleading, and in direct conflict with section 126 of the Criminal Code. It has been held by this court in numerous cases that an indictment must name the offense charged, and that a conviction could be had only for the offense named. (Books v. Commonwealth, 98 Ky., 148; Commonwealth v. Tuckman, 17 Ky. Law Rep., 117; Miller v. Commonwealth, 25 Ky. Law Rep., 1238.) The demurrer to the indictment in this case should have been sustained, and the Commonwealth required to elect which of the offenses named in the indictment it would prosecute. (Clark v. Commonwealth, 55 Ky., 211; Commonwealth v. Monarch, 69 Ky., 299; Monti v. Commonwealth, 26 Ky., 132; Waddell v. Commonwealth, 84 Ky., 279; Commonwealth v. Perrigo, 60 Ky., 5; Huff v. Commonwealth, 19 Ky. Law Rep., 1065.)

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

FRANCIS, &c. v. MILLION, &c.

(Filed May 6, 1904—Not to be reported.)

1. Judicial sales—Purchase by joint owner—Liability to co-tenants—The fact that one of several heirs having a joint interest in a tract of land, bought it at public judicial sale at less than its real value, does not make the purchaser liable to have the excess between his bid and the actual value of the land, charged to him as an advancement, only in the distribution of any surplus of his father's or mother's undevised estate, if any.

2. Buying adverse claim—Public sale—Bad faith—Joint tenants—The fact that one bought at public sale an adverse claim to a tract of land in which he and his sister owned a joint interest, will not vitiate the sale in the absence of an allegation of fraud or bad faith in the purchaser, although he bought such interest at less than its real value; and the fact that the purchaser sold the land at an advance of $2,000 a year later, proves nothing against the good faith of his purchase.

3. Joint tenants—Counsel fees—Costs—Section 489, Kentucky Statutes, which allows the recovery of costs and fees and other expenses by one joint owner against others having interests in common with them, but who did not appear, or have counsel in the case, applies only to actions brought for the recovery of property by such joint owners, or suits for the settlement of estates. It does not apply to expenses incurred in defending the joint title in unsuccessful suits brought by others.

Grant E. Lilly for appellants.

Geo. C. Webb for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Judge O'Rear.

This case grows out of Cunningham v. Estill, 24 Ky. Law Rep., 559. It was there held that appellants Mrs. Cunningham and Mrs. Francis, and appellee Wallace Estill, the three children of Jonathan T. Estill, became vested in remainder with the fee to the residue of a certain tract of land, after selling enough to pay Jonathan T. Estill's debts. This suit was brought by a judgment creditor of Wallace Estill to subject his undivided one-third of the land to the payment of the plaintiff's judgment debts. Mrs. Cunningham and Mrs. Francis interpleaded and defended, claiming that Wallace Estill was not entitled to a third of the land, for the following reasons: First, that their father had colluded with Wallace when a portion of the original tract had been sold in the suit to settle Jonathan T. Estill's assigned estate, by reason of which Wallace had bought in that portion therein sold, viz., 112 acres at $2,000 less than its actual value; that that sum should, therefore, be charged to Wallace as an advancement, and should be deducted from his one-third in the remainder of the land; second, that Wallace, as joint owner, held a fiducial relation toward his sister, and could not, without their consent, acqu're a hostile title to this land; third; that in a suit brought by the sisters against their father and his assignee, Smith (the case of Cunningham v. Estill, supra), they had incurred certain expenses, including counsel fees in recovering and defending the common title, for the benefit of the three, and that Wallace Estill's part of the land should be charged with one-third of such costs.

As to the first proposition, it can not be regarded as an advancement in any event. For whatever may have been the purpose of the parties, the advantage, if any, gained in the matter by Wallace Estill could be charged against him as an advancement only in the distribution of any surplus of his father's or his mother's undevised estate. This estate in suit is not one inherited by Wallace Estill from any person. It is an estate by purchase, derived by the deed between Jonathan T. Estill and his wife, the one discussed in the Cunningham case above cited. It is also claimed that Wallace Estill was a joint tenant with his sister in the remainder estate in this land, and that he will not be allowed to profit at their expense by buying in an adverse claim to the common title. Conceding this to be true, there is no sufficient allegation of fraud or bad faith on his part to vitiate the transaction. He bought at a public competitive sale, made by the court's commissioner. The sale was duly reported to and confirmed by the court. A mere statement that he bought it for less than its actual value, is not enough. The best test of actual market value is a sale on the market under circumstances calculated to elicit full and free bidding by intending purchasers. Opinions as to what a thing would bring are necessarily less convincing as to its value than the fact of what it did bring. There is no sufficient allegation to detract from the presumption that the officers of the court did their full duty, and that the sale was a fair one.

The fact alone that the purchaser sold the land a year later for an advance of $2,000 proves nothing against the good faith of the first sale. Besides, appellants waited for nearly thirteen years before claiming any benefit of that

transaction, or offering to share with their brother the burden imposed by his purchase. "Equity aids the diligent, not the slothful."

The circuit court held that appellants were entitled to be reimbursed by one-third of their expenses, including counsel fees, in the Cunningham suit to establish the common title. But the court refused to allow an item for counsel fees incurred by appellants in resisting the enforcement of a lien for the fees of attorneys in the Cunningham suit. Appellants were sued for $3,300, as counsel fees in establishing the title in the suit of Cunningham v. Estill. By defense the claim was reduced to $2,200. In conducting this defense the fee in question was incurred. It is claimed by appellants that appellee Wallace Estill's interest in the land should be charged with one-third of that fee, as he got the benefit of the defense.

Section 489, Kentucky Statutes, which allows the recovery of costs, and fees and other expenses by one coparcener or joint owner against others having interests in common with them, but who did not appear or have counsel in the case, applies only to actions brought for the recovery of property by such joint owners, or suits for the settlement of estate. It does not apply to expenses incurred in defending the joint title in unsuccessful suits brought by others.

Judgment affirmed.

Whole court sitting except Chief Justice Burnam.

WEBER v. GARDINER.

(Filed May 6, 1904—Not to be reported.)

1. Homestead—Execution levy thereon and sale—The levy of an execution and sale of a house and lot owned and occupied as a homestead by the execution debtor, creates a lien thereon subject to the owner's right of occupancy during her life, and the purchaser can only acquire the title thereto by paying the occupant $1,000 and satisfying the prior liens thereon for purchase money, taxes, etc.

2. Same—In an action by the owner to set aside a sale of her homestead made under an execution against her, it was error in the lower court to set aside the sale and adjudge that no lien was thereby created, though such lien was subordinate to the value of appellee's homestead and the liens for purchase money, taxes, improvements, etc., yet unpaid; and upon return of the case appellant should be allowed, by proper pleading, to bring the lienholders before the court, that their liens may be enforced. But in the event the appellant should decline to demand a sale of the house and lot, or to bring the lien holders into court for that purpose, the chancellor may again enter judgment quashing the sale and appellant's lien, and dismiss her petition.

W. T. Burch for appellant.

Samuel Avritt for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Settle.

The appellee, Isabella Gardner, owns a small house and lot in the city of Louisville, which she purchased in 1892 at a cost of $2,050. In the year 1900 she became indebted to the appellant, Wilhelmina Weber, to the amount of $152.68.

In the year 1901 appellant instituted suit against appellee to recover the debt mentioned, and shortly thereafter obtained judgment therefor, upon which she caused an execution to issue, which was levied by the sheriff upon the house and lot of appellee. The property was duly appraised at $1,600, and soon after sold by the sheriff in satisfaction of the execution, appellant becoming the purchaser at the amount of the execution debt, which was then $190.95. At the time of the sale appellee was residing upon the lot, and claiming it as a homestead, and had continuously so occupied and claimed it ever since the year 1893. But the lot not being divisible, a homestead was not set apart to her by the sheriff, before or at the time of the execution sale, nor was there $1,000, or any other sum, paid to her in lieu of a homestead.

No steps were afterward taken by appellant either to obtain a deed to, or the possession of the property, or to enforce a lien thereon by virtue of the execution sale. But on March 24, 1908, this action was instituted by appellee to set aside the sale made of the house and lot under appellant's execution, and such lien, if any, as the latter may have acquired thereby, upon the ground, as alleged, that she is entitled to a homestead in the property of $1,000, she being a bona fide housekeeper with a family; that the property is not worth exceeding $1,600, and further that there are liens thereon for unpaid purchase money, taxes and repairs, aggregating $983. The averments of the petition were denied by the appellants' answer, and in addition, it was alleged therein, that appellee had, after the debt of appellant was created, expended considerable sums in adding to, and otherwise improving the property, and that in any event it was liable for her debt to the extent of the cost of such improvements. The affirmative matter of the answer was controverted by reply, and upon the issues thus made, proof by depositions was taken by the appellee. Upon the hearing the chancellor rendered judgment declaring appellee entitled to a homestead in the property, setting aside the sale made by the sheriff and quashing the levy under appellant's execution. Appellant complains of the judgment and insists upon a reversal.

The following facts seem to be established by the evidence found in the record: That appellee was to pay for the house and lot when purchased in 1892, $2,050; that she had paid of this sum $1,780.32, and yet owes of the purchase money, principal and interest, $770; also for painting the house, $75; for repairing gutters, $6, and city taxes, $132; making a total of $983, all secured by liens on the property; that appellant's debt was created in 1900, and that all sums that have been credited to appellee on the purchase of the house and lot were paid before appellant's debt was created; that appellee is, and for years past has been, a bona fide housekeeper with a family, and that she and her family, consisting of an imbecile daughter and crippled son, were occupying the house and lot in controversy as a homestead, at the time of the creation of appellant's debt and the sale of the property under her execution; and, finally, that the value of the house and lot is $1,600. It is apparent from the foregoing facts that the property in controversy is not worth the amount of the lien debts and appellee's right of homestead. Of this fact there is manifestly no doubt in the mind of appellant, as she rejected the offer made by appellee in the petition, to accept of appellant $1,000 in lieu of

a homestead, if the latter would pay the lien debts against the property, or receive a conveyance of the same and assume the payment of the lien debts. It is, however, insisted for appellant that certain improvements were made upon the lot after her debt was created, in the shape of an additional building, and by painting the dwelling house, and that to the extent of these alleged improvements, the property should be subjected to the payment of her debt.

The painting can not be said to be an improvement in the sense contended for by appellant. It did not add to the value of the property except by way of preventing waste and depreciation. The building referred to is a cheap box house or shed room of poor material, which was erected in the rear of and adjoining the dwelling house, by appellee's son and one Wright, at a cost of $150, for use in the manufacture of potato chips. But it was in proof that this small room was put there, by the persons building it, under an agreement with appellee that it might be removed by them at any time. So it is not owned by appellee, is not a part of her lot, and does not in the least add to its value. It is evident that a sale of the house and lot in controversy would not realize a sum sufficient to pay the lien debts outstanding against the property, and the value of appellees' homestead; and these demands must all be satisfied before appellant can receive anything upon her debt, so it is difficult to understand of what benefit it would be to appellant to sell the property. But, as under her execution sale and by virtue of section 1709, Kentucky Statutes, appellant, as purchaser, acquired a lien upon the house and lot subject to the incumbrances existing thereon, she may, upon bringing the lienholders into court, insist upon a sale of the property to satisfy, first, the lien debts, second, appellee's right of homestead, and, finally, her own debt out of any surplus remaining. (Wilson, &c. v. Flanders, 24 Ky. Law Rep., 1303; Atkins v. Emerson, 10 Bush, 13.)

It was error, therefore, for the chancellor to set aside the sale under appellant's execution, and also error to declare that no lien was thereby created upon the lot in appellant's favor for her debt, though such lien is subordinate to the value of appellee's homestead and the liens, for purchase money, taxes, painting, etc., yet unpaid, as shown by the record. When the case returns to the lower court the appellant should be allowed by proper pleading to bring the lienholders before the court, that their liens may be enforced. But in the event appellant should decline to demand a sale of the house and lot as herein directed, or to bring the lienholders before the court for that purpose, the chancellor may again enter judgment quashing the sale, discharging the lien thereby created in appellant's favor, and dismiss her petition.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with the opinion herein.

CHICAGO, St. LOUIS & NEW ORLEANS R. R. CO. v. SULLIVAN.

(Filed May 10, 1904—Not to be reported.)

Attorney's fees—Bonds—In an ad quod damnum proceeding against appellant it deposited the amount of the judgment with the county clerk as required by statute, and took an appeal to the circuit court when it attempted

to take possession of the right of way when appellee resisted on the idea that the money had not been paid over to him which the jury assessed. Appellant then sued out an injunction restraining appellee from interfering with its possession of the right of way, but the restraining order being dissolved by the judge of the lower court, and a judge of the Court of Appeals refusing to reinstate it appellee brought an action upon the injunction bond to recover traveling expenses, attorney's fees and other costs incurred in defending the injunction proceeding. Held—It was error in the lower court in overruling a demurrer to the petition in this action. The law is well settled in this State that the only damage that can be recovered in this class of cases is "such as results from the operation of the injunction itself." The trial court should have given a peremptory instruction to find for the defendant.

Robbins, Thomas & Corbett, J. M. Dickinson, Pirtle & Trabue and Jacob Corbett for appellant.

J. D. Wickliffe for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Chief Justice Burnam.

A jury awarded the appellee, Jerry M. Sullivan, $3,000 as damages in an "ad quod damnum" proceeding instituted by appellant for a condemnation of a right of way through his farm in Ballard county for their railway line from Cairo to Paducah. The appellant deposited the full amount of this judgment with the county clerk as required by the statutes, and on the same day prosecuted an appeal therefrom to the circuit court. When they attempted to take possession of the right of way, appellee resisted on the ground that they had not paid over to him the money assessed by the jury. The railroad company thereupon brought an action in the Ballard Circuit Court for an injunction restraining the defendant from interfering with their possession of the condemned "right of way." The temporary restraining order was granted by the clerk after the execution of a bond to appellee by appellant, that they would pay such damages as he might sustain by reason thereof. This temporary restraining order was subsequently dissolved by the judge of the Ballard Circuit Court, and upon appeal by the railroad company to a judge of this court, a motion to reinstate was overruled.

Thereupon appellee brought this action upon the injunction bond taken by the clerk, to recover traveling expenses, "attorney's fees," and other costs incurred in defending the injunction proceeding. A demurrer was filed by the defendant, which was overruled by the court, and upon a trial before a jury resulted in a verdict under peremptory instruction for $500 attorney's fees in favor of the plaintiff and the defendant has appealed. The law is well settled by a long line of decisions in this State that the only damage that can be recovered in this class of cases is "such as results from the operation of the injunction itself." The rule is stated with great perspicuity in the New National Turnpike Co. v. Dulaney, &c., 86 Ky., 518, in these words: "When the attachment or injunction is merely ancillary or in aid of the relief sought, or is relied on to secure the relief when obtained, or to prevent the commission of a wrongful or tortuous act that would result in irreparable injury before the termination of the prime cause of action, then a recovery may be had on the bond for the payment of reasonable counsel fees, when the defendant has succeeded in discharging the attachment or dissolving the in-

junction; but on the contrary when the injunction is the relief sought and in fact gives the relief, if sustained, no recovery for counsel fees can be had."

This case was preceded by Burgin v. Sharer, 53 Ky., 399, and has been followed in Bennett v. Lambert, 100 Ky., 731; Taylor & Apperson v. Hamilton, &c., 108 Ky., 120; Williams v. Allen, 21 Ky. Law Rep., 1191; Simpkins v. Well, &c., 22 Ky. Law Rep., 542, and numerous other cases. The proceeding in which the bond sued on was executed was not in any sense ancillary to the condemnation proceedings. The only question involved in the proceedings was whether the railroad company was entitled to the possession of the condemned right of way after having deposited the amount assessed in favor of appellee by the ad quod damnum jury, with the county clerk. If the injunction in that case had been sustained, it covered all the relief sought, and the judgment, therefore, dissolving the injunction does not authorize the recovery of attorney's fees. We think the trial court erred in not giving to the jury a peremptory instruction to find for defendant.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

INGRAM v. ISON.

(Filed May 10, 1904—Not to be reported.)

1. Sale of land—Plea of infancy—Where appellant sold his land to appellee, representing to him at the time that he was twenty-one years of age and his mother at the same time saying to appellee that appellant was of age, and it appearing that at the time appellant was a married man with two children and the wearer of a full beard, the action of the chancellor in dismissing his petition seeking to set aside the deed, will not be disturbed.

2. Same—Ratification—Where one sold land to another, his rental of it from the vendee two years after he became of full age, was a ratification of the sale and a recognition of appellees' right and title to it.

D. D. Fields and S. B. Dishman for appellant.

Ira Field, D. Hays and Salyer & Baker for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Settle.

On September 6, 1896, the appellant, Leander Ingram, sold and conveyed to the appellee, Philip Ison, one hundred acres of land in Letcher county for $100. The deed was duly accepted and put to record by appellee, the possession of the land immediately delivered to him, and the consideration mentioned in the deed paid to appellant.

July 12, 1901, this action was instituted by appellant to set aside the deed and recover the land, upon the ground that he was under twenty-one years of age at the time of the sale of the land and the execution of the deed. It was also averred in the petition that the consideration for the conveyance was grossly inadequate, and that the land was worth three times the amount paid for it by the appellee. The answer of appellee denied the averments of the petition as to infancy, and gross inadequacy of price, and averred that appellant, at the time of the sale and conveyance of the land, represented to

appellee that he was over twenty-one years of age, that it was known to appellee that he was a married man and the father of two children, and that he then wore a full beard, and in every way appeared to be over twenty-one years of age.

The answer also averred that appellee in good faith believed when he purchased the land and accepted the deed, that appellant was twenty-one years of age, and was induced by the latter's representation that such was his age, to enter into the contract and take the deed, and further that if appellant was not in fact over twenty-one years of age at that time, he is by reason of his false and fraudulent representations that such was his age, estopped to deny or repudiate the sale and conveyance to appellee; that appellee had in good faith made valuable and lasting improvements upon the land whereby its vendible value was increased, and to the end that he might recover the added value thus given the land, if the chancellor should see fit to set aside the conveyance, the answer was made a counterclaim and set off against the appellant. A reply was filed by appellant traversing the affirmative matter of the answer, and later appellee filed an amended answer in which it was averred that appellant, after he arrived at twenty-one years of age, ratified the sale and conveyance of the land made to appellee during his minority, by renting the land of appellee two years in succession. To this amendment no reply was filed and no order taken controverting it of record.

We find from an examination of the record that the evidence is conflicting as to appellant's age at the time of the sale and conveyance of the land. It, however, appears from his proof that he lacked only a month of being twenty-one at that time. Much of the evidence strongly conduces to show that he had then attained his majority, and it is admitted that he was a married man with two children and the wearer of a full beard. If the determination of the rights of the parties were made to rest upon the matter of his age at the time of the conveyance, it must be confessed that a correct solution of that question would be difficult under the evidence. There is, however, no doubt from the evidence that both the appellant and his mother, at the time of the execution and acknowledgment of the deed, represented to the appellee that he was twenty one years of age, and there is no proof whatever tending to show that appellee had information from any source that he was under that age. In fact, it appears from the evidence that the appellee never had any information that appellant claimed to be under twenty-one at the time of making the conveyance until about a month before the institution of this action.

We are of opinion that the chancellor did right in dismissing appellant's action. He was not entitled to the relief sought. In Schmithimer v. Elzeman, 7 Bush, 298, it was held by this court in a case where an infant femecovert was seeking to set aside a deed that she and her husband had made, to one who had been induced by their false representations that she was twenty-one years of age, to purchase her land, that a court of equity could not grant the relief sought. In discussing the question, the court, in the case supra, said: "Neither infancy nor coverture can excuse parties guilty of fraudulent concealment or misrepresentation, for neither infants nor femes covert are privileged to practice frauds upon innocent ones. In this

case the conveyance is only voidable, the contract is fully executed. Appellee asks only to be left in the undisturbed possession of property for which he has paid a fair and full consideration. The chancellor could give no relief without making himself a party to her iniquitous and fraudulent conduct." * * *

In the case at bar the appellee is not asking as against an infant the specific performance of an unexecuted contract. The contract is an executed one, which the alleged infant is seeking to avoid four years after it was made, and as he does not appear with clean hands, he was not entitled to relief. The evidence shows beyond a doubt that the price paid by appellee for the land was its fair value at the time, and no claim can be made of unfair dealing on his part in the contract with reference to the land. Furthermore the judgment should have gone for appellee in the court below upon the ground that appellant, after the conveyance of the land and attaining his majority, ratified the sale and deed by renting the land of appellee, thereby recognizing his right and title to same.

In Haffert v. Miller, 86 Ky., 574, it is said: "The deed of an infant conveying real estate where any valuable consideration passes to him is, as well settled by this court, not absolutely void, but voidable merely, and he has an election after his disability to affirm or avoid it. To confirm, it is not indispensable that he should re-acknowledge the first or execute a new deed, but he may do so after full age by an act in pais * * * and there must be some positive act or words of the minor from which his assent to the deed executed during his minority may be inferred."

The renting of the land by appellant from appellee two years after his reaching full age, was hardly less positive in its ratification of the conveyance theretofore made in infancy, than would have been a writing confirmatory of appellee's title.

Wherefore, the judgment is affirmed.

COX v. SHELBY COUNTY TRUST CO.

(Filed May 10, 1904—Not to be reported.)

1. Wills—Where testator provided in his will that the trustee should sell his land whenever a fair price could be obtained for it, it was not incumbent upon the trustee to advertise the sale by posting notices or to obtain the consent of any one before making the sale.

2. Same—Power of court—Where one was appointed trustee under a will, the court having the power to limit its authority, did not do so, a sale by the trustee in accordance with the provisions of the will, will not be disturbed.

Gilbert & Gilbert and Harrison for appellant.

J. C. Beckham & Son and Willis & Todd for appellees.

Appeal form Shelby Circuit Court.

Opinion of the court by Judge Nunn.

On the 18th day of June, 1879, Fielding Neal made and executed his will, which, after his death, was duly probated in the Shelby County Court.

That part of the will having application to the questions involved in this litigation is as follows: "After my debts and funeral expenses are paid, I give unto my beloved wife, Bettie Neal, one third of all my property, both real and personal, during her life, and at her death the amount so given to her is to go to my granddaughter, Bertie Neal Amis. I bequeath unto my said granddaughter, Bertie Neal Amis, two-thirds of all my estate in trust for the sole and separate use of my said granddaughter, Berite Neal Amis, during her life. In case my said granddaughter should marry, then the said estate is to be held by the trustee hereinafter named, in trust for her, and, in addition to that, is to be held free from the use, control and the liabilities of her husband; upon the death of my granddaughter, Bertie Neal Amis, it is my will that the estate hereby willed to the said Bertie Neal Amis shall go to her children, if she have any, and if she should die without issue and before she is of age, then in that event it is my will that the estate so devised to her shall be equally divided between the children of my three children, namely, James Neal, Richard and Oakley Neal. I appoint A. P. Corrithers executor and trustee, and require that he give good and sufficient security, and should the said A. P. Corrithers fail or refuse to serve, it is my will that a court of competent jurisdiction appoint some suitable person in his place; in this event, bond should be required by the court. It is my will that all my real estate shall be sold whenever the property will bring a fair price, and the proceeds be invested in such a way as the trustee may think best."

Appellant is the Bertie Neal Amis mentioned in the will, she having married W. E. Cox in the year 1898, and by whom she has two or three living children. Corrithers qualified both as trustee and executor under the will.

When appellant became the wife of W. E. Cox, he qualified and executed bond as her trustee and acted as such until the fall of 1897, when he resigned, and the appellee, trust company, was appointed in his stead. The order of court with reference thereto is as follows: "The resignation of W. Ewing Cox, trustee of Bertie Amis Cox, is now accepted, and he is released from all further liability and duty as such trustee except as shown in this judgment for the above sum. And then the court, upon its own motion, appointed the Shelby County Trust Co., trustee of Bertie Amis Cox, under the will of Fielding Neal, to take, hold and manage the estate held in trust for Bertie Amis Cox under the will of said Fielding Neal."

The property devised to Mrs. Neal, the widow of the testator, and appellant was divided between them soon after the probation of the will, appellant receiving in the division as part of the devise to her, a valuable farm consisting of 580 acres, which is the subject of this controversy. Appellee, trust company, on the 14th day of October, 1902, sold this tract of land to its co-appellees herein, McCormick & Olgesby, for the price of $20,500, one-third cash, and balance on time, with interest. This sale was made privately, that is, without order of court or posting advertisements. Appellant instituted this action for the purpose of having this sale set aside by the court, alleging that the property had been sold without and against her consent, and without the power of the trust company to make the sale, and at a great sacrifice. Appellees made an issue with her upon these questions, and the court, after hearing the case, found against her, and she has appealed.

It appears from the record that appellee, trust company, had doubts as to its power to convey this property to its co-appellees in its capacity as trustee under the will, and, on the day of the sale of the land, Corrithers resigned as executor of the will, and the county court appointed the appellee, trust company, administrator de bonis non with the will annexed, and in making the conveyance to its co appellees it signed and executed the deed in both capacities. The resignation of Corrithers, as executor, and the appointment of appellee in his stead was of no force or effect. The office of executor, under this will, ceased when Corrithers made his final settlement in 1890, and turned over the estate in his hands to himself as trustee. If this deed is valid, it is so by reason of the trust company executing it as trustee under the will of Fielding Neal, as authorized by the order of court copied above.

The will not only empowered, but directed, that this property should be sold whenever it would bring a fair price. Appellant claims that this power was given to Corrithers; that the testator reposed personal confidence in him; that he did not mean that this power was to be exercised by any trustee other than Corrithers. We can not agree with this construction of the will. The language directing a sale of the real estate applied equally to Corrithers or any person which a court of competent jurisdiction might appoint to act as such trustee.

Appellant also contends that the appellee, trust company, had no power to execute the provisions of the will in regard to a sale of the property except it was authorized by the court appointing it, and that the court did not give it power to make a sale. We agree with appellant that the court had the power to limit the authority of appellee, and could, by an order of court, have prohibited a sale altogether, or placed it upon terms in making a sale; such as advertising and fixing the terms of the sale and requiring it to report the sale to the court for its confirmation, but as we understand the order of court, it did not limit the powers of appellee, but appointed it trustee of Bertie Amis Cox under the will of Fielding Neal to take, hold, manage or sell it, as authorized by the will of Fielding Neal. In such case it was not incumbent upon the trustee to advertise the sale by posting notices, or to obtain the consent of any one before making the sale. The only requirement was that the trustee should sell it when a fair price could be obtained therefor. (13 B. M., 564.)

There was much proof heard on the question as to whether or not the property brought a fair price, the preponderance of which was in favor of appellees on this question.

For these reasons the judgment of the lower court is affirmed.

SCHLITBAUM v. COMMONWEALTH.

(Filed May 10, 1904—Not to be reported.)

Criminal law—Where the bill of exceptions and the bill of evidence have been stricken from the record, leaving the sole question as to the sufficiency of the indictment for the consideration of this court, the specifications in the indictment being substantially made in the language of the statute, a judgment of conviction will not be disturbed.

Glenn & Ringo and Heavrin & Woodward for appellant.

N. B. Hays and Lorraine Mix for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Ohio Circuit Court sentencing the appellant to one year in the State penitentiary.

The bill of exceptions and the bill of evidence have been stricken from the record on motion of appellee, which leaves the sole question of the sufficiency of the indictment for the consideration of this court. The appellant was indicted in the Ohio Circuit Court for embezzlement under section 1202 of the Kentucky Statutes. The indictment is specific and certain and contains the requisites of an indictment as defined by the Criminal Code, sections 122 and 124. It charges that the appellant was the agent of the Illinois Central R. R. Co.; that while in its employment and acting as the agent of this corporation, he unlawfully, willfully and feloniously converted $86 of lawful money of the United States, the kind, character and particular description of which was unknown to the grand jury; that this money was the property of this corporation and was converted to his own or to the use of another, one Boatner; that this money came into appellant's possession by reason of his employment with this corporation and that same was converted to his use for the purpose of depriving this corporation of the money. The specifications in the indictment are substantially made in the language of the statutes, which have been approved in the cases of Clark v. Commonwealth, 97 Ky., 76; Clifford v. Commonwealth, 96 Ky., 4; Jones v. Commonwealth, 13 Bush, 356, and Fisher v. Commonwealth, 24 Ky. Law Rep., 300.

Wherefore, the judgment of the lower court is affirmed.

SOUTHERN RY. IN KENTUCKY v. RAILEY BROS.

(Filed May 10, 1904—Not to be reported.)

1. Railroads—Damages—Shipment of stock—A judgment against appellant for $1,920 damages for delay in the shipment of seventeen head of horses will not be disturbed where the evidence conduces to show that the damages resulted from the negligence and delay of appellant in its transportation of the horses.

2. Same—In an action against a carrier, for damages resulting to stock which it undertakes to transport, the rule is that if from the preponderance or weight of the evidence the jury can find that the cause of the injury is the carrier's negligence instead of the negligence of some one else, or instead of a mere accident, then the plaintiff's case for recovery is made out.

Wallace & Harris for appellant.

D. L. Thornton for appellees.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge O'Rear.

In this action judgment was rendered upon the verdict of a jury awarding appellees $1,920 in damages on account of the alleged negligent delay in the shipment of seventeen head of horses from Railey Station in Woodford

county, Kentucky, to Chicago, Ill., it being alleged that the horses, by reason of the delay and negligent exposure by appellant, contracted colds, and were diminished in value to that extent. The shipment was made in the latter part of April, 1901. The horses had been prepared with much care and pains for sale at Chicago. They had been trained and carefully groomed and put in condition through the winter months. They were saddle or combined horses. The bill of lading or contract of shipment provided for the carrying of the car of stock from Railey Station to Louisville by appellant, there to be delivered to a connecting carrier. On account of the delay which is unexplained, or at least not satisfactorily explained, the car of stock did not reach Louisville in time to make connection with the regular outgoing train which should have taken it out had it arrived at the time scheduled. Owing to a drawhead in the car being out of repair it had to be repaired at Louisville. This further delayed the delivery of the car to the connecting carrier. Although the parties had agreed for a reasonable delay within which this drawhead might be repaired at Louisville, appellee having selected this particular car, an Arms Palace Horse Car, not owned by appellant, yet there was proof to show that the repairing was not done within a reasonable time, and that the car was thereby unnecessarily further delayed. There was also evidence tending to show that in doing the work, appellant's car repairers left the doors open an unnecessary length of time, so that the horses were chilled. It was proven that on that day the weather was freezing at Louisville, being cloudy, windy and snowing. The person in charge of the horses testified that on the following morning they developed symptoms of cold and influenza, refusing to eat or drink, indeed being so swollen about the throat that many of them were not able to. They continued to grow worse until they reached Chicago. Their condition was such that the sale was postponed for quite a while, and some of the horses were so reduced in value as to entail considerable loss upon the owners.

Appellant contends that it was not shown where or how the horses contracted the colds, that they had been blanketed and kept in warm stables all the winter, that they were walked over frozen ground from the stables to the car the day they were shipped, and that they might have caught the cold in that way; or, that they might have contracted cold because of the sudden and radical change in the weather, and especially as they went north after leaving appellant's line of road, and not at all because of any negligence or fault of appellant. These matters, however, were all for the jury to determine. The facts were elaborately testified to by witnesses. Various theories as to the cause of the sickness were submitted to the jury. It was for them to determine under the facts whether it was caused by appellant's neglect in delaying the shipment and leaving the car doors open as stated; that such might have been the cause is not seriously denied. Appellant contents itself with claiming that neither of the other theories suggested might also have been the cause, and that the verdict of the jury must have been speculative. Whether one cause or another, both or all of which have been proven as existing, led to a given result is a question of fact to be determined under all the evidence.

The cases of Hurt v. L. & N. R. R. Co., 25 Ky Law Rep., 755, and Louisville Gas Co. v. Kaufman, Straus & Co., 20 Ky. Law Rep., 1069, 105 Ky.,

131, are relied on with other cases of the same import. In the Hurt case it was said: "It is not enough to show merely that the plaintiff sustained his injury while in the service of the master. Where the circumstances attending the injury show nothing as to the real cause, but leave it to conjecture whether it was the negligence of the master, the fault of the injured servant, or unaccountable accident, there is a failure of proof. The cause of the injury must be proved. Unless it is shown affirmatively there can be no recovery."

And so say we yet. There is a marked distinction between failure of proof and conflict in proof. Here there was a showing as to the cause of the injury. Like every other disputed fact, it must be determined by the jury under all the evidence. This court has never said, nor are we aware that any authority is to be found, that before a carrier can be held liable for injury because of its alleged negligence, that such negligence must be proved to be the cause of the injury to the exclusion of a reasonable doubt. But the rule is that if from the preponderance or weight of the evidence the jury can find that the efficient cause of the injury is the carrier's negligence instead of the negligence of some one else, or instead of a mere accident, then the plaintiff's case for recovery is made out.

Appellant contends that as the written contract, the bill of lading, did not provide within what time the stock was to be carried, it was improper to admit evidence to the jury proving statements by appellant's depot agent at Railey Station asssuring appellees that the car would be delivered at Chicago, or could be delivered there within so many hours. It is argued that this evidence was in effect the enlarging of a written contract by parol testimony. It is not claimed that the writing contained anything on this point. It was, therefore, implied that appellant would at least use ordinary diligence in transporting the stock. The statement of the depot agent was at least competent to show what was the ordinary and reasonable time within which the shipment could be made. It was a statement made by appellant's agent having the transaction in charge, and in the course of the transaction, and operates as appellant's admission of such fact. Where an extraordinary and unusual delay occurs in the shipment under such contract the implied undertaking in the writing is broken, unless the carrier shows that the delay was caused by something beyond its control, that it was unavoidable, or, that it was a necessary incident to the prudent and proper management of its business as carrier of passengers and live stock. We are of opinion that the evidence was relevant. The instructions fairly present the matters at issue to the jury. There was evidence to support the verdict upon all points.

Perceiving no prejudicial error the judgment is affirmed, with damages.

DONELAN, CH'N, &c. v. BIRD, &c.

(Filed May 10, 1904.)

Office and officers—Circuit judge—Vacancy in office—When filled—Under Constitution, section 152, providing "that if the unexpired term will not end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected and if three months inter-

vene before said succeeding annual election, the office shall be filed by appointment until the said election, and then said vacancy shall be filled by election for the remainder of the term." A vacancy in the office of circuit judge occurring by the death of the incumbent on January 1, 1904, his successor should be elected at the regular November election, 1904, the court judicially knowing that at said election presidential electors will be voted for in every county throughout the State, said electors being State officers.

A. T. Root for appellant.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Settle.

The record herein presents an agreed case in which the parties sought in the court below, and are now seeking in this court, a decision of the question as to when an election in Campbell county for filling the vacancy in the office of circuit judge for the seventeenth judicial district, caused by the death of the Hon. John P. Newman, should take place, whether in November, 1904, or November, 1905.

The decision of the question submitted must turn upon the construction to be given section 152 of the Constitution, for section 1522, Kentucky Statutes, bearing on the subject is but a repetition of what we find in the Constitution. The section of the Constitution, supra, reads as follows: "Except as otherwise provided in this Constitution, vacancies in all elective offices shall be filled by election or appointment, as follows: If the unexpired term will end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment for the remaindegr of the term. If the unexpired term will not end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, and if three months intervene before said succeeding annual election at which either city, town, county, district, or State officers are to be elected, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election for the remainder of the term. If three months do not intervene before the happening of said vacancy and the next succeeding annual election at which city, town, county, district or State officers are to be elected, the office shall be filled by appointment until the second succeeding annual election at which city, town, county, district or State officers are to be elected; and then, if any part of the term remains unexpired, the office shall be filed by election until the regular time for the election of officers to fill said offices. Vacancies in all offices for the State at large, or for districts larger than a county, shall be filled by appointment of the governor. All other appointments shall be made as may be provided by law. No person shall ever be appointed a member of the general assembly, but vacancies therein may be filled at a special election, in such manner as may be provided by law."

It appears that John P. Newman was duly elected judge of the seventeenth judicial district at the regular election held therein on the 3d day of November, 1903, for the full term of six years, beginning the first Monday in January, 1904; that he received his certificate of election from the State Board of Election Commissioners, and his commission from the governor, after which he took the required constitutional and statutory oaths. But before the

arrival of the time for undertaking the performance of the duties of his office, Newman died, his death having occurred January 1, 1904, thereby causing a vacancy in the office to which he had been elected. On January 27, 1904, the governor duly appointed and commissioned the present incumbent, Albert S. Berry, to fill the vacancy, and he has, ever since his appointment, performed the duties of the office.

Obviously, the section of the Constitution, supra, will not permit the appointee of the governor to continue in the office in question, until the expiration of the term for which his predecessor was elected, as the term will not end at the next annual election at which city, town, county, district or State officers will be elected. It is equally manifest that the contingency can not arise that would entitle him to conitnue in office until the second annual election after the happening of the vacancy at which officers of the classes named are to be elected, because more than three months wil intervene between the happenin g of the vacancy, and the time for the holding of the first election thereafter of the character indicated, and it is only where three months do not intervene between the beginning of such vacancy and the next succeeding election at which city, town, county, district or State officers are to be elected, that the Constitution will permit the appointee to hold over until the second annual election occurring after the happening of the vacancy.

As in this case not only three, but more than ten, months will intervene between the happening of the vacancy and the next succeeding annual election, if at such election there are to be elected officers of the character specified in the section, supra, we think this case must be controlled by that part of the section which declares that, "If the unexpired term will not end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, and if three months intervene before said succeeding annual election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment until the said election, and then said vacancy shall be filled by election for the remainder of the term."

The only question that remains to be determined is as to whether at the November election, 1904, there will be elected either city, town, county, district or State officers.

This court judicially knows that on Tuesday after the first Monday in November, 1904, members of congress and persidential electors will be voted for in every county, and elected throughout the State. In Eversole v. Brown, 21 Ky. Law Rep., 925, and Neeley v. McCollum, 21 Ky. Law Rep., 823, it was held by this court that members of congress are not district or State officers within the meaning of section 152 of the Constitution. But in Todd, Mayor v. Johnson, County Clerk, &c., 99 Ky., 550, it was held by this court that presidential electors are State officers within the meaning of the section supra. We adhere to the conclusion expressed in that case, and find that it is sustained by the Supreme Court of the United States in cases of McPherson v. Blacker, 146 U. S., 135; In re Green, 134 U. S., 389.

We are of the opinion, therefore, that an election should be held in Campbell county on Tuesday after the first Monday in November, 1904, for the purpose of electing a circuit judge for the seventeenth judicial district, to fill the vacancy in that office caused by the death of John P. Newman, and to serve during the remainder of the term for which he was elected.

Wherefore, the judgment is affirmed.

COMMONWEALTH v. PARLIN & ORENDORFF CO.

(Filed May 10, 1904.)

1. Corporations—Unlawfully conducting business — Penal action —In a penal action, under section 11, Criminal Code, against a corporation for an alleged violation of section 571, Kentucky Statutes, for carrying on business in this State, in Todd county without first filing in the office of the secretary of State the statement required by said section, giving the name of an agent and location of his place of business where process could be had on him for the corporation, evidence showing that the defendant had, within a year before the filing of the suit, deposited a lot of buggies, wagons and farm implements, with the firm of Glenn & Gates in Todd county for sale, and that said firm had an established place of business and were selling or offering to sell defendants goods as agents and not as drummers, the goods being stored and kept at the agent's place of business, was enough to sustain the prosecution. It was not necessary in such case to prove the contract between the defendant and its agent in Todd county, whether verbal or written.

2. Foreign corporations—Interstate commerce—Federal Constitution—The defendant can not claim exemption on the ground that it was a foreign corporation and that the requirements of the Kentucky Statutes was an interference in the nature of regulating interstate commerce and, therefore, repugnant to the Federal Constituiton, as the statute makes the same requirement of all corporations whether foreign or domestic.

N. B. Hays and J. B. Mallory for appellant.

S. Walton Forgy for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Judge O'Rear.

This is a penal action under section 11 of the Criminal Code of Practice against appellee company, a corporation, for the alleged violation of section 571, Kentucky Statutes. It is charged that appellee carried on business in this State in Todd county, without first having filed in the office of the secretary of State the statement required by section 571, giving the name of an agent, and location of his place of business where process could be had upon him for the corporation.

At the close of the evidence for the Commonwealth, the court peremptorily instructed the jury to find the defendant not guilty. This appeal involves the determination of whether there was any evidence tending to establish appellee's guilt. Appellee is an Illinois corporation engaged in the manufacture and sale of farm implements and vehicles. One Leander Gates, of the firm of Glenn & Gates, dealers in such implements at Kirkmansville, in Todd county, was introduced as a witness for the State. He testified that his firm within a year before the beginning of this proceeding had in their custody a lot of buggies, wagons and farm implements, the property of appellee, which they, as agents for appellee, were offering to sell, and that they had sold some of them, although the witness could not recollect and would not undertake to detail any transaction where an actual sale had occurred within the year. The witness was asked whether his contract with appellee was in writing. He answered that it was Upon being requested he produced what he said was understood to be a copy of it. He would not say, however, that it was a copy, or whether he had ever compared it with the

original. The original contract was not produced, nor was its absence accounted for, nor was a notice served upon appellee to produce it. The objection of appellee to the introduction of the alleged copy was, therefore, properly sustained.

It is argued that as the contract between appellee and its agents, Glenn & Gates, was not proven, that the Commonwealth failed to establish its case. We think not. The terms of the contract do not appear to us to be at all material to this prosecution. The fact that Glenn & Gates conducted appellee's business in Todd county in this State within a year before the beginning of the prosecution, by selling or offering to sell their wares at an established place of business and not as drummers, the wares being stored and kept at the agents' place of business, was enough to sustain the prosecution. What appellee was to pay its agents for their services, or how, or when, or at what prices the goods were to be sold, do not appear to us to be material in this case. The copy of the contract above alluded to, if it is a copy, would be relevant only as indicating whether Glenn & Gates were agents of appellee in the sale of the goods, or whether they were themselves purchasers of the goods; the contract alluded to being the evidence of the terms of the sale, securing to appellee payment of the selling price of the goods. The latter seems to be appellee's version of what the contract is. The contract, at least the purported copy, is as follows:

"AGENCY CONTRACT.

"This agreement, made and entered into this 2d day of October, 1901, by and between Parlin & Orendorff Co., of St. Louis, Mo., first party, and Glenn & Gates, of Kirkmansville, Ky., second party; Witnesseth: Said first party does hereby appoint said party its agent for the receiving, keeping and selling in its behalf, of such goods as are designated, in the price list hereto attached, such agency to continue until the 1st day of January, 1903, unless sooner terminated by the said first party.

"Said first party agrees to furnish to the said second party any such goods mentioned in the price list hereto attached, as may be ordered by said second party during the continuance of this agency, upon the following terms and conditions, viz.:

"Said second party shall, at his own expense, keep all goods shipped by first party under this contract, insured against loss by fire, to the benefit of said party, to an amount not less than two-thirds of the invoice price of the goods so shipped, while in his custody, and shall safely house or store, and keep free from taxes or other charges to said first party, all such goods, and shall be responsible for said goods, and for all damages to said goods while in his possession. First party is to have insurance issued, send invoice for cost of same to second party, who agrees to remit for the expenses of same, immediately upon the receipt of such invoice.

"Said second party is to have the exclusive sale in Kirksmansville, Ky., of all implements manufactured by the first party, as shown by the list hereto attached, during the continuance of this contract, and is not to handle any other goods of such classes manufactured by any party other than the first party.

"All goods shipped to said agent under this contract will be invoiced to him at a certain price to be agreed upon at the time of such order, and such

agent to sell said goods as far as possible for cash, and when sale can not be made for cash, in no case shall the time of payment of any note extent beyond January 1, 1903. He shall take the notes only of parties of well-known responsibility and good reputation, for the payment of their debts in the locality where they reside; and the said first party reserves the right at any time to reject any note taken by agent, in case it shall not be deemed good by the first party, in which event said second party agrees to take up said note in cash or in commercial paper satisfactory to said party.

"Said second party is to see that all the implements are properly set up, and is to deliver no goods until settled for by cash or notes taken on blanks furnished by first party, duly filled out, without alteration or erasures.

"Said second party agrees to keep all moneys and notes received on said sales, separate and apart from other transactions, and to remit the full invoice price of all goods sold in cash or note to said first party, first endorsing each note in the following form, viz.: For value received, I hereby promise to pay the within note at maturity or any time thereafter, or any renewals of the same, and hereby waive protest, demand and any notice of nonpayment thereof.

"Any notes turned over to first party by second party that shall remain unpaid sixty days after maturity, are to be taken up by said second party. This contract is to be a full guarantee for the payment of all notes turned over to first party by second party and a failure of said agent to endorse said note shall not affect this guarantee. Said second party agree to defend and collect said notes without expense to said first party.

"The ownership of all goods under this contract shall remain in said first party until sold in the usual course of trade by said agent, and the proceeds of all sales of goods to the amount of the invoice price thereof, whether in cash, notes or accounts, shall at all times be the property of the said first party. Settlement between parties to be made on the first of each month for all goods sold during the previous month, and remit proceeds of all sales for goods furnished under this contract, as soon as sold in the same proportion as the sales are made; either cash, part cash and part in notes or all notes, at the invoice price thereof, to said party of the first part. Final settlement to be made July 1, 1902, for the spring trade and November 1, 1902, for the fall trade, and at such time said party of second part shall turn over to said first party cash or notes as hereinbefore provided, for the full invoice price of goods shipped under this contract, which have been sold by said second party. The difference between the invoice price and expenses (including freight, taxes and insurance) and the price at which said goods are sold by said second party is to be in full for all compensation and expenses under this contract.

"Conditions named under head of notice and warranty, form part of this contract.

"First party is not to be liable for damages on account of its inability to fill any order sent in by the said second party.

"Five per cent. commission will be allowed the said agent on all cash paid said first party on the first of the month following any sale or sales, or within fifteen days from the date of any invoice. No commission is to be allowed on payments made at regular time for settlement.

"This contract may be revoked by said first party at any time without notice of said second party, and in case of revocation, settlement shall at once take place between said parties for all goods sold unto date, and all goods remaining unsold shall be delivered to said first party, at some point in Hopkinsville, Ky., as may be designated by first party, free of freight and charges both ways, or to some point nearer Kirkmansville as first party may direct.

"By agreement between the parties hereto, this contract is to cover and embrace any and all goods now in the hands of said second party held under any previous contract or agreement between the parties hereto and such goods are to be sold and settled for as herein provided, irrespective of the terms of any previous contract. Also all goods received from G. D. Rose stock, except wagons, as per list of same with prices and terms attached, dated November 1, 1901.

"This contract shall not be binding until acceptance is endorsed thereon at St. Louis, Mo., by Parlin & Orendorff Co.

"PARLIN & ORENDORFF CO.,
"By J. G. HARDY, Traveling Agent.

"Signed GLENN & GATES.

"Accepted by Parlin & Orendorff Co, St. Louis, Mo., ————————, 190————, "Manager."

We are of opinion that such contract, as the copy above indicates, constitutes only an agency, and is not a selling by the owners as wholesalers to the alleged agents as retailers, retaining merely a lien upon the property to secure the payment for goods delivered under it.

It is next insisted by appellee that it was engaged in interstate commerce, and that the requirement by the Commonwealth of Kentucky that it should comply with the conditions imposed by section 571, Kentucky Statutes, was an interference in the nature of a regulation of interstate commerce, and is, therefore, repugnant to the Constitution of the United States. Section 571 makes the same requirements of all corporations, whether domestic or foreign. It applies only to those corporations doing business in Kentucky, and having an established place of business therein. To sales by nonresidents, or foreign corporations, effected by drummers or correspondence or otherwise than through agents at an established place for conducting such business in this State, the section does not apply. (Commonwealth v. Hogan, &c., 25 Ky. Law Rep. 41.) That the State may, in the fair exercise of its police power, compel all corporations establishing a place of business within the State and carrying on business thereat, to comply with the conditions of section 571, is not violative of the provisions of the Constitution of the United States reserving to congress the exclusive control of the regulating of commerce between the States, is settled in this State by the cases of Commonwealth v. Read Phosphate Co., 23 Ky. Law Rep., 2284; Knoxville Nursery Co. v. Commonwealth, 21 Ky. Law Rep., 1483; Commonwealth v. Hogan, &c., Co., supra.

One G. D. Rose had, prior to October, 1902, handled appellee's goods in Kirkmansville as its sole representative. Rose died about October, 1902, and appellee subsequently brought a suit against his administrator to recover certain wagons and other vehicles and implements, claiming in the suit that

it was the owner of the goods, and that Rose was merely their selling agent.

Appellee filed with its petition against Rose's administrator copies of what purported to be contracts between them, showing such agency. In this prosecution the Commonwealth was permitted to prove the contents of the suit against Rose. For what purpose we can not understand, unless it was to show that appellee had an established agency at this point. This, however, might have been done, as it was, by other evidence. The Rose suit was more apt to be misleading than helpful to the jury. The danger is that the jury might infer that because appellee had had a contract with Rose, constituting him an agent to do business for it in Todd county at a time, that is now barred from prosecution by the statute of limitation, that probably appellee had the same arrangement or a similar one with Glenn & Gates. We are of opinion that the Rose record was irrelevant.

But for the reasons indicated the judgment is reversed and cause remanded for a new trial under proceedings consistent herewith.

CITIZENS NATIONAL BANK v. COMMONWEALTH.

MARION NATIONAL BANK v. SAME.

FARMERS NATIONAL BANK v. SAME.

(Filed June 18, 1904—Not to be reported.)

T. L. Edelen, W. J. Lisle, John McChord and Thompson & Spalding for appellants.

Wm. W. Spalding & Henry L. Stone for appellees.

Appeal from Marion Circuit Court.

Judge Barker delivered the following response to petition for rehearing:

These cases were considered together, as they (with slight differences) involved the same questions. The court erred in attributing to the Citizens National Bank the payment of a franchise tax, when it was the Marion National Bank which made the payment. We now make the correction by withdrawing all that was said in this matter, so far as the Citizens National Bank is concerned, and extending it to the Marion National Bank.

The act of 1900 did not give the Commonwealth a new cause of action, but a new remedy for the collection of taxes on national bank stock. The stock was always assessible in the hands of its owner. The new law merely made the bank the agent for the stockholders to pay the tax on stock, which payment it recoups from the stockholders out of the dividends due them. This being true, the statute of limitation is a bar to all recovery beyond five years next before the institution of these proceedings. The remuneration of the auditor's agent is to be based on the amount actually covered into the treasury by his efforts, which, of course, means the net result of this proceeding. We do not think the county levies for the years involved were void.

Petition for rehearing and other modification, except as herein indicated, overruled.

DOTY'S ADM'R v. DOTY'S GUARDIAN.

(Filed May 11, 1904.)

1. Contract by mother with father of her illegitimate child—In 1882 Boyle Doty, a well-to do bachelor, 35 years of age, induced Annie James, an orphan girl, to go to his home and live with him as his mistress and housekeeper. In 1889 a child was born to them, who was given the name of David Irvine Doty, whom he recognized as his child. In 1889 there being some talk of an indictment against them for living together, she took the child to Missouri, but returned in a few weeks and took the boy back to Doty's house, where they lived until he died, in September, 1901. After his death, the mother of the boy qualified as his guardian and brought this suit against Doty's administrator, alleging that when his mother returned from Missouri with him, Boyle Doty agreed with her that if she would not take the boy back to Missouri, but would bring him to his house to live, and never take him away, so that he could keep him continually with him, and raise and educate him, he would give him 250 acres of land within a certain boundary, worth $15,000, and $2,500 to educate him and build a dwelling on the land for the boy. She accepted this proposition and carried it out, and Doty laid off the land and built a house on it and put him in possession of the house and land, which was still held by him. Held—That the contract being based on the evident desire of the father of the boy to raise and educate him, and make some provision for him in the future, was a good and enforcible contract, and while it can not be specifically enforced by reason of being in parol so as to compel the conveyance of the land, the chancellor was authorized to adjudge the plaintiff the sum of $2,500 for his education and $6,720 for the value of the land.

2. Competency of the guardian as a witness—The mother of the child, although its legal guardian, not being presumably liable for the costs of the suit, did not have such an interest therein as to disqualify her as a witness to the contract with the decedent for the boy.

3. Immorality of the contract—The contract not being based upon any agreement for her to continue illicit relation with decedent; but being solely to enable him to keep the boy at his home and rear and educate him, was not an immoral one, although the mother continued to live at the home of decedent with the boy.

J. A. Sullivan, C. F. Burnam and W. S. Moberly for appellants.

J. Tevis Cobb, Smith & Bush, C. H. Breck, R. L. Greene and W. B. Smith for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hobson.

About the year 1878, Boyle Doty, a well to do bachelor, something like thirty five years of age, living on his farm in Madison county, became intimate with Annie James, a girl about sixteen years of age, living with her grandmother in the slashes two or three miles from Doty's residence, her father and mother being dead. In the year 1882 her grandmother having died, she went to his house and lived with him as his mistress. In 1889 1889 a son was born to them, the appellee, David Irvine Doty. They continued, after the birth of the child, living together as before, until the year 1898, when there was some talk about the grand jury indicting them, and she took the boy and went to Missouri, staying there for some weeks. On

her return from Missouri she took the boy with her to Doty's house, and she there lived with him as before, until his death on September 6, 1901. He left a considerable estate, a large part of which he had accumulated while Annie James lived with him and managed and controlled his household, doing all those things that a farmer's wife would usually do under similar circumstances. After his death, the child, David Irvine Doty, by his mother as guardian, brought this suit against the administrators and heirs at law of Boyle Doty, charging the facts stated, and alleging that when his mother returned from Missouri with him, Boyle Doty agreed with her that if she would not take the child back to Missouri, and would bring him to his house to live and never take him away from him so that he could have him constantly with him and raise and educate him, he would give the child 250 acres of land within a certain boundary, worth $15,000, and would also give him $2,500 in money to educate him and build a dwelling house upon the land for the child; that she accepted the proposition and carried it out; that Boyle Doty laid off the land to the child and set it apart as the tract of land which he had given to the infant, and in accordance with the contract, built a dwelling house upon it and put the child in possession of the house and land which was still held by him. He prayed that the title to the land he conveyed to him, or if this could not be done, for judgment for the value of the land and the $2,500, the amount agreed to be given for his education. The allegations of the petition were denied by the defendants, and on final hearing the court entered a judgment in favor of the child for $2,500, with interest from May 2, 1902, also for $6,720 for the value of the land, with interest from December 1, 1903. From this judgment the defendants have appealed, and the plaintiff has taken a cross appeal.

The first question to be determined relates to the competency of Annie James, the mother and guardian of the child, to testify to the contract between her and the deceased on which the action is based. It is insisted for appellants that she is testifying for herself as to a transaction with one who is dead, and is, therefore, incompetent under section 606 of the Civil Code, for the reason that she is liable for the costs of the action and is entitled to compensation for her services as guardian. It is also insisted that she is the real actor in the suit and is, therefore, testifying for herself. In support of this view we are referred to Smith v. Beswick, 24 Ky. Law Rep., 276; Miller v. Cabell, 81 Ky., 178, and Hobbs v. Russell, 79 Ky., 61.

It was held in Stowers v. Hollis, 83 Ky., 544, that the mother of a bastard is a competent witness for the child to prove a contract by the father with her for the support of the child, although he is dead when she testifies. But in that case the mother was not the guardian of the child or party to the action. The exact question presented here was, therefore, not raised in that case. Subsection 2, section 37, of the Civil Code, reads as follows: "A guardian, curator, committee, or next friend who brings or prosecutes an action for a person who is under disability, is liable for the costs which accrue during his conduct of the action, unless he be allowed to sue in forma pauperis, by an order of the court, or by an order of the judge thereof during vacation."

Under this provision it was held that a guardian was personally liable for costs accruing during the prosecution of an action conducted by him. (Sny-

der v. Fidelity Trust and Safety Vault Co., 14 Ky. Law Rep., 615.) But by the 9th section of the act regulating costs, approved May 27, 1892, which is now section 892, Kentucky Statutes, it is provided as follows: "A personal representative, guardian, assignee, curator, committee, or trustee in an action shall, if unsuccessful, be adjudged to pay costs as other litigants. The judgment for costs in such case shall only be against the assets which have, or may, come to his hands."

This act being subsequent to the Code, repeals its provisions in so far as they are in conflict therewith, and under it any judgment rendered herein against the guardian for costs, must be only against the assets which have, or may, come to her hands. She is not, therefore, personally liable for costs.

In Smith v. Beswick's Adm'r, 24 Ky. Law Rep., 276, it was held that an attorney who was to receive a sum equal to one-half the recovery, and was to get nothing if he failed to recover, could not testify for the plaintiff as to a transaction between him and the decedent The attorney was equally interested with his client in the result of the case, and every rule of law which closed the mouth of the client would apply equally to the attorney. By section 2036, Kentucky Statutes, it is provided: "The guardian, besides all necessary disbursements and repairs, shall be allowed by the court a reasonable compensation for his services."

Every witness summoned by the plaintiff would, to the extent of his witness claim, be interested in the result if the guardian would be interested because of her right to compensation for her services. She is entitled by law to a reasonable compensation for her services, but is given no right to any part of the fund recovered. Her trust may be terminated before any part of it comes to her hands.

In New York Life Insurance Co. v. Johnson's Adm'r, 24 Ky. Law Rep., 1867, it was held that a policy holder in a mutual company, who thus participates in the profits of the company, may testify for the company as to a transaction with a decedent on the ground that the disqualifying interest to exclude the witness must be direct and certain, and that an uncertain or remote interest will not disqualify. In Elsenlord v. Clum, 12 L. R. A., 336, the New York Court of Appeals held the mother competent in an action by the son to establish her marriage with his father, although if this fact was established, she would be entitled to dower in the land sued for, the court ruling that the judgment in favor of the son would not be evidence in her favor in an action for dower. In 1 Greenleaf on Evidence, section 389, in summing up those who are competent, though remotely interested, this is given, "A creditor for his debtor," and in section 390 the rule is stated as follows: "The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote or contingent."

We, therefore, conclude that her right to a reasonable compensation for her services was insufficient to disqualify the witness, for she was entitled to the allowance for her services whether the case was won or lost; her interest was not directly in the result of the action, although the ward's estate

might be able to pay her if the suit was won, and unable to pay if it was lost. This indirect interest in the recovery went to her credibility and not to her competency. Were the rule otherwise, no person holding a claim could testify for the debtor as to the acts of one who, was dead when the testimony was given. It remains to determine whether the witness was incompetent to testify because she was, as guardian, a party to the action as relator. In Miller v. Cabell, 81 Ky., 178, it was held that the guardian of an infant is an indispensable party to an appeal from a judgment obtained in a proceeding instituted in the name of the infant by him as guardian, and in that case the court said that "where the guardian of an infant sues for him, he is the real actor, and the court has no power to displace him, unless his interest is in some manner hostile to the infant, or he is prosecuting the action in bad faith, and without regard to the interest of the infant."

In Hobbs v. Russell, 79 Ky., 61, it was held that an executor, who was also one of the devisees, when sued as executor, could not testify for himself as to a transaction between him and a decedent. This case was followed in Witt v. Thomas, 19 Ky. Law Rep., 847, where the administrator was also the sole heir at law. But in Swinebroad v. Bright, 25 Ky. Law Rep., 742, where the executor was sued by one of the devisees, and it was simply a question as to which of the devisees was entitled to the fund, it was held that the executor and his surety could testify as to a declaration of the decedent, on the ground that he had no interest in the fund, as he had to pay over the fund in any event to one devisee or the other, and that the statute was aimed to widen not to narrow the competency of witnesses. So in Michigan it is held that an executor who has no personal interest in the controversy which is simply between the estates of two deceased persons may testify for his estate, although a party to the action. (Penny v. Croul, 13 L. R. A., 83; Devol v. Dye, 123 Ind., 321.)

On the other hand, it is well settled that a person, though not a party to the action, can not testify as to transactions with a decedent if he is interested in the result; thus the distributees of an estate are not competent witnesses for the administrator. (Manion v. Lambert, 73 Ky., 295.) Nor are the beneficiaries of a fund competent for the trustee (Hopkins v. Faber, 86 Ky., 223), nor persons otherwise interested in fact. (Hinkson v. Wigglesworth, 20 Ky. Law Rep., 1161; Whitlow v. Whitlow, 22 Ky. Law Rep., 1179.) It will thus be seen that it is interest in fact in the controversy that disqualifies a witness, and not the mere fact that he is or is not a party to the action. (Swinebroad v. Bright, 25 Ky. Law Rep., 743.)

The plaintiff in the case before us is David Irvine Doty. The recovery is his. The guardian may be removed by the county court at any time. Her only power is to protect the rights of the infant while she is guardian. If she were to resign as guardian, on learning that her testimony was necessary to protect his interests, and another were appointed in her stead, she could, after she was removed and when another had been substituted in her place as guardian, testify for the infant in the action. (Stowers v. Hollis, 83 Ky., 544.) The infant is under fourteen years old. He has no voice in the selection of his guardian and no control over the appointment. The action of the county court in appointing a guardian for him or the failure of the guardian to preserve his interests by resigning, should not be allowed to destroy

the infant's rights. Infants are the wards of the chancellor and no construction of the statute should be adopted which would be prejudicial to their rights, unless required by its language. If the mouth of the infant's most, important witness can be closed by that person's being appointed his guardian, then the rights of infants may be often sacrificed by the statute that was designed for their protection. The language of the statute is, "No person shall testify for himself," etc. The witness here is testifying for the infant and not for herself in the ordinary sense in which these words are commonly used. The meritorious cause of action is in the infant, and in him alone. He can not testify for himself as to the transaction with the decedent, and, as his mouth is closed by the law when the decedent's mouth is closed by death, he and the decedent are placed upon equal footing. The administrator or executor holds the legal title to the personal estate of the decedent. The devisees or distributees take the title from him and where he, in his fiducial capacity, has a transaction with another who afterwards dies, the principal of mutuality which underlies the statute, forbids that he should testify as to what occurred between him and the person who is dead. (Alexander v. Alford, 89 Ky., 105.) But the title to the ward's estate is in the ward; a guardian can not sue in his own name except on a contract made with him as guardian. He has no legal interest in his ward's estate. When he sues in his own name as guardian, on a contract made with him in that capacity, he can not testify for himself as to a transaction with one who is dead; for there he is personally liable for the negligent loss of the ward's estate and for the costs, or for any misconduct as guardian; and in such case he can not, by resigning and having another substituted in his stead as guardian, make himself competent; for by subsection 9 of section 606 of the Code, the assignment of a claim by one who is incompetent to testify, shall not make him competent to testify for the assignee. The transaction here sued on was not had by Annie James as guardian. The cause of action is in the child. She is in no event liable for anything. The court might for cause displace her in the action as guardian and appoint a next friend to conduct it for the infant. If she had resigned as guardian and another had been appointed, or if, to protect the rights of the infant, the court had substituted a competent next friend to conduct the action for the infant in her stead, the cause of action being in the infant, her successor would not have derived his powers from her, and she would not have been incompetent to testify under the provision of the statute referred to relating to assignments of claims. In view of the palpable policy of the statute to open the doors and let witnesses testify, leaving their credibility for the tribunals before whom the evidence is given, and in view of the helpless condition of infants and the policy of the law to protect their interests and throw around them safeguards to prevent their suffering from cunning or ignorance, we conclude that the construction of the statute contended for, would be contrary to its spirit and purpose; unduly imperiling the rights of infants, and that the court properly overruled the exceptions to the testimony of Annie James, leaving the matters relied on to go to the credibility of the witness.

The case of Mason v. McCormick, 75 N. C., 263, relied on for appellants, was decided under a statute materially different from ours. There the statute provided that no party should testify, and in addition, that was the case

of a next friend suing for an infant, and as such personally liable for the costs of the action. The only possible interest the witness here has, is in her commissions as guardian, and objection on a similar ground could be made to every witness who has a debt or claim of any sort against the ward's estate. This is too uncertain an interest to disqualify a witness.

It is insisted also for appellant that the evidence, as a whole, fails to sustain the claim of appellee; but we must give some weight to the finding of the chancellor. The evidence is conflicting. If we look at the evidence produced by the appellants alone the case seems entirely without merit; and if we take alone that for the appellee, it seems to be clearly made out. The testimony of Annie James establishes the contract as set out in the petition. Her deposition shows her to be a woman of good common sense, and there is a sincerity about her testimony that is impressive, especially in her explanation of things relied on to contradict her. She is sustained by a large number of witnesses who show, beyond question, that the intestate recognized and treated the appellee as his son, declaring his purpose to give him the property, and a number of the witnesses repeat declarations of the intestate that bear on their face inherent evidence of their truth; that he laid off the piece of land for the boy seems pretty clear, and that he built the house for him and not for himself we think is evident from the proof; for he did not entertain the intention of moving to the house or living in it himself, and was fretted, when on his return home, he found his things had been moved up to the new house. Besides all this, his brothers who lived near him, had little to do with him on account of the life he led, and he seems not to have been on intimate terms with any of his relatives, or to have entertained a warm affection for any of them. On the contrary, there was more or less estrangement. He would naturally feel an interest in his only son, and would feel more obligation to provide for him because of his unfortunate position, as well as his helpless infancy. To believe that he did not entertain this purpose would be to reject the testimony of a large number of witnesses and deny to the intestate that goodness of heart and innate sense of justice which the proof in the record shows he possessed. He was evidently attached to the child, and the proof by a number of witnesses shows that he contemplated educating him and giving him a position in the world. In his last sickness he sent for his friend, Stone Walker, to write his will, and when he found that Mr. Walker was away, he asked his friend, Dr. Harris, to write his will; but the doctor declined, saying he should get a lawyer, and when Mr. Walker returned he was too sick to make a will. While it does not appear what he wished to put in the will, the fact that he desired to make a will is at least some evidence confirmatory of the testimony of the number of witnesses testifying to the provision he intended to make for the boy. The child was the natural object of his bounty, for he recognized him and treated him as fully as his son as if he had been born in wedlock. He had been born and reared in his house, and naturally the instinctive yearnings of a father's heart must have gone out for his helpless child, who at the time of the contract was only about nine years old. In view of all the facts, we think the chancellor properly held that the contract, as alleged, was made.

It is further insisted, however, for appellants that the contract, if made,

contemplated the continuance of the illicit relation which theretofore existed between the intestate and Annie James, the mother of the child. The rule is, that a contract made in consideration of future illicit intercourse is void, and that it is also void if made in contemplation of a state of concubinage, or if the illicit relationship was understood by the parties to form a part of the contract. (Lytle v. Newell, 24 Ky. Law Rep., 188; McDonald v. Fleming. 51 Ky., 205.)

There are facts in the record tending to sustain this view of the contract, but it is also capable of other construction. If this were a suit by the mother for her services we have no question the principle should be applied, but it is not a suit for her services. It is a suit by the child. The evidence leaves no doubt that when the mother left Missouri she left with the purpose of returning to Doty's house and resuming her old place there. He met her at Richmond and took her and the child home in his buggy. She needed no inducement to return home. She had come from Missouri for that purpose. Her letters, introduced by appellant, show this beyond question. The object of the contract was not to get her to return or to resume her old place at his house. This was all settled. The purpose which the intestate had in view was keeping the boy. The law gave the mother the right to control the child. He wanted this right, and to induce her to agree that the child should not be taken from him any more, and should remain at his house and under his control, he agreed to make a certain provision for the child. Future illicit relations between him and the mother formed no part of the consideration of the contract. The consideration was that the mother should not put the child elsewhere, as she had a right to do, so that he might be brought up without the constant sense of his unfortunate origin. To compensate for this, Doty agreed to make a provision for the boy sufficient to educate him and make him independent. If we credit the testimony of the mother such was the contract. It was natural that the father would want the child, and that he did want him is certainly shown by his subsequent conduct no less than by his declarations. It was also natural that he would feel himself that if he kept and raised that boy there in that house where, as he got older he would be made every day to feel the shame of his birth, the father should in some way adequately provide for him. The law does not presume illegality and in behalf of the infant under all the facts that construction of the contract must be adopted which will make it stand rather than that which will destroy it.

On the cross appeal it is insisted for the infant that the chancellor should have adjudged him the land, and that the recovery is too small. Title to land can not be acquired by a parol contract and part performance will not take the case out of the statute under the rule in force in this State. (Grant v. Craigmiles, 4 Bibb., 205; Hadyen v. McIlvain, 4 Bibb., 58; Holzclaw v. Blackerby, 9 Bush, 40.) The contract is not otherwise within the statute of frauds and while appellee can not be adjudged the land, the value of the thing promised may be estimated and compensation for the breach of the contract may be adjudged, the intestate having received the consideration upon which his promise rested. (Benge v. Hiatt's Adm'r, 82 Ky., 666; Stowers v. Hollis, 83 Ky., 544; Mercer v. Mercer, 87 Ky., 80, and cases cited.) It is said there is a mistake in copying the record and that this is shown by

the transcript. The depositions were taken in shorthand and it is said the stenographer made a mistake in copying from his notes, and that this mistake is shown by other parts of the record. We do not see that there is enough in the record to warrant us in concluding that a larger judgment should have been entered in favor of appellee, and on the whole case the judgment appealed from is affirmed on the original and on the cross appeal.

Whole court sitting.

GRAHAM v. MAGANN, FAWKE LUMBER CO.

(Filed May 11, 1904.)

Manufacturing establishments—Lien of employes for wages—A sawmill engaged in manufacturing lumber is a manufacturing establishment in the meaning of sections 2487 and 2488, Kentucky Statutes, which provide that the employes of such companies shall have a prior lien on all the property owned by said company for six months' wages due such employe. The appellant being an employe of the appellee company has a prior lien on all its property for his wages, superior to any mortgage or other lien created thereon subsequent to the enactment of the aforesaid statutes such wages having been earned within six months before suit.

L. A. West for appellant.

Riddell & Riddell for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Chief Justice Burnam.

The Magann, Fawke Lumber Co., owned a sawmill plant near Irvine, Ky., and were engaged in the business of manufacturing lumber. On the 20th of April, 1900, they mortgaged their entire plant to George P. Magann to secure the payment to him of a note for $40,000 for borrowed money. George P. Magann transferred this debt to the Bank of Montreal, Canada. The bank, on the 14th of March, 1902, filed its petition in the Estill Circuit Court for an enforcement of their lien and a sale of the property. A judgment was rendered decreeing a foreclosure in accordance with the prayer of the petition. At the sale made thereunder by the master commissioner of the Estill Circuit Court, the bank became the purchaser of all the mortgaged property at the price of $37,800. The bank subsequently transferred the benefit of their bid to Angus Kirkland, the president of the bank, and the sale was confirmed. In the meantime appellant, David Graham, who had been in the employ of the sawmill company at a salary of $75 per month up to the 23d of April, 1902, filed a lien in the county clerk's office of Estill county for $225, as required by section 2494 of the Kentucky Statutes, and, on the 10th day of June, 1902, instituted this suit against the lumber company, the bank, and other creditors, asking that his lien be adjudged superior to that of the bank; and that it should be paid out of the proceeds arising from the sale of the company's property. The defendants answered, denying the alleged indebtedness, and also that he was entitled to the priority asserted.

Section 2487 of the Kentucky Statutes provides that when the property or effects of any manufacturing establishment shall in any wise come to be distributed among creditors, whether by operation of law or by the act of the

company, owner or operator, the employes of such company, owner or operator, in such business, shall have a lien upon so much of such property and effects as may have been involved in such business and all the accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business. And section 2488 provides: "The said lien shall be prior to the lien of any mortgage or other incumbrance thereafter created, and shall be for the whole amount due such employes as such, and for wages coming due to the employes within six months before the property of effects shall in any wise come to be distributed among the creditors, as provided in section 2487. The lien of such employes shall be superior to the lien of any mortgage or other incumbrance theretofore or thereafter created."

In Bogard v. Tyler, 21 Ky. Law Rep., 1452, it was decided that a sawmill at which lumber is sawed for sale on the markets is a manufacturing establishment in the meaning of this statute. And appellant has proven that he was an employe thereof, and that the claim asserted by him was for wages coming due within six months before the judgment and sale of the sawmill plant at the instance of the bank. The chancellor reduced appellant's claim to $125, in view of the fact that he had been too unwell during a part of the time for which the lien was claimed to render full services to the company, and we do not feel disposed to disturb his findings on this question of fact, but the chancellor erred in not giving appellant a superior lien over the mortgage creditors to secure the payment of the amount found due to him. While the decisions of the courts of the country are not entirely harmonious on the question, we think the weight of the authorities uphold the validity of statutes securing to employes of manufacturing establishments liens for wages superior to prior mortgage liens, when such liens are created subsequent to the enactment of the statutes. No constitutional provision is infringed by the statute; and as manufacturing plants are only valuable as going concerns, and can not be operated without material and employes, it is, therefore, the policy of the law to secure to such employes a prior lien for their wages for a limited period (Wimberly v. Mayberry, 14 L. R. A., 305.)

For reasons indicated so much of the judgment appealed from as denies to appellant a prior lien for the $125 adjudged to him is reversed and the cause remanded, with direction to adjudge this sum payable to him out of the proceeds of the sawmill property.

NORMAN, &c. v. CENTRAL KENTUCKY ASYLUM.

(Filed May 11, 1904—Not to be reported.)

Percy N. Booth and S. B. Kirby for appellants.

Holt & Alexander for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Judge Hobson delivered the following response to petition for rehearing:

We can not apply in this case the rule that where an amended petition is filed perfecting the cause of action set out in the original petition, the running of the statute of limitation stops at the filing of the original petition;

for by an order entered by consent in this case all the pleadings anterior to the amended petition were withdrawn and stricken from the file. The original petition, is, therefore, no part of the record.

The summons on the amended petition was served on J. C. Norman, the appellant. A guardian ad litem was appointed for her, who filed answer and for her prosecuted the appeal to this court. We, therefore, conclude that on the return of the case to the circuit court no further process will be necessary. Our attention is called to the fact that the record, including the depositions taken in the case of Pettit v. Norman, pending at the same time in the Jefferson Circuit Court, was by consent read on the trial of this case and made part of the record. This record is not copied in the transcript before us, and it is insisted that we must presume it supported the judgment. But as the judgment must be reversed on the question of limitation, we can not apply that rule here and direct a judgment to be entered in favor of the plaintiff for the time not barred by limitation.

The petition is overruled.

GEORGETOWN TELEPHONE CO. v. McCULLOUGH'S ADM'R.

(Filed May 11, 1904.)

Action for causing death—Proximate cause—Liability of appellant—Appellant, at the time of the accident complained of, occupied two rooms in a building belonging to H., J. & Co., using the front room as an operating room and the other as a store room, where, among other things, was kept some dynamite. H., J. & Co. sent a carpenter to partition off a bath room next to the store room, who, upon discovering the dynamite, directed his assistant to remove it which he did, placing it in the common hallway, of which appellant had no knowledge. Mary McCullough was in the employ of appellant, in the operating room, and while standing in the door of the hallway, the dynamite in some unknown way exploded, injuring her so that she died the next day. Held—That the proximate cause of the accident being the act of the carpenter and assistant, who were not in the employ of appellant, the appellant is not liable in damages for the death of deceased, and on this evidence a peremptory instruction should have been given to find for appellant.

Victor F. Bradley for appellant.

Montgomery & Lee for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Barker.

The Georgetown Telephone Co. is a corporation operating a telephone line in Georgetown, Kentucky. It occupied, at the time of the accident involved herein, two rooms in a building owned by Herring, Jenkins & Co., on the south side of Main street. The front of these two rooms was used as an operating room, while the back room was used for storing the materials used by the corporation in its business. The decedent, Mary McCullough, was one of the operators employed by the corporation, and her place of business was in the front room. The two rooms opened into a hall common to all the tenants of the owners of the building.

On the 7th day of January, 1903, the owners of the building, Herring,

Jenkins & Co., employed a carpenter, one Cleary, to partition off a bath room next to the store room of appellant, and in order to do this, it was deemed necessary to move some shelves and their contents in the wareroom of appellant. In preparing to do this, Cleary found upon one of the shelves a box half full of dynamite; there being, probably, six or seven pounds of this explosive. Fearing that it might explode, he requested a young man by the name of Loots, who occasionally worked for appellant, but who was not then in its employ, to remove the dynamite from the shelves; this, Loots refused to do; whereupon Cleary ordered one Goddard, who was in his own employ as assistant, to remove it. Goddard did so, taking the box from the shelf where it had been, and carrying it out into the common hallway, where he placed it in a corner near the front door of appellant's operating room. Here, from some unknown cause, it was exploded. Just immediately before the explosion appellee's decedent was standing on the inside of the door of the operating room, leading into the hallway, with her hand upon the door knob; when the explosion took place, the concussion blew in the door with such force as to throw her across the room, mashing and breaking her arm, from which injury she afterwards died. Appellee having qualified as the administrator of her estate, instituted this action to recover damages for her death, alleging that it was caused by the negligence of appellant, in failing to furnish a safe place for her to work. The answer controverted all of the material allegations of the petition, and thus completed the issues. The trial resulted in a verdict for appellee in the sum of $4,983.33.

The first question that meets us on this appeal is, whether or not appellant was entitled to a peremptory instruction upon the evidence establishing substantially the foregoing facts. Assuming, for the purposes of this case, that it was negligence in appellant to keep the dynamite in question in the back part of its store room, does it, therefore, follow that it is responsible for the accident by which the decedent was injured? It is neither alleged, nor proved, that Cleary was in the employ of appellant; or that he went into its wareroom by its knowledge or consent, or that it knew, or approved, in any way, of the removal of the dynamite from the shelf in the wareroom to the corner in the hall. The only person, other than Cleary and his assistant, who seems to have known of the removal of the dynamite was young Loots, who occasionally worked for appellant as assistant to one of its employes, but who, on the day in question, was not in its employ. And it does not appear that he even knew where the dynamite was placed when it was removed from the shelf; that the dynamite, when placed in the public hall, was in a very much more exposed and dangerous place than when on the shelf of appellant's wareroom, is too obvious to require demonstration. But that it was shortly after being placed there ignited by, perhaps, some one throwing into the box a lighted match, or the stump of a cigar or cigarette, shows this to be true, if evidence on this point is needed. It does not follow that, because one is negligent and an accident occurs, therefore the author of the negligence is liable in damages. The negligence must be the proximate cause of the injury, in order to establish liability. Shearman and Redfield, in their work on Negligence (5th edition, section 25), say: "The fact that the defendant has been guilty of negligence, followed by an accident, does not make him liable for the resulting injury, unless that was occasioned by the negligence. The connection of cause and effect must be established.

And the defendant's breach of duty, not merely his act, must be the cause of the plaintiff's damage. The defendant's negligence may put a temptation in the way of another person to commit a wrongful act, by which the plaintiff is injured; and yet the defendant's negligence may be in no sense a cause of the injury."

In section 23 it is said: "The proximate cause of an event must be understood to be that which, in a natural and continual sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred. Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation; that is, the proximate cause which is nearest in the order of responsible causation."

In section 32, the authors say: "The connection between the defendant's negligence and the plaintiff's injury may be broken by an intervening cause. In order to excuse the defendant, however, this intervening cause must be either a superseding or a responsible cause. It is a superseding cause whether intelligent or not, if it so entirely superseded the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury. It is a responsible one, if it is the culpable act of a human being who is legally responsible for such act. The defendant's negligence is not deemed the proximate cause of the injury, when the connection is thus actually broken by a responsible, intervening cause."

The case of Bosworth v. Brand, 1 Dana, 377, was an action in which Brand obtained a verdict and judgment against Bosworth, for the value of a slave killed on Bosworth's farm, at a negro frolic or dance. It seems that Bosworth permitted some fifty negroes to assemble and dance at an outhouse: "That a patrolling party surrounded the house about midnight, for the purpose of apprehending the negroes and breaking up the frolic; that the negroes refused to surrender when called upon so to do, and endeavored to make their escape; that one of the patrol, without any necessity for so doing, wantonly fired a pistol, loaded with balls and buckshot into a dark room, crowded with negroes, and thereby killed the slave of Brand."

It was unlawful for Bosworth to permit the negroes to assemble in the manner in which they did, and the court said: "That this act renders the conduct of Bosworth illegal in permitting the assemblage of the negroes, and that it renders him liable to the penalty therein named, to be recovered in the manner therein prescribed, there is no doubt. But that he is liable for every accident or injury happening to the slaves of others whilst so assembled, or in going to or coming from his farm, is an inference by no means so obviously deducible therefrom. * * * It is true in general, that a man is entitled to reparation for every damage he sustains from the unlawful action or omission of another. But the damages must be the direct and immediate, or at least, proximate and natural consequence, of the act or omission complained of. It will not do to carry it to every consequence, however remote, which can be traced to the particular action or omission, and much less to such things as are not a natural consequence, and may have arisen from other and extraneous causes. Thus it is said, Buller's Nisi Prius, 25: 'That if one whip my horse, whereby he runs away with me,

and runs over a man, he may have an action against such person, for the whipping was an act of folly, and he ought to be answerable for the consequences. A fortiori, I might maintain an action, if I received any hurt, because the consequence is more natural.' He also suggests the propriety of proving, in such cases, that the injury was such as would probably follow from the act done. 'So, also,' he says 'if a man lay logs of wood across a highway, whereby my horse stumbles and flings me, I may bring an action; for whenever a man sustains a particular injury by a nuisance, he may maintain an action; but then the injury must be direct, and not consequential, as by being delayed in a journey of importance.' For which he cites Carthew, 194, 451. Pothier, in his treatise on obligations, page 97, said: 'If a man sells me a cow, which he knows to be infected with a contagious distemper, and conceals it from me, he is responsible for the damage I suffer, not only in that particular cow, but also for my other cattle to which the distemper is communicated.' But, he says, if the loss of his cattle prevented him from raising a crop, which prevented him from paying his debts, and his creditors in consequence seized his property and sell it much below the value, that these consequences, being too remote, the fraudulent vendor is responsible for none of them. Suppose the slave of one goes to the farm of another, and is not driven away in the time prescribed by the above cited act; that in consequence he is overtaken on his return home, by a hurricane, and killed by the falling of timber, or is accidentally shot, or even whilst remaining after the prescribed time, he is accidentally killed, could the owner of the slave recover his value from the owner of the farm? Or, to take a case under another clause of the statute, that slave enters a tippling house, and purchases a dram, and whilst in the act of drinking it, he is accidentally or designedly shot, by some one from without the house, would the seller of the dram be responsible for the value of the slave? It seems to us, that all these propositions must be answered in the negative, and that the contrary opinion has no plausible foundation in either law or justice."

In the case of Insurance Co. v. Tweed, 7 Wallace, 44, the rule as to proximate cause is thus stated by Mr. Justice Miller: "One of the most valued criteria furnished us by these authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

In the case of McGahan v. Indianapolis Natural Gas Co., 49 Am. St. Rep., 199, the gas company had negligently permitted one of its pipes to become defective, whereby McGahan's house became filled with it; whereupon he employed a plumber to examine the house for the cause of the leakage. The plumber went into the room with a lighted lamp, thus causing an explosion. It was held that the negligence of the plumber, and not that of the gas company, was the proximate cause of the injury, and in the note to this case, it is said: "When the independent act of a responsible person intervenes between the defendant's negligence and the injury sustained, such act breaks the causal connection between the negligence and the damage, and he who is guilty of the original negligence is not chargeable, but redress must be sought from him who directly caused the injury, unless the intervening act is such as might reasonably be anticipated as the natural or prob-

able result of the original cause." (Reed v. Evansville, &c., Railroad Co., 53 Am. St. Rep., 391.)

Applying the principle enunciated in the foregoing authorities, we have no hesitancy in reaching the conclusion that the act of Cleary and Goddard in removing the dynamite from its comparatively safe position on the shelf in the appellant's wareroom, to the exposed position in the public hall, was the proximate cause of the explosion which resulted in the injury complained of. Suppose Goddard, under the instructions of Cleary, had taken the dynamite out on the public street and placed it at the door of an adjoining building, and it had there been ignited and exploded, just as it was in the hall by appellant's door, would it be contended, then, that appellant was responsible for any damage arising from this wrong? We think not. As said before, neither Cleary nor Goddard were in the employ of appellant, nor were they, so far as this record discloses, acting with its approval; so far as the evidence shows, they were trespassers in the wareroom where the dynamite was, and wrongdoers in removing it at all. According to the evidence, as shown in this record, what defense could Cleary and Goddard have offered had they been sued for their wrongful act in removing the dynamite to the hall? Certainly, between the original negligence, if such it be, of appellant, in permitting the dynamite to remain on the shelf in its wareroom, and the injury of the decedent, they intervened as responsible causal agents, and their wrongful act was the direct and porximate cause of the injury inflicted.

The court should have sustained appellant's motion for a peremptory instruction; wherefore, the judgment is reversed for proceedings consistent with this opinion.

GREGORY v. ILLINOIS CENTRAL R. R. CO.

(Filed May 11, 1904—Not to be reported.)

Damages—Action for—An action by a father for damages for the loss of his son's services by reason of his having been killed by appellee, can not be maintained at common law, and the action of the lower court in sustaining a demurrer to the petition was proper. The common law allows no remedy by way of a civil action for injury causing the death of a human being. Such injury must necessarily precede death, and the law did not allow any cause of action for an injury to the person who survived him.

Hendrick & Miller for appellant.

Reed & Oliver, Pirtle & Trabue and J. M. Dickinson for appellee.

Appeal from Marshall Circuit Court.

Opinion of the court by Judge Barker.

Appellant's son, Joseph W. Gregory, an infant sixteen years of age, was run over and instantly killed by an engine and train of cars operated by appellee's employes, while he was attempting to cross its tracks at a public crossing in Gilbertsville, Marshall county, Kentucky. This action was instituted by the father to recover of appellee damages in the sum of $2,000, for the loss of his son's services by reason of the killing, from the time of his death until he reached the age of twenty-one years.

It is conceded that this action is not based upon any statute authorizing it, but upon the common-law right of the father to his infant son's services, and the remedy given for their deprivation. The petition contains the usual allegations of negligence in such actions. A general demurrer was sustained to the petition, and appellant declining to amend, it was dismissed; from which judgment this appeal is prosecuted. The ruling of the trial judge, in sustaining the demurrer, was correct.

"The common law allowed of no remedy, by way of a civil action, for an injury causing the death of a human being. Such injury must necessarily precede death; and the law did not allow any cause of action for an injury to the person to survive him. The husband or master of the deceased was not allowed to sue, because the only damage recognized by the law was the loss of service during the lifetime of the servant, and the death of the servant therefore, worked no injury to the master, of which the law could take notice. And, if the act causing death amounted to a felony, the general rule of the common law, forbidding any civil suit upon a felony, would alone have sufficed to exclude a claim for damages. Whatever may be said of these arguments, the conclusions thus reached formed a settled doctrine of the common law. No one, whether as executor, master, parent, husband, wife, or child, or in any other right or capacity, could maintain an action for damages on account of the death of a human being." (Shearman and Redfield on Negligence, 5th edition, section 124; Eden v. Lexington & Frankfort R. R. Co., 14 B. Mon. 165; Covington Street R'y Co. v. Packer, 72 Ky., 455; Louisville & Nashville R. R. Co. v. McElwain, 98 Ky., 700, Harris v. Kentucky Timber and Lumber Co., 19 Ky. Law Rep., 1731.)

The maxim actio personalis moritur cum persona, was the uniform rule of the common law and prevails in Kentucky to-day, except where it has been modified by the express language of the Constitution and Statutes.

The case, of Craig's Adm'r v. Lee, 14 B. Mon., 96; Gray v. Combs, 7 J. J. Marsh, 478, and Smith v. Hancock, 4 Bibb, 222, cited by appellant as establishing a contrary doctrine to the maxim, all involved actions for the value of slaves killed or injured by negligence or malice. While it is true, that the master was entitled to the services of the slaves, the latter was a mere chattel of the former; and the right of the master to recover for injury to, or death of his slave, was based upon the same principle of his right to recover for the injury to, or destruction of his horse or other species of property. These cases have no bearing upon the principle involved in the case at bar. Wherefore, the judgment dismissing the petition is affirmed.

HORD, &c. v. SARTIN, &c.

(Filed May 11, 1904—Not to be reported.)

Forcible entry—Defect in warrant—Practice—In a warrant for forcible entry after a traverse has been taken, it was error in the trial court to refuse to permit the warrant to be amended so as to correct an omission of the court below.

A. E. Cole and F. P. O'Donnell for appellants.

W. D. Cochran for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Barker.

This was a proceeding against the appellees for the forcible entry by them upon certain land situated in Mason county, Kentucky. A trial in the country resulted in a verdict of guilty, which was traversed by appellees, and appealed to the circuit court. After the case reached the circuit court, appellees moved to quash the warrant, because of its failure to allege that the land involved in the proceeding, was in the peaceable possession of the appellants at the time of the forcible entry complained of. It was conceded that the omission of this allegation was fatal to the validity of the warrant; and thereupon appellants offered to file an amended warrant signed by the justice before whom the case had been tried in the country, correcting the omission, and they also tendered and offered to file an amendment of their own, which would have corrected the original warrant. These amendments the court refused to allow, and sustained a motion to quash the warrant; of which appellants are now complaining.

The question presented for adjudication on this appeal is, whether or not the circuit court may arbitrarily refuse to permit an amendment of a writ of forcible entry, which merely corrects it, and perfects the cause of action originally attempted to be stated therein, after traverse and appeal. In the case of Bailey v. Kelly, 18 Ky. Law Rep., 718, this court approved an amendment similar to the one in question here, permitted by the justice prior to the trial of the writ before him; and it was said in the opinion: "It would be, we think, exceedingly technical to say that this warrant could not be amended to make it conform to the form laid down and required by the Code of Practice, as it was offered before trial or issue joined, as in all probability it was a mere oversight in the officer who drew up the warrant. We are satisfied that the county judge, who permitted the warrant to be amended, did not err by permitting the amendment and trial."

In the case of Parker v. Ozment, 8 Ky. Law Rep., 525, the Superior Court approved the amendment of the warrant of forcible detainer after traverse to the circuit court, in order to make it show the county where the land was situated.

In the case of Forsythe v. Huey, 25 Ky. Law Rep., 148, it was held that the circuit court did not err in permitting an amendment of the warrant after traverse; and in Hoffman v. Mann, 25 Ky. Law Rep., 255, there was involved the identical question under consideration, and it was held that the amendment of the warrant after traverse was proper. The opinion so elaborately discusses the principles, and reviews the authorities bearing upon it, as to render any further extension of this opinion unnecessary. And while, as a general rule, this court will not interfere with the discretion conferred upon the trial court by section 134 of the Code, in regard to amendments, we are constrained to the conclusion that, in this case, the court must have labored under the impression that the warrant, as a proposition of law, could not be amended after traverse.

Upon the authority of the cases cited the judgment is reversed for proceedings consistent with this opinion.

BURNSIDE v. MEALER, &c.

(Filed May 11, 1904—Not to be reported.)

1. Mortgages—The fact that in a mortgage purporting to convey the entire tract of land and all interest in it, that the words "homestead and dower being relinquished by E. J. Mealer," subtracts nothing from the effect of the mortgage. These words mean only that she relinquished homestead and dower in addition to acknowledging the instrument as her act and deed.

2. Limitation of actions—An action to recover usury must be commenced in one year after it is paid.

3. In an action upon a note against a personal representative, the fact that the technical defense that the debt had not been demanded, properly verified in one year after the qualification of the personal representative, is no evidence of fraud, as demand may be waived.

Wm. Herndon for appellant.

S. B. Dishman, P. D. Black, Jas. D. Black and B. B. Golden for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Hobson.

On December 31, 1894, William Burnside recovered judgment against E. J. Mealer for something over $300.

Execution was issued on the judgment and returned no property found on May 26, 1896. On April 4, 1901, he instituted this action on the return of no property found, against her, John T. Hays and William Gilbert. They answered, alleging that they did not owe her anything. He then amended his petition and alleged that on March 20, 1891, John Mealer, the husband of E. J. Mealer, borrowed of William Gilbert $1,500 for which he gave his note in twelve months with his wife as his security, and to secure the note he and his wife, E. J. Mealer, mortgaged to Gilbert a tract of land owned by them jointly; that in the certificate of acknowledgment Mrs. Mealer only relinquished her dower and homestead; that John Mealer paid $150 on the debt and afterwards died, but no demand was made of the debt properly verified within one year after the qualification of his personal representative; that on February 13, 1896, Gilbert filed suit and recovered judgment foreclosing his mortgage; that the property was sold for the sum of $2,200, one-half of which was the property of E. J. Mealer; that the sale was made on June 27, 1898, and was confirmed at the July term, 1898; that judgment should have been rendered in favor of Gilbert for the sum of $1,350, and he should only have been adjudged a lien on the husband's half of the land; that E. J. Mealer filed an answer in that suit, but afterwards withdrew it and allowed the judgment to be taken fraudulently with intent to perfer Gilbert to her other creditors. The court sustained a demurrer to this pleading because the time for attacking the transaction as a fraudulent preference to prefer one creditor to another had passed before the action was brought.

Burnside then filed an amended petition charging that the judgment was a fraud gotten up by Gilbert and E. J. Mealer for the fraudulent purpose of defeating her creditors in the collection of their debts; that they each acted in collusion for the purpose of covering up in the hands of Gilbert the money and property of E. J. Mealer. The court overruled a demurrer to this pleading and Gilbert filed an answer denying its allegations and pleading the

former judgment in bar of the petition in so far as it set out facts going to show that he had recovered more than was coming to him in the former case. On final hearing the court dismissed the action and Burnside appeals.

The proof wholly fails to show fraud or collusion between Gilbert and Mrs. Mealer It tends to show there was some usury embraced in the judgment, but an action to recover usury must be begun in one year after it is paid. This action was not brought in time for that purpose. The fact that when Gilbert, for her accommodation, had indulged her on the debt, she did not set up in the suit the technical defense that he had not demanded his debt properly verified in one year after the personal representative qualified, is no evidence of fraud, as the demand may be waived. The statute was only aimed for the protection of the estates of deceased persons from interest or claims not demanded of the personal representative, and where he knows of the debt, he may waive the demand. This waiver may be express or may be implied. The mortgage executed by Mealer and wife purports to convey the entire tract, including all interests they had in it. The clerk's certificate shows they signed and acknowledged the instrument as their act and deed. The fact that he adds to the certificate the words "Homestead and dower being relinquished by E. J. Mealer," subtracts nothing from the effect of the mortgage which passed the entire title and which they acknowledged and delivered as their act and deed. These words mean only that she relinquished homestead and dower in addition to acknowledging the instrument as her act and deed. The certificate considered in Sutton v. Pollard, 13 Ky. Law Rep., 85, was of wholly different tenor. The only thing the wife there did, according to the certificate, was that she relinquished her dower. The presumption that she consented, when examined separate and apart from her husband, to the conveyance of the property as set out in the mortgage, was there overthrown by the certificate. But here the certificate is in due form and the words quoted must be understood as added to show that it was not only a joint conveyance of the property, but that she released also her dower and homestead.

Judgment affirmed.

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COURT OF APPEALS OF KENTUCKY.

CITY OF LEXINGTON v. WILSON, &c.

(Filed May 11, 1904.)

1. Taxation—City ordinance—Tax lawfully imposed—Inadequate remedy—How collected—By proper ordinance, enacted pursuant to its charter, the city of Lexington imposed a license or occupation tax upon the proprietors of livery stables, but no provision was made for its collection in a summary way or by suit. An action was instituted to recover the amount due as in case of debt. On demurrer the court dismissed the petition. Held—Where an adequate remedy is provided for the collection of a tax, lawfully imposed, the authority to resort to any other remedy is denied; but where the legislature has enacted a law imposing a tax, or authorized an authority to impose such tax, and it has been done, but no adequate remedy is provided for its collection, the right to do so is implied, and an action therefor can be maintained.

2. Payment of fine—The payment of a fine imposed for a failure to take out the license, does not discharge the claim for the license tax.

3. Cases overruled—To the extent that other cases are in conflict with this opinion, they are overruled.

Allen & Duncan, Z. Gibbons and A. O. Ambrose for appellant.

J. D. & G. R. Hunt for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Paynter.

The appellees are the proprietors of a feed, livery and sale stable. By proper ordinances enacted pursuant to the charter of cities of the second class, a license or occupation tax was imposed upon the proprietors of livery stables, which is graduated by the number and character of vehicles used for hire in the conduct of business. The ordinances were adopted for the purpose of raising a revenue, but no provision was made for collecting it by a summary way or by suit. This action was instituted to recover amounts due from appellees, as in case of debt. On demurrer the court dismissed the petition, hence the question here for determination is, can such an action be maintained.

Before entering into a discussion of the questions, it is well to say that the court is confronted with the claim that its opinions on the question are in conflict, not only as to conclusions, but as to reasons given in support of them. A careful examination of the opinions leads the court to concede that the claim in some degree is true. It is of the greatest importance that the opinions of this court should be in harmony one with another, not only that persons who have controversies may know their legal rights, so that they can be settled without resort to courts, but that the administration of justice may be had, in so far as it is possible, under settled rules of law. It is especially important that this should be so in the matter of the imposition of public burdens and the methods of their enforcement. In view of the conflict in the opinions of the court on the question under consideration, a brief review of them is necessary, so that the court may the more clearly state its conclusions and the rule that is to be observed hereafter.

By an act of the legislature, the Portland Dry Dock and Insurance Co. was required to pay to the city of Louisville 50 cents on each $100 of its capital stock, and as the capital stock was $100,000, the tax amounted to $500 annually. By a subsequent act the board of trustees of the town of Portland were empowered to collect and receive $200 of the annual tax to be laid upon the Portland Dry Dock and Insurance Co. and the city of Louisville $300 of it. The trustees of Portland brought suit against the Portland Dry Dock and Insurance Co. for their part of the tax, and the question was made that the action could not be maintained. This court, in Portland Dry Dock and Insurance Co. v. Turstees of Portland, 12 B. M., 81, held the action could be maintained, although a more summary remedy was provided by law for the collection of the tax.

In Johnson v. Louisville, 11 Bush, 538, the court had under consideration the question as to whether a suit for a tax could be maintained when the charter of the city of Louisville had provided a full and adequate remedy for the collection of the tax, and while the court held that the judgment was not void which had been rendered for the tax, it also held that as there was a full and adequate remedy provided by law for its collection, it was exclusive. In conclusion, the court said: "We are well satisfied that upon principle such suits can not be maintained, and that sound public policy demands that the courts should not sustain them, except in those cases where the prescribed mode of enforcing payment would be ineffectual."

It was claimed that the property of the Louisville Water Co. should pay taxes. The company denied its liability therefor. The sheriff was proceeding to enforce payment, and the water company enjoined the collection of the taxes. In passing upon the question in Louisville Water Co. v. Hamilton, 81 Ky., 523, the court decided that the water company was liable for the taxes, but that as it was performing a public service, its property could not be seized and sold by the sheriff for the taxes. It was also held that as the court had been applied to for "some sort" of relief by the water company, it should have taken cognizance of the case, and required it to pay the money into court, etc.

In Greer v. City of Covington, 83 Ky., 410, the court sustained the right to maintain an action to recover taxes, because the statute provided for such an action in addition to the right of the tax collector to seize and sell prop-

erty for them. It also decided that such an act was not in violation of the Constitution.

In Baldwin v. Hewitt, Auditor, 88 Ky., 680, the court held that a suit for taxes could not be maintained without express legislative authority, upon the theory that the collection of taxes was not an inherent power of the judiciary; that to allow such an action would destroy the theory of government as to the distribution of powers; and further because the legislature had given the right to sue railroad companies for taxes there was implied "a legislative opinion that in its absence no such suit could be maintained."

In the case of the Louisville Water Co. v. Commonwealth, 89 Ky., 248, the Commonwealth sought to recover taxes, and the court held that the action could not be maintained, because there was no express statute authorizing it.

In Clark, Sheriff v. Louisville Water Co., 90 Ky., 524, it appeared that the sheriff had seized and was going to sell the property of the water company for taxes, and it enjoined the sheriff from doing so. The court held it was liable therefor, and adjudged that as it had come into court asking equitable relief, the court should take charge of its property and compel it to pay the tax.

In the City of Covington v. District of Highlands of Campbell County, 24 Ky. Law Rep., 433, the appellee instituted an action against the city of Covington to recover the tax due it, and the court sustained the action, although there was no express authority for it.

A careful examination of the cases to which reference has been made, shows that the court in the cases of the Portland Dry Dock Insurance Co. v. Trustees of Portland, and the City of Covington v. District of Highlands of Campbell County, held that actions to recover taxes, although there was no express legislation authorizing it, could be maintained. The case of Johnson v. Louisville recognized that such an action could be maintained, if the remedy provided by law for their collection was not full and adequate. In Louisville Water Co. v. Hamilton, the court certainly recognized that an action could be maintained to recover without any express statute authorizing it, or it would not have held that as the water company had sought relief in the court against their collection, the court should have enforced their payment. The fact that the water company sought relief against the collection of taxes did not confer upon the court the jurisdiction to enforce their collection. Such a proceeding might authorize the court to hold that it would exercise a jurisdiction which it had to determine liabilities for taxes and enforce them, but it could not confer a jurisdiction not existing under the law. If the court had intended to so hold, it would have assumed a most untenable and illogical position. It held that the sheriff had no authority to seize and sell the property of the water company and that the injunction was properly obtained. If it had proceeded to hold that no action could be maintained for the taxes, because there was no statute expressly authorizing it, it would have followed that the court should not have enforced the payment of taxes through the instrumentality of a receiver Certainly the court could not consistently hold that an action could not be maintained by the authority to which the tax was due, then in an action rightfully brought by the taxpayer to prevent the sale of his property for the tax, hold that the taxing authority might enforce the collection of the tax.

If the law does not authorize the taxing authority to maintain a direct action to recover taxes, it certainly does not do so in an action brought by the tax payer. If the reasoning of the court is correct in Baldwin v. Hewitt, Auditor, and Louisville Water Co. v. Commonwealth, that an action can not be maintained in the absence of express authority, because it would be destructive of our theory of government as to the distribution of power, the same reasoning should prevent the court from enforcing the collection of taxes in an action by the taxing authority or in one by the taxpayer. If the reasoning be sound, it would be a usurpation of authority and the exercise of a jurisdiction which did not exist the same in the one as in the other case. It would be wholly immaterial who began the proceeding or as to the form of action, for the objection does not stick in the bark, it denies the authority of the courts at law or in equity to enforce the payment of taxes in the absence of express authority. Clark, Sheriff v. Louisville Water Co. followed Louisville Water Co. v. Hamilton. Thus it will be seen that there are two cases expressly holding that the action may be maintained, and one which concedes that it can be done, and two which logically lead to the same conclusion. On the other hand, the cases of Baldwin v. Hewitt, Auditor, Louisville Water Co. v. Commonwealth, and the dictum in Greer v. City of Covington, are to the effect that such action can not be maintained. There is another line of cases bearing upon the question to which reference will hereafter be made, but we do not think they are in point or in conflict with any of the cases discussed. In Baldwin v. Hewitt, Auditor, and Louisville Water Co. v. Commonwealth, the court gave as one of the reasons for holding that the action could not be maintained, was the act authorizing suits against railroads for taxes implied "a legislative opinion that in its absence no such suit could be maintained." After further consideration, we are of the opinion that instead of it creating impliedly a "legislative opinion" that such actions could not be maintained without express legislative authority, it manifests a legislative judgment that it was not wise to seize and sell railroad property for taxes by summary process owing to the nature of the property and the public service it performed, but that it should be done by a proceeding in court. The legislature intended that the remedy by suit should be exclusive, as the summary remedy is intended to be in some other instances. Another reason which the court gave for its conclusion is, to wit, that to allow such actions would be destructive of our theory of government as to the distribution of its powers, is not a satisfactory one. Taxation is a political matter. The legislative department must alone determine the necessity for the imposition of a tax and fix the rate, prescribe the method of assessment and regulate the manner in which payment shall be enforced. With these things the judicial and executive branches have nothing to do. The legislature may provide that the collection of taxes may be by collecting officers by a summary proceeding or by the judiciary. We have not found that the courts of the country have held that when without express legislative authority a court takes jurisdiction and gives a judgment for tax due by a citizen, it has been guilty of exceeding the limit of judicial function or has invaded the province of the executive department of government. From the very necessity of the case it requires the power of the executive department and the strong arm of the courts to effectually enforce

the collection of taxes imposed by legislative authority for the support of the government. The question which has perplexed the courts in suits for taxes, is not whether the assumption of jurisdiction was a usurpation of the function of other departments, but to ascertain the legislative will with reference thereto. Some courts hold that unless there is an express legislative authority for the suit, they will not sustain it. Others hold that where a tax is imposed and no remedy is provided for its collection, there is an implied authority for the courts to exercise jurisdiction in the matter. So it is not a question of destroying "our theory of government in the distribution of its powers," but of legislative intent, for the executive department of government has no more authority to collect taxes without legislative authority than has the judiciary, hence if one is given the authority to collect taxes to the exclusion of the other, it can not be said there is a usurpation of authority in the execution of the legislative will. If express and exclusive authority was conferred upon the executive department or the judiciary to collect a tax, and the unauthorized one should proceed to do so, then there would be a disregard of the legislative will and reprehensible effort to usurp authority which would tend to the destruction of our theory of government that one department should not invade the constitutional or legal limits of another department of government. Should the court take jurisdiction of an action for taxes as in debt when there is no act of the legislature in terms conferring it? To put the question in a different form, can an intention to confer such jurisdiction on the courts be inferred. We answer in the affirmative. In doing so it must be conceded that the legislature has the authority to confer such jurisdic ion and the decisions of this court uphold such legislation. The court also recognizes the rule of this court to be that when the legislature has prescribed a full and adequate remedy for the collection of taxes, the authority to resort to any other remedy for their collection is denied. When the legislature has enacted a law imposing a tax or authorized an authority to impose one, and it has been done, a liability has been created on the taxpayer which he must discharge. If no summary method is provided to enforce its payment, then unless the court can do so, a tax has been imposed and a liability created by law, and the State, county or municipality is without means of enforcing its satisfaction. To so hold is attributing to the legislature incompetency or gross neglect in the enactment of laws. When the legislature enacts a law, imposing a tax, the presumption is that it intended that it should be collected. If it does not provide another method of collection, the presumption should be indulged it knew that the courts were open to enforce liabilities created by contract or by law, and that the remedy by suit afforded by the common law would be ample.

In Dillon on Municipal Corporations, 4th edition, section 818, it is said: "If the charter gives the power to impose taxes, but is silent respecting the method for their recovery, the corporation may enforce them or provide by ordinance for their enforcement by due course of judicial proceedings. In such a case the authority to collect by suit is clearly implied, being necessary in order to make the power to tax available."

Cooley on Taxation, 3d edition, page 836, says: "Sometimes the implication of an intent to give a remedy by suit may be so strong as to be conclusive;

as where the statute provides for a tax, but is silent as to the method of collection."

Where no adequate remedy is provided for the collection of a tax, the right to do so is implied. There is an ordinance of the city of Lexington which imposes a penalty for failing to take out a license. The payment of the fine does not discharge the claim for the license tax. If it can be said to be a remedy for the collection of the tax, it is inadequate. The case of McLean County Precinct v. Deposit Bank of Owensboro, 81 Ky., 254, is not opposed to the conclusion we have reached. The law which the court was called upon to construe, conferred jurisdiction upon the county judge to appoint a tax collector and held that, as the legislature had control over the matter and chose to confer the authority upon the county judge to make the appointment, the judiciary should not interfere. The case of Grand Rapids School Furniture Co. v. Trustees School District No. 29, Pike County, 19 Ky. Law Rep., 1610, is to the same effect. Our conclusion is, that the action can be maintained. To the extent cases are in conflict with this opinion, they are overruled.

The judgment is reversed for proceedings consistent with this opinion.

Chief Justice Burnam dissents from this opinion.

DUPOYSTER, &c. v. FORT JEFFERSON IMPROVEMENT CO., &c.

(Filed May 11, 1904.)

Deed held in escrow—Conditions—Delivery by husband without wife's consent—Joint interest of wife—The appellant, R. S. D., owned a one-eighth interest in the land in controversy by inheritance, and acquired a three-eighth interest by deed from her husband, made August 14, 1889. In September, 1890, in consideration of a large sum of money B. S. D., J. C. D. and appellant, who is the wife of J. C. D., acknowledged a deed to appellee for the land in controversy, which was delivered to S. J. M. in escrow, with a writing which recited that when appellee presented J. C. D.'s receipt for the first payment of the purchase money, $25,000, the deed was to be recorded. Instead of presenting a receipt for said sum, J. C. D., in writing, consented that the deed should be recorded by means of the payment to him of $5,500, as administrator of B. S. D., whereupon the deed was recorded. Subsequently appellee paid to J. C. D. $3,000. No part of the $5,500 nor of the $3,000 was paid to the appellant, R. S. D., and she never consented that such payments should be made to her husband or that the deed should be recorded. The court decreed that the contract of sale should be rescinded and that appellee was entitled to a lien upon the three-eighth interest owned by J. C. D. and the one-eighth interest owned by appellant R. S. D. in said land. Held—That the deed made by J. C. D. to appellant in August, 1889, not having been on record when the sale was made to appellee in September, 1890, and that appellee's agents were not aware of the existence of said deed at the time of its purchase, the three-eighth interest of J. C. D. therein was properly held liable to a lien in favor of appellee for the amount due appellee on rescission. But as to the appellant, R. S. D., she never having consented to part with her title except upon condition that the cash payment was made of which appellee was aware, no contract of sale of her one-eighth interest was ever consummated, nor could the wrongful act of her husband in consenting to have the deed recorded, divest her of her title or encumber it.

with a lien for money which she never received nor authorized any one else to receive, and the deed to appellee should be set aside as to her one-eighth interest in said land.

White & Ray for appellants.

F. H. Sullivan, J. M. Nichols & Son and J. Smith Hays for appellees.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Paynter.

This is the fourth time this case has been here; however each appeal presented a different question for review. On a former appeal it was decided that of the land conveyed by J. C. Dupoyster and Ben S. Dupoyster to the appellee, Fort Jefferson Improvement Co., one-half belonged to J. B. Dupoyster and Delva D. Edwards; three-eighths to J. C. Dupoyster and one-eighth to Rebecca S. Dupoyster; but the latter was not before the court in the proceeding wherein the court adjudged a lien on one-half of the land on the rescission of the contract between J. C. and Ben S. Dupoyster and the appellee. The various proceedings had, are made to appear in the opinions of the court on former appeals (Fort Jefferson Improvement Co., &c. v. Dupoyster, &c., 21 Ky. Law Rep., 515. Fort Jefferson Improvement Co., &c. v. Dupoyster, &c., 24 Ky. Law Rep., 1193, and Dupoyster, &c. v. Fort Jefferson Improvement Co., 24 Ky. Law Rep., 1782), hence much detail of fact will be omitted here.

The appellant claims that she not only owns the one-eighth by inheritance, but that she had acquired her husband's three-eighths interest in the land by virtue of a deed dated August 14, 1889, which he executed to her. The facts are the appellee procured a rescission of the contract of sale and claimed a lien upon J. C. Dupoyster's three-eighths interest in the land and the one-eighth interest which the appellant owned by inheritance, for the purchase money which had been paid to J. C. Dupoyster as an individual and as administrator of the estate of Ben S. Dupoyster. It appears that on September 17, 1890, in consideration of a large sum of money, Ben S. Dupoyster, J. C. Dupoyster and the appellant acknowledged a deed to appellee for a large tract of land, which deed was delivered to S. J. Moore in escrow. In a writing which accompanied the deed, it was recited that when appellee presented J. C. Dupoyster's receipt for the first payment on the land, it being $25,000, the deed was to be recorded. Instead of presenting a receipt for that amount, J. C. Dupoyster, in writing, consented that the deed should be recorded by means of the payment to him of $5,500 as administrator of Ben S. Dupoyster, whereupon the deed was recorded. Subsequently, the appellee paid J. C. Dupoyster sums aggregating about $3,000. The record shows that the $5,500 was paid out on the debts due by Ben S. Dupoyster's estate, and that the appellant, who is the wife of J. C. Dupoyster, never received any part of the purchase money paid to J. C. Dupoyster individually, or as administrator, and that she never consented that such payments should be made to her husband, or that the deed might be recorded. The court decreed at the instance of the appellee, that the contract of sale should be rescinded, and that it was entitled to a lien upon one-half of the land, being J. C. Dupoyster's three-eighths and the appellant's one-eighth interest in the land. From this judgment this appeal is prosecuted.

We will first consider the question as to J. C. Dupoyster's three-eighths interest. The deed which he executed to the appellant August 14, 1889, was not recorded until twelve years after the sale to the appellee; therefore, was not on record when the sale was made. We have reached the conclusion that the appellee's agents were not aware of the existence of the deed at the time of the sale to it, and that three-eighths of the land should be treated as the property of J. C. Dupoyster for the purpose of an equitable adjustment on the rescission of the contract between the appellee and J. C. Dupoyster. It, therefore, follows that the court properly adjudged a lien on that three-eighths interest in the land for the amount found to be due the appellee.

As to Rebecca S. Dupoyster's one-eighth interest, we reach a different conclusion. She never consented to part with her title to it, except on the condition that the cash payment was made. She only consented that the deed should be delivered and recorded when this was done. Of this act the appellee was fully aware. From the terms of the writing placing the deed in escrow, the appellee is not only charged with notice that the deed was only to be delivered upon that condition, but it actually agreed with the appellant that it was only to receive the deed on that condition. It knew the limitation that was placed upon the authority of J. C. Dupoyster to receive the money and the authority of Moore to have the deed recorded. It was not misled in this regard. So far as the appellant was concerned, no contract of sale of her one-eighth interest in the land was ever consummated. Her husband had no authority in law or otherwise, to sell her interest in the land, nor could his wrongful act in consenting that the deed should be recorded, be treated as a consent by her to the delivery of the deed, nor should it operate to divest her of title to her interest in the land, or to encumber it with a lien for money which she never received or consented that any one else should receive. If the husband's wrongful act can have either of these effects, it would be allowing him to consummate a sale of her land and encumber it, in opposition to her wishes. If A., B. and C. owned a track of land and they made a deed therefor and placed it in escrow with an agreement that it was to be delivered and recorded upon the payment to A. of a specified sum, and A., in violation of that agreement accepted a less sum and consented that the deed should be recorded, it would not be binding on B. and C., because it was delivered and recorded in violation of an agreement made with the grantee. B. and C. only agreed to a consummation of the sale upon a certain condition which never happened. The grantee in such a deed could not claim that he acquired B. and C.'s title to the land under the deed, because he obtained it in violation of the agreement. It follows that there was no contract of sale consummated between the appellee and Mrs. Dupoyster, hence it is a misnomer to say that a contract has been rescinded, so far as she is concerned. It would be most inequitable to burden her interest with a lien for money which J. C. Dupoyster received for himself individually and as administrator of Ben S. Dupoyster. It is urged that where a married woman sells her land by executory contract or otherwise, and the contract can not be enforced, the court will adjudge a lien upon her land for the amount which she has received by virtue of the contract. We concede this to be true, but the principle does not appy here, because the

contract of sale as to her interest in the land was never consummated, hence there could be no rescission of the contract so far as she is concerned. The deed to the appellee should be set aside so far as it purports to convey her one-eighth.

The rule that the payment to one joint payee is a payment to all, is invoked to support the appellee's claim to a lien on appellants' interest in the land. In no proper sense was the appellant ever a payee, nor could she have been, except on the consummation of the sale in accordance with the terms of the writing evidencing the contract placing the deed in escrow. It was not within the power of the appellee and J. C. Dupoyster to make a contract of sale of her land to which she never gave her consent, and claim that thereby she became a joint payee with her husband and thus give him the right to collect her money. She never ratified or agreed to ratify the transaction, except upon the condition that the appellee pay all the purchase money, which it refused to do, because it could not obtain the interest of J. B. Dupoyster and Mrs. Edwards, which the appellant never owned or represented that she owned. For the apellant it has been urged that a married woman can not deliver a deed in escrow so as to thereby divest her of title to her land, but we have not deemed it necessary to enter into a discussion on this question, as is apparent from the conclusion we have reached.

The judgment is reversed, with directions to the court below to adjudge to the appellant her one-eighth interest in the land free from the appellees' claim, and for further proceedings consistent with this opinion. And the judgment is affirmed on the appeal of J. C. Dupoyster, J. B. Dupoyster and Mrs. Edwards.

GASKIN, &c. v. CITY OF GEORGETOWN.

(Filed May 12, 1904.)

Cities—Reducing boundary—Trial — Continuance—Absent witnesses—On an application of the board of council of the city of Georgetown to change the boundary of said city so as to exclude about eighty legal voters and residents therefrom, which change was resisted by a number of citizens residing in said territory, it appearing on the day of trial that twenty-four of the witnesses residing in said territory for whom the sheriff had subpœnas, were absent and were returned "not found," and whose testimony was material for the defendants, it was error in the lower court to try the case without giving the defendants an opportunity to have said witnesses, most of whom were interested parties, present at the trial.

L. F. Sinclair and L. L. Bristow for appellants.

J. B. Finnell for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Settle.

The city of Georgetown, August 1, 1902, by its board of council, passed an ordinance proposing to strike certain territory therein described, from the corporate limits of that city, after which a petition was filed in the Scott Circuit Court by the city through its mayor and board of council, in accordance with section 3488, Kentucky Statutes, alleging a compliance with the provisions

of that section, and praying the court to strike the described territory from the corporate boundary of the city.

At the October term, 1902, of the circuit court, the appellant, Z. R. Gaskin, and about eighty other persons, citizens and legal voters of the territory proposed to be stricken off, filed an answer to the petition of appellees, which traversed the allegations thereof, and interposed by affirmative averments certain objections to the striking from the city of Georgetown of the territory described in the ordinance and petition: That is to say, it is averred in the answer that to strike the proposed territory from the city would result in injury to the city, and to the property and legal rights of the inhabitants residing in the territory sought to be stricken off, in that it would deprive them of police, fire and water protection, prevent their children from attending the graded school for colored children in the city, and finally that not only a majority, but every citizen, resident and voter of the territory sought to be stricken off, was opposed to the change. The answer was signed by nearly all the voters and taxpayers of the territory sought to be stricken off. The reply filed by appellees not only traversed the affirmative allegations of the answer, but in addition alleged that the persons signing the answer did not reside in the territory sought to be stricken off, and that a majority of the voters and residents of the territory in question were not opposed to the change.

On October 23, 1902, the court assigned the case for trial on the following day, and on that day, presumably upon the calling of the case for trial, appellants moved for a continuance until the succeeding term, filing in support of the motion the affidavit of appellants Z. R. Gaskin and Thomas H. Carter. The court, however, overruled the motion, refused the continuance, and proceeded to try the cause. The trial resulted in a judgment granting the prayer of the petition, and the striking of the territory described therein from the boundary of the city of Georgetown. One of the grounds urged by appellants for a reversal of the judgment is, the alleged error of the lower court in refusing the continuance. Trial courts are allowed a broad discretion in the matter of granting or refusing continuances, which should be exercised in any given case according to the facts and circumstances thereof. But when there is an abuse of such discretion, operating to the prejudice of the substantial rights of the party applying for the continuance, it constitutes error, which may be corrected upon appeal by a court of revisory power.

It appears from the affidavit for continuance, which is in the usual technical form, that twenty-four of appellant's important witnesses were absent, when the case was called for trial in the court below. It further appears from the statements of the affidavit, that the absent witnesses would, if present, have testified that they were resident voters, property owners and taxpayers of the territory sought to be stricken from the corporate boundary of Georgetown; that they and all the inhabitants of the territory sought to be stricken off, were and are opposed to the proposed change, and that they had not been served with the subpœnas issued and placed in the hands of the sheriff the day before, though their names appear therein. In order that the materiality of this testimony may be understood, it will be well to bear in mind that two of the issues made by the pleadings were, first, was the

proposed alteration of the boundary of the city of Georgetown opposed by a majority of the resident voters of the territory proposed to be stricken off; second, were the persons resisting the striking off the proposed territory resident voters of such territory?

Section 3483, Kentucky Statutes, as amended by Act March 22, 1902, provides the mode whereby the boundary of a city or town may be added to or reduced. When such action is desired, it must, according to the provisions of the statute supra, begin with the enactment by the board of council of an ordinance accurately defining the boundary to be added or stricken off. The ordinance must be published for not less than three weeks in a newspapers or if there be no newspaper in the city or county, by advertisement by handbills, to be posted for at least fifteen days at four or more public place, in the city, and as many at public places within the territory to be annexed or stricken off. Within thirty days after the adoption, publication and advertisement of such ordinance, and twenty days before the next succeeding term, a petition shall be filed in the circuit court of the county within which the city may be situated, in the name and on behalf of the city, showing compliance with the statute as to the enactment of the ordinance, its publication or advertisement, the object and purpose thereof, together with an accurate description, by metes and bounds, of the territory proposed to be annexed or stricken from the city, and praying for a judgment to annex or strike from the city the territory described, as the object may be. The statute further provides that notice of the filing of the petition shall be given in the same manner as provided for notice of the passage of the ordinance. If no defense be made at the first term of the court after the filing of the petition and notice of same, and the court shall make no order granting further time for making defense, the court shall render a judgment annexing or striking off the proposed territory, as the object of the proceedings may be. "But at the first term of the circuit court, or within the time fixed by the court by its order, any one or more of the resident voters of the territory proposed to be annexed or stricken off, may file a defense in said proceeding, setting forth the reason why such territory, or any part thereof should not be annexed to the city, or why the limits of the city should not be reduced. The case shall be tried by the court without the intervention of a jury. If the court, upon hearing, be satisfied that less than a majority of the resident voters of the territory sought to be annexed or stricken off, have remonstrated against the proposed extension or reduction, and that the proposed extension or reduction of the limits of the city, as the case may be, will be for the interest of the city, and will cause no material injury to the owners of real estate in the limits of the proposed extension or reduction, it shall so find, and the proposed extension or reduction shall be decreed or adjudged. But if the court shall find that a majority or more, of the resident voters of the territory to be affected, or the owner or owners of said property, if there be no resident voters, remonstrated against such change, and that such change will cause material injury to the owners of real estate in the limits of the proposed extension or reduction, it shall so find, and said extension or reduction shall be denied." * * *

We take it to be the meaning of the statute supra, that though the trial court is required to consult the wishes of the resident voters or property

owners of the territory sought to be added or stricken off, the will of the majority, the one way or the other, is not absolute, but should be permitted to control, unless the conditions mentioned in the statutes, that would prevent its doing so, are found by the court to exist. In any event, it was not only proper, but necessary, for the chancellor to ascertain whether a majority of the resident voters of the territory proposed to be stricken from the boundary of the city of Georgetown, favored or opposed the change, and whether such of the persons as were resisting the changes were not resident voters of the territory proposed to be stricken off, for these were questions that vitally entered into, and should have had great weight in, the determination of the main question involved.

There can, therefore, be no doubt of the materiality of the testimony of the absent witnesses set forth in the affidavit. The fact that the absent witnessses were residents and voters of the territory sought to be stricken off, could doubtless have been proved by appellants, or others present at the trial, but the facts as to whether they favored or opposed the striking off the proposed territory, and whether they did or not sign the answer filed in the case, could have been proved only by themselves. The case is one in which numbers count. The record does not contain a bill of evidence heard on the trial in the court below, but it appears from a signed statement of the judge of that court which may be found in the record, that comparatively few of the many witnesses summoned or of the persons interested in the case, testified. Certainly not a sufficient number of them to enable the court to ascertain whether a majority of the resident voters in the territory proposed to be stricken off, were or not opposed to the change of boundary.

If the fact that a majority of the voters residing in the territory proposed to be stricken off, were opposed to the striking off, could have been ascertained in no other way than by introducing as witnesses all the voters in the territory, appellants had the right to introduce them upon the trial if their attendance could reasonably be procured, and were entitled to reasonable time and opportunity to have them summoned. The question of diligence in any given case must depend upon the facts and circumstances thereof. Appellants and those associated with them in resisting the proposed change of boundary, were not made parties to the action by appellees, but upon their own motion, and by filing answer during the appearance term. The framers of the statute evidently had in mind the difficulties likely to arise in the carrying out of its provisions. So, in view of the large number of persons to be affected by changes of municipal boundaries, to give them opportunity to make known their approval or objections to such changes, and at the same time prevent undue haste upon the part of the courts in passing upon the civil and property rights to be affected by the statute, it authorizes the court in which an action such as this is pending, in the event the resident voters of the territory proposed to be annexed or stricken off, have not time, or reasonable opportunity, to file a defense during the first term succeeding the bringing of the action, to fix by its order a later time subsequent to such term, within which to allow the defense to be filed. It would be but fair to presume that the answer was filed as soon as it could be prepared, after appellants learned of the pendency of the action.

It is true that section 9 of the Practice Act provides that "unless other-

wise directed by the parties, the clerk shall issue subpœnas for witnesses to the first day of the term, and they shall attend at such days as the case in which they are subpœnaed shall be set for trial, and until the same is disposed of by trial or continuance: Provided, however, The court may, by rule entered upon its order book, direct the clerk to set actions at law for convenient days during the term as provided above, and to issue subpœnas to said days, instead of to the first day, as provided above." (Acts 1902, page 273.)

It will not, however, be contended that the foregoing rule of practice has any application to persons made parties to the action after the commencement of and during the appearance term. It appears from the record that on October 23, 1902, this case was assigned for trial on the following day, October 24th. It further appears that on the 23d of October, and immediately after the assignment of the case for trial, appellants caused subpœnas to be issued for eighty-five witnesses, including those for whose absence the continuance was asked, which subpœnas were at once placed in the hands of the sheriff for service, but for want of time he was unable to obtain service upon the twenty-four witnesses named in the affidavit, consequently, by reason thereof, and of the court's refusal to grant the continuance, appellants were deprived of the benefit of their testimony.

It was the duty of these absent witnesses as parties to this action to attend court and be present at the trial, and appellants, for that reason, had the right to assume that they would do so, yet they did not in fact rely upon such assumption, but caused subpœnas to issue for them when the case was assigned for trial as already indicated. The fact that the absent witnesses were parties to the action, or that they did not take sufficient interest in the case to attend court and testify without being subpœnaed, should not have been allowed to prejudice the rights of appellants, to whom their testimony was as important as if they had not been parties. It is, however, insisted for appellees that if the witnesses named in the affidavit all lived in the territory proposed to be stricken off, they could or ought to have been found by the officer to whom the subpœnas were given for service, and the fact that they were not found is urged as proof that they did not live in the territory indicated. There being nothing in the record to contradict the statements contained in the affidavit that they did reside in such territory, that statement for the purpose of determining whether the continuance should have been granted must be accepted as true. Besides, considering the shortness of the time afforded him for serving the subpœnas, it is not strange that the sheriff should have failed to find twenty-four out of eighty-five witnesses named therein. Their temporary absence from home, whether to avoid the subpœna or on legitimate business, would, under the circumstances, have prevented its service upon them.

The case of City of Lebanon v. Creel, 22 Ky. Law Rep., 865, relied on by appellants, was decided under the former statute, some of the provisions of which were materially different from those of the present or amended statute, for which reason we do not regard that decision as applicable here

Being of the opinion that there was no want of diligence upon the part of appellants in this case, therefore, because of the error of the lower court in refusing to grant them the continuance asked, the judgment is reversed and

cause remanded, with directions to grant them a new trial and for further proceedings consistent with the opinion herein.

Whole court sitting.

HAGER, AUDITOR v. FRANKLIN.

(Filed May 5, 1904—Not to be reported.)

1. Commonwealth's attorneys—Per centum of fines and forfeitures—When payable—The declaration of the general assembly that 50 per centum of the fines and forfeitures shall not be received by the Commonwealth's attorneys until collected and paid into the treasury, was equivalent to saying that it should be paid to him when the fines and forfeitures are collected and paid into the treasury.

2. Inchoate interest—When a judgment is rendered for a fine or forfeiture, it may be said that the Commonwealth's attorney has an inchoate interest in it, which ripens into a demand upon the treasury when it is collected and paid into it.

3. When applied—The mere fact that the judgment is rendered one year and is not collected and paid into the treasury until the next year, does not prevent the Commonwealth's attorney from receiving his per centum of it and applying it to his salary for the year in which it is collected.

4. Resignation or death—The fact that the Commonwealth's attorney might resign or die before the expiration of his term, is a contingency that can not be considered, as it is not the province of the executive officers or courts to legislate, nor to disregard laws enacted by the law-making department of the government.

5. Conclusion—The conclusion the court has reached is, that the Commonwealth's attorney is entitled to his per centum of the fines and forfeitures when collected and paid into the treasury, until his salary, including his $500 allowance, shall reach the maximum sum of $4,000 annually.

N. B. Hays and Loraine Mix for appellant.

T. L. Edelen for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Robert B. Franklin, was the Commonwealth's attorney of the fourteenth judicial district for the term preceeding the first Monday in January, 1904. At the last November election he was re-elected and qualified on the first Monday in January, 1904. For the year of 1903 he was paid 4,000 out of the treasury, made up of the $500 fixed by the statute and his per cent. of fines recovered and paid into the State treasury. At the June term, 1903, of the Bourbon Circuit Court a judgment was rendered imposing a fine of $1,500 on the Peacock Distillery Co. At the December term of the same year of the same court a judgment was rendered against the Bluegrass Traction Co., imposing a fine of $500. An appeal from the first-named judgment was prosecuted to the Court of Appeals and there affirmed; and the judgment was paid into the treasury March 29, 1904. The judgment against the Bluegrass Traction Co. was paid into the State treasury in January, 1904.

The appellee, Franklin, has been paid in monthly installments the parts of the $500 salary fixed by the statute. He now claims he is entitled to 50

per cent. of the fines assessed against the Peacock Distillery Co. and the Bluegrass Traction Co. If this per cent. is paid him, he will have received about one half of the $4,000, which he is entitled to receive as compensation as Commonwealth's attorney for the present year, his right to which depends upon the interpretation of section 98 of the Constitution and sections 124 and 125, Kentucky Statutes, they read as follows:

Section 98 of the Constitution: "The compensation of the Commonwealth's attorney shall be by salary and such percentage of fines and forfeitures as may be fixed by law; and such salary shall be uniform in so far as the same shall be paid out of the State treasury, and not to exceed the sum of $500 per annum; but any county may make additional compensation, to be paid by said county. Should any percentage of fines and forfeitures be allowed by law, it shall not be paid except upon such proportion of the fines and forfeitures as have been collected and paid into the State treasury, and not until so collected and paid."

Section 124, Kentucky Statutes: "The Commonwealth's attorney shall receive from the State treasury 50 per centum of all judgments for fines and forfeitures rendered in favor of the Commonwealth in the several courts of his district, and this shall be in lieu of all taxed fees and perquisites; but he shall not be paid or receive any part of said per centum from the treasury except upon such proportion of the fines and forfeitures as have been collected and paid into the State treasury, and not until so collected and paid, unless that portion belonging to the Commonwealth shall be remitted by the governor."

Section 125, Kentucky Statutes: "No Commonwealth's attorney shall be paid, or receive as compensation for his services as such officer, for any one year, from the State treasury, more than $4,000; and should the salary and per centum of fines and forfeitures allowed under this act to such officer in any district, for any year, exceed said sum of $4,000, said excess shall not be paid to such officers, but the fiscal court or the board of commissioners, in counties where, for county governmental purposes, a city is, by law, separated from the remainder of the county of any county, may allow the Commonwealth's attorney for that county such compensation as they see proper, to be paid as other claims against the county are paid."

The lower court adjudged that the appellee was entitled to the 50 per centum of the fines. It is urged for reversal: First, that as the judgments were rendered in 1903 and the appellee having received $4,000 as salary for that year, he is not entitled to 50 per cent. of the fines paid into the treasury by virtue of the judgment; second, that the per centum of fines, the same as the salary fixed by law, should be paid monthly out of the treasury. It will be observed that under section 98 of the Constitution salaries of Commonwealth's attorneys should be fixed by law, and that it shall be uniform in so far as it is paid out of the treasury, and that it shall not exceed the sum of $500 per annum. It was also contemplated that in addition to the sum so limited to be paid out of the treasury, the general assembly should provide, by law, that they are to have a percentage of the fines and forfeitures collected and paid into the treasury. Section 124, Kentucky Statutes, provides that they shall receive from the State treasury 50 per cent. of all fines and forfeitures, but that the treasurer shall not pay that per centum

"except upon such proportion of the fines and forfeitures as have been collected and paid into the State treasury * * * unless that portion belonging to the Commonwealth shall be remitted by the governor."

Section 125, Kentucky Statutes, limits his salary to $4,000, payable out of the State treasury. The declaration of the general assembly that the 50 per centum should not be received by the Commonwealth's attorney until collected and paid into the treasury, was equivalent to saying that it should be paid to him when the fines and forfeitures were collected and paid into the treasury. The legislature could not have made its meaning clearer had it expressly provided that the 50 per centum of the fines and forfeitures should be paid to the Commonwealth's attorney when collected and paid into the treasury. When a judgment is rendered for a fine or forfeiture, it may be said that the Commonwealth's attorney has an inchoate interest in it, but that interest does not ripen into a demand upon the treasury until it is collected and paid into it. The mere fact that a judgment is rendered one year and is not collected until the next year and paid into the treasury, does not prevent the Commonwealth's attorney from receiving his per centum of it and applying it to his salary for the year in which it is collected, because the statute provides that when collected and paid into the treasury, he shall receive his per centum of it. It is urged that a Commonwealth's attorney might thus be enabled to collect his entire year's salary in the first months of the year and might then resign or die.

This may be true. That suggestion is fully answered by a statement that it is not the province of executive officers and courts to legislate, nor to disregard laws enacted by the law-making department of government. The Constitutional Convention saw proper to restrict the power of the general assembly so as not to allow Commonwealth's attorneys reasonable compensation, except upon the contingency that they could recover judgments for fines and forfeitures and have them paid into the State treasury. When the legislature has expressly provided that when the contingency arises which enables Commonwealth's attorneys to collect part of his salary, the courts ought not to hold that it has not arisen, simply because a Commonwealth's attorney might die or prove unfaithful to his trust.

It is urged that if the Commonwealth's attorney should be paid his per centum of fines and forfeitures monthly. If the legislature had recognized that the practical operation of the statute fixing the salary of the Commonwealth's attorney would give him his per centum of the fines and forfeitures monthly, it would have so declared. It must have known that this could not be done, because, at the close of many months in the year probably there would be nothing to the credit of the Commonwealth's attorney for fines and forfeitures, besides it is impossible to tell what the Commonwealth's attorney's per centum of fines and forfeitures will be during the year; therefore, it is not possible to pay his per centum in monthly installments. The conclusion the court has reached is, that the Commonwealth's attorney is entitled to his per centum of the fines and forfeitures when collected and paid into the treasury. This conclusion is in harmony with the spirit of the statute, for the amount of the Commonwealth's attorney's salary depends upon a contingency. If an event happens in the early part of the year which brings a sum to make up his salary he should have it, because it is.

possible that the contingency might not happen which would give him anything in addition to the $500, and if it did happen it might not be until the last of the year. Chinn v. Shackelford, 25 Ky. Law Rep., 1813, is in harmony with our conclusion in this case. We do not think the cases cited by the attorney general support the opposing view.

The judgment is affirmed.

WOOLRIDGE, &c. v. WOOLRIDGE.

(Filed May 13, 1904—Not to be reported.)

Guardian and ward—Construction of statute—Where a guardian failed to obtain authority from the county court as provided by section 2041, Kentucky Statutes, to institute an action for the sale of his ward's real estate, but after the institution of the suit and before taking proof or the rendition of the decree, he filed a petition in the county court to obtain such authority, which was granted, and this authority empowered the chancellor to decree the sale of the land, the sale will be upheld.

James Bradley for appellant.

Victor F. Bradley for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Settle.

The appellee, James R. Woolridge, who is the father and statutory guardian of the infant appellants, Marion and Annie Washington Woolridge, resides in the State of Tennessee. His wards reside with him in that State, and his appointment and qualification as guardian was in the county of their residence in the same State.

Appellant, as guardian of his wards, brought suit in the Scott Circuit Court of this State, to obtain a decree for the sale of a small, unimproved and unproductive tract of land of twenty-five acres, owned by his wards lying in Scott county. The infants were made defendants, summons was served upon their guardians ad litem, a warning order entered against them, and an attorney appointed to defend. Proof was taken by depositions to show, and it did show, that the land was indivisible, unimproved and unproductive, that an offer of $86 per acre, which appellee had received for the land, was its full value, and that its sale at that price, and a reinvestment of the proceeds would be more beneficial to the infant owners than to retain the land. Upon this evidence, after the customary reports from the guardian ad litem, attorney for the nonresident defendants, and the execution by the guardian of the bond required by section 493, Civil Code, a decree was duly rendered by the chancellor, directing the sale of the land at public auction by the commissioner, who was ordered to accept no bid below $86 per acre, and to pay the proceeds of the land when collected, to appellee as guardian of appellants.

It appears, however, that appellee before instituting the action failed to obtain of the county court of Scott county authority to do so, as required by section 2041, Kentucky Statutes. But after the institution of the suit, and before the taking of proof or the rendition of the decree therein, he filed a

petition in the county court of Scott county to obtain such authority, which was granted him by judgment of that court, the judgment not only confering authority upon him as guardian, to bring the suit, but also to receive the proceeds of the land, and take same to the State of Tennessee for reinvestment, or other proper use of the infants. The guardian ad litem of the infants, complaining of the judgment of the circuit court, prosecutes this appeal which presents but one question for our consideration, viz.: Did the authority to maintain this action and receive the proceeds of the sale of the land, which, was conferred upon appellee, as guardian, by the county court after the institution of the action, empower the chancellor to decree the sale of the land? We think the question should be answered in the affirmative.

Section 2041 of the statute, supra, provides: "Where there is no guardian of a nonresident minor in this Commonwealth, his guardian appointed and qualified according to the law of the place where the minor resides, may collect, receive and remove to such place of residence, any personal estate of the monor being in this Commonwealth. Upon application by a petition in a summary way, the county court of the county having jurisdiction to appoint a guardian may authorize such foreign guardian to sue for, recover, and so remove any personal estate of such minor, or otherwise to act, as a guardian appointed in this Commonwealth."

The better practice would be for the foreign guardian to obtain of the county court the authority that may be conferred under the statute quoted, before bringing such an action as the one at bar, but we find nothing in the statute that would prevent the county court from conferring the necessary authority after suit is brought, provided it be done, as in this case, before judgment is rendered under which the guardian may come into the possession of the money or property of the infant sought to be affected by the action. The main purpose of the statute is to prevent the foreign guardian from collecting, receiving, or removing the personal estate of the ward, without authority from the county court having jurisdiction to allow it to be done. The authority for the purpose contemplated may be granted by the county court in a summary way, as was done in this case, and the amended petition showing the guardian's authority in this case, was filed before any steps were taken in the circuit court, by which the guardian could have recovered or received the money of his wards.

The case of Watts v. Wilson, 93 Ky., 495, and Parish, By, &c. v. Hatchett, 15 Ky. Law Rep., 847, are not in conflict with the views herein expressed. In those cases the guardian never received authority from the county court to institute, or maintain the actions, either before or after they were brought; consequently the proceedings in each case were properly held to be invalid.

Wherefore, the judgment is affirmed.

TANDY v. RILEY.

(Filed May 12, 1904—Not to be reported.)

1. Malicious prosecution—Where a defendant in an action for malicious prosecution laid all of the facts upon which he bases his prosecution before a competent attorney, and fairly obtained his advice that such prosecution

was legal, and he acted in good faith upon it, it is a complete defense to the action against him.

2. Joinder of actions—In an action for malicious prosecution and slander the court properly compelled plaintiff to elect which of the two actions he would prosecute, because, while the two charges are injuries to character, they amount to more than injuries to character, and the two actions can not be joined.

H. G. Botts for appellant.

Cammack & Perry for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Nunn.

The parties to this action are first cousins, have lived in the same vicinity from their infancy, and were good friends until the month of February, 1901, when the subject of this controversy arose.

Early one morning in the month of February, 1901, before it was light, the appellant went to his kitchen and opened the side door, when a bundle of switches, which had been set against the door, fell into the room. Attached to this bundle was a note addressed to appellee, as follows: "If you and Sam Tandy don't stop so much d—d telephone talk, you will get h—l whipped out of you with these switches." After it was light, appellee and another followed the tracks of persons who had placed the switches at his door, on to or near the premises of appellant. One of the persons wore a small sharp-pointed shoe, and the other appeared as if he had on a felt boot, i. e., a sock with no shoe to it, but with an overshoe on the outside. Appellee knew that appellant had two men working for him that wore the footwear described. Appellant owned, or was interested in a telephone line which made connection with a line to Carrolton, Ky. Appellee was, at the time, endeavoring to construct another line to connect with a line to Carrolton, and he was impressed with the belief that this was the telephone matter referred to in the note left with the switches. Appellee consulted with the county judge and related the circumstances to him, who advised him to submit the facts to the Commonwealth's attorney, which he did, and the attorney informed him that a felony had been committed, and requested him to go before the grand jury, which was then in session, and relate to that body the facts. Appellee did so, and also gave to the grand jury the names of the two men who worked for appellant, viz., Arch Long and Gabe May. Long was summoned and testified before the grand jury that he and Gabe May placed the switches at the door of appellee and Sam Tandy; that Gabe May wrote both of the notes, one of which was read to appellant and the other to appellant's wife; that appellant advised the placing of the switches at his brother, Sam Tandy's door, to avert suspicion. Upon this evidence, the grand jury returned an indictment against May, Long and the appellant for a felony, for the violation of section 1241a of the Kentucky Statutes. May and Long escaped, and appellant had his trial and was acquitted.

Appellant then brought this action against appellee, alleging that he falsely, willfully, maliciously and without probable cause, obtained this indictment against him, and caused his arrest, and aided in the prosecution

thereof, to his damage in the sum of $10,000. In another paragraph of the petition he sued for slander, setting forth the objectionable and defamatory language, and asked damages to the extent of $10,000. On motion of appellee the court compelled appellant to elect which cause he would prosecute; the one for malicious prosecution, or the one for slander, and he elected to prosecute for malicious prosecution.

Appellee answered, denying the malice, false arrest and the want of probable cause, and also pleaded as a defense that he, in good faith, related truthfully all the facts connected with the transaction, to worthy and eminent counsel and sought their advice in the matter, and was advised by this counsel that a felony had been committed, and was advised by the Commonwealth's attorney for that district to go before the grand jury and relate the facts to that body for its investigation, which he did. The appellant did not reply to this affirmative matter and defense, nor was it controverted of record. On the trial evidence was heard, and at its conclusion the court, at the instance of appellee, peremptorily instructed the jury to find for appellee. The jury returned a verdict as directed, and the court dismissed appellant's petition, and overruled his motion for a new trial, and he has appealed. His first complaint is that the court erred in forcing him to elect which paragraph of his petition he would prosecute, and contends that the two causes of action were properly joined under section 83, subsection 5, of the Civil Code. It is true that, in a sense, malicious prosecutions, like slander, are injuries to character. But malicious prosecutions and false arrest amount to more than injury to character; it is an injury to the person. But this is not an open question. This court in the case of Dragoo v. Levi, 2 Duv., 520, has passed upon this exact question, holding that these actions could not be joined.

He also complains that the court erred to his prejudice in giving to the jury the peremptory instruction. In the case of Masker v. McCourt, 19 Ky. Law Rep., 1897, this court decided that if a defendant in an action for malicious prosecution, laid all the facts upon which he based his prosecution before a competent attorney, and fairly obtained his advice that such prosecution was legal, and he acted in good faith upon it, it was a complete defense to the action. (Ahrens & Ott Mfg. Co. v. Hoehr, 21 Ky. Law Rep., 299; Lancaster v. Langston, 18 Ky. Law Rep., 299.)

Appellee's pleading in this case alleges that he obtained the advice of counsel in the way and manner thus stated, and this was not controverted by appellant, and as the pleadings stood, appellee was entitled to the peremptory instruction. Even if we are mistaken in this, appellee's proof sustained his pleading on this point, and it was not contradicted, and he was entitled to the instruction on the evidence. Appellant's acquittal on the indictment was not evidence, or sufficient evidence, of the want of probable cause on the part of appellee.

Wherefore, the judgment of the lower court is affirmed.

TOWN OF BARDWELL v. HARLIN, &c.

(Filed May 12, 1904.)

Municipal corporations—Sixth class towns—Tax rate—Constitution—Bardwell, a town of the sixth class, having by a two-thirds vote created a bonded debt for waterworks in 1901, and having a regular tax levy of 50 cents on the $100 worth of taxable property in said town for current expenses, can not make an additional levy of 50 cents on the $100 worth of property therein to pay interest on its bonded debt aforesaid, same being in conflict with section 157 of the Constitution, providing that for other than school purposes, the tax rate of towns of less population than 10,000 shall not exceed 75 cents on the $100 worth of property.

J. W. Nichols for appellant.

Shelbourne & Kane for appellee.

Appeal from Carlisle Circuit Court.

Opinion of the court by Chief Justice Burnam.

At the November election, 1901, two-thirds of the qualified electors of Bardwell, a town of the sixth class, voted to incur a bonded indebtedness of $9,000 to enable the town authorities to erect a waterworks for the benefit of the citizens of the town. In pursuance to this vote eighteen bonds of the town for $500 each, due in twenty years, were issued and sold by the trustees of the town, realizing therefor $9,660 in cash, which was paid into the town treasury. Prior to the creation of this indebtedness, the trustees of the town had regularly levied a tax of 50 cents on each $100 of taxable property within the limits of the town to pay the current expenses thereof. After the issual and sale of the bonds in January, 1903, the trustees of the town in addition to the usual levy to meet current expenses, by proper ordinance levied a special tax of 50 cents on the $100 of taxable property in the town, to pay the interest on these bonds and to create a sinking fund for the payment of the principal thereof at maturity. Whereupon appellees, residents and taxpayers of the town, brought this action against the town and its collecting officer, to enjoin the collection under the ordinance of so much of said levy as was in excess of 75 cents on the $100 of taxable property within the town, on the ground that to this extent the tax was ultra vires. The defendants in their answer, plead the various ordinances authorizing them to incur the debt to build waterworks, and allege that the special tax of 50 cents was necessary to meet the interest on the bonds as it matured, and to pay off the bonds themselves at their maturity, and claim that in so doing they were within their legal and constitutional power. A general demurrer was filed to this answer by the plaintiffs, which was sustained by the trial court, and defendants declining to plead further, judgment was rendered enjoining and restraining the town authorities from collecting taxes under the levy, in excess of 75 cents on each $100 of taxable property within the town, and the defendants have appealed.

The decision of the questions presented by the appeal involves the construction of sections 157, 158 and 159 of the Constitution. Appellants contended that the limitation contained in section 157 of the Constitution of a tax rate of 75 cents on the $100 for towns and cities having less than 10,000 inhabitants, only applies to the rate of taxation which may be levied by the

municipal authorities for the ordinary current expenses of the town, and does not apply to an indebtedness which has been created by a vote of the electors; that as to indebtedness of this character, section 159 of the Constitution expressly confers the authority and makes it the duty of the municipal authorities to levy such additional tax as may, in their judgment, be necessary to provide the means for the extinguishment of a debt so contracted by a vote of the people. The sections referred to were plainly intended to limit the tax rate and indebtedness of municipalities of every class, by fixing a maximum tax rate and per centum of indebtedness upon the assessed valuation of property therein, beyond which they could never go except, first, for school purposes; second, for the purpose of paying the interest and providing a sinking fund for the extinction of indebtedness contracted before the adoption of the Constitution; and, third, where the public health or safety of the municipality should so require.

Section 157 expressly provides that for other than school purposes the tax of all cities and towns having less than 10,000 inhabitants, shall not exceed 75 cents on the $100, unless it be necessary to enable such city to pay the interest on and provide a sinking fund for the extinction of indebtedness contracted before the adoption of the Constitution. Section 158 provides that towns of the class to which Bardwell belongs shall not be authorized or permitted to incur indebtedness to an amount including existing indebtedness exceeding in the aggregate 3 per centum on the value of the taxable property therein, to be estimated by the assessment next before the last assessment, unless, before the adoption of the Constitution, such municipality had incurred an indebtedness in excess of such limitation. And to still further emphasize the purpose of the contention it was expressly provided by section 159, that when any city, town, taxing district or other municipality was authorized to contract an indebtedness, it should be required at the same time to provide for the collection of an annual tax sufficient to pay the interest thereon, and to create a sinking fund for the payment of the principal thereof within not more than forty years from the time of contracting the same. An examination of the debates which followed the report of the committee on municipalities in the constitutional convention, shows that this was the construction placed upon the section at that time.

The chairman of the committee in explaining the provisions of the report, used these words: "The second, third and fourth clauses relate to and control the power and methods of taxation. Property holders must have some rights even against a majority. Unlimited taxation may mean confiscation, and the citizen has a right to know that there is a limit beyond which no taxation can ever go."

The construction contended for by appellant would have the effect of entirely abrogating the limitation contained in these constitutional provisions for the protection of taxpayers. These sections were construed in Whaley v. Commonwealth, 110 Ky. 154, 23 Ky. Law Rep., 92; O'Bryan v. City of Owensboro, 24 Ky. Law Rep., 469-645; Sparks v. Robertson, 24 Ky. Law Rep., 2336; and in each of these cases the construction indicated herein was adopted. In our opinion appellant has no power to levy or collect a tax in excess of 75 cents on the $100 upon the value of the taxable property of the town.

Judgment affirmed.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. v. DRUIEN.

(Filed May 12, 1904.)

1. Contracts to be partly performed in each of two States—A contract which is to be partly performed in each of two States or countries, is presumed to be governed by the law in force in the State or country in which it is made.

2. Carriers—Liability for damage by fire not caused by its negligence—By the laws of the State of Illinois a stipulation in a contract by a common carrier, limiting its liability for loss from fire not caused by its negligence, is valid and enforcible, and, therefore, where in a contract made by appellant in the State of Illinois with appellee for the shipment of a carload of horses from Peoria, Ill., to Louisville, Ky., in which the liability of the carrier was limited to such loss only as was caused by its own negligence, there can be no recovery for damages occurring to appellee's horses by fire in said shipment, which was not caused by the carrier's negligence.

Humphrey, Burnett & Humphrey and John T. Dye for appellant.

Fairleigh, Straus & Fairleigh and G. S. & J. A. Fulton for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the oourt by Judge O'Rear.

The appellant, Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., is an Ohio and Indiana corporation, operating a line of railroad connecting Peoria, in the State of Illinois, with Louisville, in the State of Kentucky. The latter city is one of the termini of its railroad.

On the 20th day of July, 1899, the appellee delivered to the appellant at Peoria, Ill., sixteen horses, being one car load, to be transported by the appellant over its line of railroad from Peoria to Louisville, there to be delivered by the appellant to its connecting line for transportation to Bardstown in Nelson county, Ky. The shipment was a through one from Peoria, Ill., to Bardstown, Ky. The railroad company at the time it received the horses, made and delivered to the appellee a through bill of lading, providing for the delivery to its connecting line at Louisville, which contained stipulations limiting its liability for loss or damage to the property while in transit. On appellant's line of railroad, at a point in the State of Illinois, the car in which appellee's horses were, caught fire while the train was running, whereby three of the horses were killed, and two others so severely injured as to practically destroy their value. This suit was brought on the contract of carriage to recover of appellant the damages sustained by appellee for the loss and injuries named. The petition charged the loss and damages in this language: "Plaintiff avers that while said horses were in transit and being transported by defendant under its said agreement, and by the negligence of the defendant, three of said horses were killed or so injured that they died therefrom within less than seven days, and two others severely injured so as to greatly impair their value. All of which injuries were received and incurred on defendant's line of railway in the State of Illinois, while in defendant's custody and under its control, and on said — day of July, 1899; all to the damage of the plaintiff in the sum of $1,375."

The answer denied the charge of negligence. By the second paragraph of

the answer the railway company pleaded that the horses were delivered to it in Illinois; that the bill of lading evidencing the contract between the parties, was there signed by the railway company and the plaintiff, through his agent; that this bill of lading provided that the railway company should not be responsible for any injury occasioned to the horses by fire, not the result of the negligence of the railway company; that the only injury received by the horses was from an accidental fire which was not the fault of the railway company; that this stipulation in the bill of lading was valid by the law of the State of Illinois; that the contract of shipment was made in Illinois; that the carriage began in that State, and that the fire occurred in that State.

Other defenses were tendered in additional paragraphs of the answer, but a demurrer was sustained to them. In view of the conclusion at which we have arrived, we do not deem it necessary to notice further the defenses held bad on demurrer. The demurrer was overruled as to the first two paragraphs. The effect of the ruling of the court was to hold:

1st. That the stipulation limiting the liability of the carrier for loss or damage resulting from fire not caused by its negligence, is a valid stipulation, enforcible against the plaintiff in this action.

2d. That, therefore, the denial of negligence is a sufficient plea.

Upon the issue whether the fire was the result of appellants' negligence the jury found a verdict for the railroad company. Upon motion for a new trial made by the plaintiff the court retracted its ruling, and held that the stipulation contained in the bill of lading limiting the liability of the carrier, is not an enforcible one in this action. The new trial was consequently granted. At the second trial, precisely the same evidence was introduced as upon the first. The court peremptorily directed the jury to find the plaintiff's damages, about which there was really little or no dispute. This ruling of the trial court presents the real question for decision here, which is: was the stipulation in the bill of lading valid as a defense to this action?

It is claimed by appellant, and conceded by appellee, that the contract is to be regarded as an Illinois contract, and, therefore, to be construed and given effect according to the laws of the State of Illinois. But appellee makes this concession with the proviso that the terms of the contract do not contravene any general public policy of the State of Kentucky.

The rule for the construction of contracts made in one country to be performed wholly or in part in another, as applied by the courts of America and England, is a common law rule. It is the result of the efforts of the court to enforce the agreement of the parties to the undertaking. Foremost in such an inquiry, where the instrument itself is silent or ambiguous upon a given point, is to find the intention of the parties, to the end of giving it effect. It is presumed where the contract is made in one country to be performed wholly in another, that the laws of the latter were in the minds of the contracting parties, and that the terms of the contract were made with respect thereto. But where the agreement was to be performed partly in the country where made, and partly elsewhere, the general rule seems to be that the laws of the country where the contract was made were in the contemplation of the parties, as to its legal meaning and effect, and it will be construed and enforced accordingly. (2 Parsons on Contracts, 570; Bishop

on Contracts, sections 1891-2-3; the text and authorities in 5 Am. & Eng. Ency. Law, 2d edition, 302, also sustain the foregoing statement.)

But there are necessary exceptions to this rule. As where the contract, though valid where made, is immoral, and the like. (Bishop on Contracts, section 1882.) This presumed intention of the parties, being based upon probability, can not be entertained, at least ought not to be, when to do so would be to convict them of an intention to violate a statute, whether there is a penalty attached to it or not. It may be doubted whether, in the general run of such transactions, the parties really have in mind the laws of either of the States. The fiction is a necessary convenience contrived by the courts to supply those latencies that seem to take for granted that the law, which is very often the outgrowth or the beginning of a custom, and, therefore, generally known and observed, was to be resorted to in the interpretation of the terms of the agreement, being, as is sometimes said, read into the agreement. Otherwise the contract would be meaningless, or so obscure as to its meaning as to be unenforcible, which, of course, could not have been mutually intended. But the rule is not a hard and fast one. Appellee urges that one of its exceptions is where, though it were the real intention of the parties that the contract should be interpreted by the laws of the country where made and where it was to be partly performed, its terms are in violation of the public policy of the country where it is sought to be enforced, the courts of the latter will not enforce such objectionable terms; that to do so would be to make the agreement of the parties paramount to the laws of the forum, and to compel the courts to violate the laws of their State, which they are sworn to uphold, in order to carry into effect an agreement between individuals. This point is made clear it is argued by applying to the attempted enforcement of this contract section 196 of the Constitution of this State, which reads as follows: "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability."

At the common law, which obtains in Illinois as well as in this State, a common carrier is liable for loss of freight in its charge, occurring by fire whether or not caused by its own negligence, its liability being that of an insurer. (Lawson Contract of Carriers, 244; Rorer on Railroads, 1238; Adams Express Co. v. Guthrie, 9 Bush, 78; Adams Express Co. v. Nock, 2 Duv., 562.) But at comomn law it could limit its liability for loss occurring by fire not caused by its negligence. (Anchor Line v. Dates, 68 Ill., 369; Adams Express Co. v. Haynes, 42 Ill., 89; Anchor Line v. Knowles, 66 Ill., 150; Merchants Despatch Co. v. Theilbar, 86 Ill., 71; Merchants Despatch Co. v. Leysor, 89 Ill., 43; Black v. Wabash Ry., 111 Ill., 351; Brown v. Louisville & Nashville R. R. Co., 36 Ill. App., 140; First National Bank of Hupeston v. Lake Erie R. R., 65 Ill. App., 21; Illinois Central R. R. Co. v. Frankenberg, 54 Ill., 88; Lawson on Contract of Carriers, 244.)

Under section 196 of the Constitution such contracts can no longer be made in this State.

Appellee contends that the provision of the Constitution is the most emphatic indication possible of the public policy of this State on that subject; that no contract to carry freight in this State can limit the common law

liability of the carrier with respect thereto, wherever made. He goes further. He insists that a contract by a common carrier to carry freight anywhere, even if made and to be executed entirely out of this State, if liability is sought to be enforced under it in this State, can not be enforced here; that the public policy of this State forbids its enforcement, if to do so, would be to limit its common law liability.

The cases of The Kensington, 183 U S., 263, and Liverpool Steam Co. v. Phœnix Insurance Co., 129 U. S., 397, and Chicago, &c., R. R. Co. v. Gardner, 51 Neb., 70, are cited and relied on as sustaining appellee's position.

An earnest desire to contribute to the uniformity of the law, as well as great respect for the eminent courts whose decisions are invoked, have lead us to a careful examination of the opinions, and of what we understand to be the principle controlling them.

In the case of The Kensington, 183 U. S., 263, the facts were these: The Kensington, a steamer transporting passengers from Antwerp to New York, issued to a passenger at Antwerp a ticket for New York, which had printed on it stipulations relieving the steamship company from certain acts of negligence on the part of its servants. A libel was filed by the passenger in a Federal court to recover damages for the loss of baggage belonging to the passenger. The contract against liability was relied on to defeat a recovery, and the laws of Belgium were invoked to support the validity of the contract because it was made in Belgium, where the limitations of liability of the carrier even as against its own negligence was valid. Mr. Justice White, delivering the opinion of the court, said: "Testing the exemptions found in the ticket, by the rule of public policy, it is apparent that they were void, since they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel, for all neglect in loading or stowing, and, indeed, for any and every fault of commission or omission on the part of the carrier or his servants * * * As the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that 'all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made,' it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force, or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the lex loci governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties, can the public policy of a country be set at naught. (Story, Conflict of Laws, sections 38, 244.) * * * In the very nature of things, the premises, upon which this decision must rest, is controlling here, unless it be said that a contract, made in a foreign country, to be executed in part in the United States, is more potential to overthrow the public policy, enforced in the courts of the United States, than would be a similar contract, validly

made, in one of the States of the Union. Nor is the suggestion that, because there is no statute expressly prohibiting such contracts, and because it is assumed no offense against morality is committed in making them, therefore, they should be enforced despite the settled rule of public policy to the contrary. The existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion."

We have quoted thus freely from the opinion of the learned justice, not only because it is the strongest statement of the general principle on which appellee relies to which our attention has been directed, but also because we are in accord with it. The other Supreme Court case, Liverpool Steam Co. v. Phœnix Insurance Co., is like the case of The Genesee. In each of these cases it is to be noticed that the contracts were to be partly performed in the United States, and almost wholly within their jurisdiction. In each of them the injury sustained, the breach of the contracts, was within the maritime jurisdiction of the United States Courts, to wit, upon the high seas. The gist of these decisions is that where parties contract, to be partly performed in the United States, and where the breach occurs and the liability attaches within their jurisdiction, their courts in construing the contract, will apply to it their own laws. Neither of the cases go so far as to say, nor do we understand that they intimate, that if the breach of a valid contract made in a foreign country, had occurred there, and, therefore, the liability of the carrier had been initiated and consummated there, that the provisions of the contract would not have been a good defense to a suit brought upon it in the courts of the United States, although such provisions were against the public policy of the United States. The Nebraska case does not show where the loss occurred. It does not appear in its statements to be necessarily opposed to these views.

The public policy of this State is necessarily confined to the regulation of its own affairs and transactions occurring within its sovereignty. No State can be said to have a public policy as to the administration of justice, or as to the service of quasi public agencies, or as to contracts made with respect thereto, transpiring wholly abroad. The public policy of a State can no more have extra-territorial effect than can a statute of the State. If the State of Illinois permits the making of contracts by common carriers limiting their liability for loss of freight not by their own negligence, that is a policy of that sovereignty which can not possibly concern the State of Kentucky. Such contract made there, and to be performed there, being valid there, is the lawful agreement of the parties to it. Their minds have met, and the consideration for it has been based upon that condition and state of law. If one of the parties sues in this State to enforce a liability under such contract, it in no wise involves the public policy of this State for our courts to determine what the rights of the parties were before they came into court, and to adjudge that liability according to their contract, there being noting immoral in it. But whether or not it would be enforced here by granting affirmative relief, if its terms presented a complete defense to the suit of the other party upon it, that defense ought to be allowed. We know that there are freight railroads that traverse both the States of Illinois and Kentucky. A shipment of freight contracted, begun and ended in the State of Illinois is the making and execution of an Illinois contract. If sued there upon it,

the carrier could plead its terms as a defense to certain liability under it. Why should the courts of this State, if the complainant should sue the carrier here, it having agents here upon whom process might be served, annul a provision of the contract that was legal where made, where it was to be executed, and where it was executed? Instead of enforcing a valid contract of parties, that would be to make a contract for them, which neither had ever contemplated, and which possibly one of them at least might have refused to enter into.

When a contract of shipment is made to be partly performed in another State where made and partly in this State, the agreement of the parties, if valid where made, ought to bind them as to all rights and defenses accruing under the contract in that State, although the provision could not be binding if made here. But as to that part of the contract that is to be performed in Kentucky, it will be read in the light of the laws and Constitution of this State, and be construed and applied accordingly. It will be conclusively presumed that the parties so intended, and that, therefore, the provision limiting the carrier's common law liability was not intended to apply to that part of the shipment that was to be performed here, for the court will not presume that the parties intended either a vain or illegal thing. That contracts to be performed partly in two States will be construed according to the laws of each of the States relating to the portions to be performed there respectively, is sustained in Bishop on Contracts, section 1394.

If shipper and carrier by entering into the contract beyond this State, could incorporate binding provisions in it limiting the duties and liabilities of carriers in this State notwithstanding the prohibition of the Constitution, it would be to put the bargains of individuals above the organic law, and to substitute them for that public policy exercised by the State for the best welfare of the whole people of an organized society. This they ought not, and will not, be permitted to do.

The test then comes, when and where did the liability under the contract before us occur? It is admitted, and it is clear, that it is an Illinois contract that is valid in that State; and that it was to be partly performed in that State. While being so performed it was broken there. Appellee contends that the contract bound the carrier to deliver the horses at the agreed destination which was in Kentucky, and that the failure to deliver was the breach of the contract, which occurred in this State. But the contract was not only to deliver, it was also to safely carry. It was broken in Illinois when the horses were killed. A cause of action upon the contract instantly arose. A suit could have been maintained there that moment for its breach. The agreement, the duty of the carrier, its failure if it did fail, and its contract immunity from that cause of loss, all arose under, and are to be controlled by, the laws of Illinois. Up to that time there was not an incident of the parties' agreement or rights relating thereto, that had come under the laws of Kentucky, or that the public policy of this State could possibly effect. This suit is to enforce those rights and liabilities as of the time and place of their occurrence, not to change them.

It is, therefore, directed that the judgment appealed from be reversed and that the cause be returned to the circuit court, with directions to enter judgment upon the first verdict.

Whole court sitting.

CONNOR v. HOME AND SAVINGS FUND CO. BUILDING ASSOCIATION.

(Filed May 12, 1904—Not to be reported.)

1. Decretal sale—Confirmation—Failure to make deed—Subsequent adjudications—Valid title—A lot purchased at decretal sale, made more than twenty-five years ago, which sale was confirmed by the court and a deed ordered to be made to the purchaser, but was not made, and which sale has, in two subsequent adjudications in which all persons in interest were parties, been recognized and confirmed and a deed made thereunder, passed a valid title to the purchaser.

2. Authority of guardian to borrow money to pay off lien on ward's property—The circuit court has no authority to authorize a guardian to borrow money with which to pay off a lien on property in which the wards have a remainder interest.

3. Life tenant—Subrogation—Liens paid by him on property in which she has a life interest—A life tenant in property on which there is a mortgage lien, by paying said mortgage, is entitled to be subrogated to the lien of the mortgagee to the extent of the principal of the debt which he paid.

E. L. McDonald for appellant.

John L. Jackman for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

This is an appeal from an order of court overruling exceptions to the commissioner's report and confirming the report of a sale of a house and lot in the city of Louisville, Ky.

The appellant presents only two exceptions upon which he asks for a reversal. The first is that he can not acquire a good title to the property on the ground that the legal title thereto is still outstanding in one J. M. Bryant or his trustee, because no deed was made to the purchaser under a judicial sale made more than twenty-five years since, in a suit instituted by Bryant's trustee to settle his estate. The agreed facts are that in the year 1876, Henry D. Pope, as trustee of J. M. Bryant, filed an action in the Louisville Chancery Court against J. M. Bryant and his creditors, to settle his estate and to enforce a mortgage lien on various lots in Bryant's subdivision. The lots were sold by order of court, and H. D. Pope became the purchaser. One of the lots being the one in controversy. The sale was confirmed May 26, 1876. On April 27, 1877, nearly a year thereafter, an order was entered suggesting the death of H. D. Pope and directing the deed to be made to his widow and children, according to their respective interests. No deed was made pursuant to this order. Prior to this order the administrator of H. D. Pope instituted an action in the same court, making his widow and children and creditors defendants, and upon the answer, counterclaim and cross petition of George B. Eastin, trustee of Minor S. Pope, it was adjudged that Eastin, as such trustee, is entitled to half of these lots purchased by H. D. Pope, and commissioners were appointed to make a division. The report of the commissioners was confirmed April 16, 1881, the lot now in question being one of the lots allotted to Eastin, trustee of Minor S. Pope. Afterward, Eastin filed the amended and supplemental answer and cross

petition, to which J. M. Bryant and W. O. Dodd, his assignee in bankruptcy, were also made defendants, in which he alleged the fact that no deed had been made in the former action to the property purchased by H. D. Pope, and on the 13th day of June, 1881, the court in that action, made an order divesting Bryant and Dodd of all interest in this property; also divesting the widow and children of H. D. Pope of all interest therein, and confirmed the title in Eastin, as trustee of Minor S. Pope. Subsequently Eastin, as trustee, brought an action in the same court against Thomas P. Jacobs, administrator of Minor S. Pope, and his heirs and creditors, for the purpose of settling the accounts of the trustee and the estate of the decedent, in which all the facts were set forth contained in the supplemental answer and cross petition, and the judgment thereon referred to. In this last action a judgment was entered July 10, 1890, ordering a sale of all the property allotted to Eastin, trustee, and at the sale thereof W. E. Young became the purchaser of the lot now in question, which sale was confirmed November 3, 1890, and a deed was made to him. He afterwards conveyed this lot to Mrs. Irvine, the mother of the infant defendants herein.

We are of the opinion under the facts of this case that Bryant, Dodd and the widow of H. D. Pope and his children were, by the action of the court, divested of all title and interest they had in this property. The case of Gill v. Hewitt, 7 Bush, 10, is not like this case. In that case there were no steps taken by suppemental proceedings or otherwise to perfect the title.

In the case of Jones v. Bigstaff, 95 Ky., 395, it was held that where the report of division had been confirmed but no deeds were made, the parties having gone into possession of their portions, the division was regarded as effective as if the grant had been expressly made.

Appellant's second exception is in substance that the court, under the facts of this case, had no jurisdiction to render a judgment ordering a sale of the property of the infant defendants. The facts are briefly these: On January 30, 1891, Hugh J. Irvine, defendant in the court below, purchased the lot of land now in question, and had it conveyed to his wife as her general estate. On September 21, 1891, Irvine and wife mortgaged the property to William Herman for $650 borrowed money, which was used in erecting a residence on the property. Mrs. Irvine died intestate in 1893, survived by her husband and two infant children, also defendants in the court below. In 1897, Herman's mortgage having fallen due, he threatened to enforce his mortgage lien. Irvine nor his children had any means to pay the debt and applied to appellee for a mortgage loan on the property for $850 with which to pay off the Herman mortgage, together with street claims and back taxes which had accumulated against the property. The appellee declined to make the loan unless he got leave of the court to join in the mortgage as the statutory guardian of his infant children. On February 9, 1897, Irvine, in his own right, and as such guardian of the infants, filed his petition in the Jefferson Circuit Court setting out all the facts, and a judgment was entered granting the prayer. Whereupon the mortgage was executed, and the money was received from the appellee and used in paying off the Herman mortgage, street claims and back taxes as provided in the judgment.

Irvine, the guardian, who was also the life tenant, made the payment that was stipulated in the mortgage until the debt was reduced to $665, and then

having failed to continue the payments, this action was instituted in the court below by the appellee in March, 1902, to enforce its lien. The chancellor decided that the mortgage was void as to the infants, but held that the mortgagee was entitled to be subrogated to the extent of $650, the amount of the Herman mortgage without interest, upon the principle that it was the duty of the life tenant to keep down the interest. Also to the extent of $32, one half the cost of the street improvements, dividing this equally between the life tenant and the remainderman, as a permanent improvement to the property, and to this extent a judgment was rendered enforcing appellee's lien. Under the authority of the case of Posey, Receiver v. Dugan, 22 Ky. Law Rep., 1104, the court was correct in adjudging this mortgage void. The court had no power to authorize the guardian to mortgage his ward's realty; the jurisdiction of the court in such matters are not inherent, but statutory.

In the Dugan case, supra, the chancellor gave leave to the guardian to encumber the infant's real estate for the purpose of erecting costly improvements thereon, while in the present case the chancellor gave leave to the guardian to mortgage the property of the infants to keep it from being sold under an old mortgage executed by the ancestor. It was simply the substitution of the new mortgage for the old. The loan in this case was granted at the request of the guardian and sanctioned by the chancellor in order to keep the property from being sold, all acting in good faith.

In the case of Flanary v. Utley, 9 Ky. Law Rep., 585, the court said: "Subrogation is but an equitable assignment. In our opinion the existence of a contract is not necessary to the right. It may arise from the circumstances of the case. It is an invention of equity founded upon natural justice, and is to be exercised for the protection of the innocent."

In the case of Donahue v. Daniels, 58 Md., 595, money was loaned to a guardian for the purpose of removing incumbrances on the ward's property, in the way of taxes and ground rent; it was held that although the life tenant was bound to keep these charges down during his tenancy, and failing to do so, they constituted liens for which the property could be sold, yet the guardian removing those incumbrances against his ward's property, would have a just and legitimate claim against them, and would be entitled to the benefit of the lien which he paid off; and that when he borrowed money for that purpose, and it was so applied, the lender was entitled to be subrogated to the guardian's rights in respect to the wards and their property.

The case of State National Bank v. Viceroy, 24 Ky. Law Rep., 894, was an action brought to enforce a mortgage to which the wife pleaded coverture. The court, after quoting the case of Treadway v. Pharis, 13 Ky. Law Rep., 789, and Kelly v. Ball, 14 Ky. Law Rep., 132, said: "The case before us is as strong as either of these, for the money was furnished on the agreement that it should be secured by a mortgage; the note was executed by the wife, and the mortgage was executed by her and her husband for the purpose of securing this money by a lien on the land. The money having been furnished on the expectation that it should be secured by a mortgage on the land, if for any reason the mortgage was defective, the creditor must be subrogated to the existing lien on the land which his money was used to discharge."

In our opinion the lower court was right in overruling the appellant's exceptions to the report of sale, as he obtained a good title.

Wherefore, the judgment is affirmed.

TOWN OF LONDON, &c. v. HOPE, &c.

(Filed May 13, 1904—Not to be reported.)

1. Banks and banking—Taxation—Construction of statutes—The object of the act of March 21, 1900, relating to the taxing of national banks, provided for a mode of assessment of the shares of such stock and the payment of taxes thereon, and in an action seeking to enjoin the collection of taxes upon shares of stock in a national bank where the petition contains no allegation that such stock was not listed for taxation at the place of residence of the owner for the year for which such taxes are sought to be collected, it was error not to sustain a demurrer to it.

2. Same—While neither the bank, nor its president nor its cashier, is the owner of shares of stock sought to be taxed, the bank is the agent of the shareholder and notice to it is notice to his agent, within the meaning of section 4241, Kentucky Statutes.

3. Same—Section 3 of the act of March 21, 1900, containing the express provision that "when any shares of stock have not been listed for taxation for state, county and municipal purposes, under levy or levies, for any year or years since 1892, it shall be the duty of the president and cashier to list same for taxation, under levy or levies for the years omitted" the legislative intent to assess shares of stock retrospectively could not have been plainer than by the employment of such language, and the act is not invalid for the reason that it seeks to tax retrospectively shares of national bank stock for the years they have escaped taxation.

Cook & Jones for appellants.

Charles R. Brock, J. A. Craft and J. W. Alcorn for appellees.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Barker.

The appellees are citizens of Laurel county, Kentucky, residing without the corporate limits of the town of London, the county seat. The First National Bank of London is a national bank organized in this State under the banking laws of the United States, having its place of business in the town of London; its capital stock is $50,000, divided into shares of $100 each.

The appellees are now, and were on the 15th day of September, 1899, the owners of certain shares in this bank. The municipality of London, by proper proceedings, was seeking to subject all of the shares of the bank to municipal taxation for the fiscal year succeeding the 15th day of September, 1899; whereupon the appellees, considering that their shares of bank stock were not subject to municipal taxation for the period mentioned, instituted this action in the Laurel Circuit Court, and obtained an injunction restraining the municipality and its officers from proceeding to enforce the collection of the taxes on the shares belonging to them. Appellant filed a general demurrer to this petition, which being overruled, it declined to plead further, and thereupon the court perpetuated the injunction; from which judgment the town has appealed.

It is conceded by appellant that the allegations of the petition are sufficient to raise the question of the legality of the ordinance, and the proceedings looking to the collection of the taxes in question against the shares of appellee. The right to impose the tax herein involved, is based upon the act of the general assembly of the Commonwealth of Kentucky, approved March 21, 1900, entitled "An act relating to the taxation of the shares of stock of national banks;" so much of which as relates to the issue in this case is as follows: "Whereas, the Supreme Court of the United States has lately decided that article 8, chapter 108 of the acts 1891, 1892, 1893 is void and of no effect, in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in 1892, any adequate mode of taxing national banks, while State banks are now, and have been ever since 1892, taxable for all purposes, State and local, therefore,

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"§ 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

"§ 2. For the purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

"§ 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of 1892, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies." * * *

The proceedings complained of by appellees were set on foot by the authorities of London, after March 21, 1900, and were, therefore, in their nature retrospective. Prior to the enactment of the statute cited, there was no law specifically authorizing the taxation of the stock by the town of London; and, as we understand the contention of appellees, they claim, first, that the statute does not authorize a retrospective assessment and collection of the taxes for municipal purposes, and, second, if it does, to that extent it is illegal. We do not think either of these positions are sound.

Section 3 of this statute contains the express provision that, when any shares of stock have not been listed for taxation for State, county or municipal purposes, under levy or levies, for any year or years since 1892, it shall be the duty of the president and cashier to list the same for taxation, under levy or levies for the years omitted. We do not see how the legislative intent to assess the shares of stock retrospectively, could have been made plainer than by the language employed in section 3 of this act. Nor is the provision of the act invalid for the reason that it thus seeks to retrospectively tax the shares of national banks for the years which they have escaped taxation.

Cooley, in his work on Taxation, 2d edition, page 291, says: "The basis of an apportionment of taxes may as lawfully be retrospective as the reverse; that is to say, it may as well have regard to benefits theretofore received as

to those which may be received thereafter. It has, therefore, been very properly held that there is no constitutional or other legal objection to the levy of taxes to pay for municipal improvements which had been previously made. Nor in apportioning the tax as between individuals is there any valid objection to making it on consideration of a state of things that may now have come to an end; as where a tax is imposed on the extent of one's business for the preceding year, instead of upon an estimate of the business for the year to come. Where taxes are levied for a series of years upon the same valuation of property, they are necessarily retrospective, but not, therefore, incompetent, though one may be taxed upon property which he has long ceased to own when the tax is levied. But there is commonly a presumption that any new tax law was not intended to reach back and take for its standard of apportionment a state of things that may no longer be in existence. 'New burdens,' it is very justly said, 'ought always to be prospective' and it is reasonable to suppose the legislature has intended that they should be. Such a supposition is in harmony with the general rule of law which requires the courts to 'always construe statutes as prospective and not retrospective, unless constrained to the contrary course by the rigor of the phraseology.' This is the rule not only as a construction of the grant of power, but also as to all the incidents; though a remedial provision may well be presumed to have been intended to reach back for the purposes of justice."

This court, in the case of Langdon-Creasy Co. v. Trustees of Owenton Common School District, 25 Ky. Law Rep., 823, in speaking of the place of taxation for personal property, said: "The legislature has the unquestioned authority to fix the situs of property for the purpose of taxation." It was also so held in the case of Wren v. Boske, 24 Ky. Law Rep., 1780. In the case of the Commonwealth v. Citizens National Bank, 25 Ky. Law Rep., 2100, the validity of the act in question, both in its current and retrospective phases, was upheld. On the subject in hand, it is said: "The act of March 21, 1900, did not, therefore, make that taxable which was not taxable before, but simply provided another mode for the assessment of the shares of stock and the payment of the taxes. It was the duty of the assessor to make the assessment. It was also the duty of the president and cashier of the bank to list the shares of stock with the assessor; but when the assessment was not made the property was simply omitted from the tax list, and the sheriff is authorized by section 4241, Kentucky Statutes, 1903, to institute the proceeding to have any omitted property assessed. A penalty may be properly imposed in the proceeding because the property was not listed with the assessor as required by law, and stood as any other property, for the assessment of which a proceeding under section 4241 may be instituted. While neither the bank, nor its president, nor its cashier, is the owners of the shares of stock, the bank is made by the act, the agent of the shareholder, and the notice to it is notice to his agent, within the meaning of section 4241. The president and cashier were properly made defendants because it is made their duty by the statute to list the stock. The bank is required to keep a list of its shareholders, and, therefore, knows who they are. Notice to the agent in an assessment of property is sufficient notice to his principal, whom he represents. Certainly the agent can not raise the

question of the want of notice to his principal, or maintain that the proceeding is in violation of the fourteenth amendment of the Constitution of the United States. Nor can it raise the question that peradventure some of the shares may have changed hands. These defenses can only be made by the shareholders, and do not properly arise in this case."

The general principle with reference to the taxation of national bank stock, both for current and past years, under the act in question, is so fully and elaborately discussed in the opinion cited, that it is unnecessary to notice further that phase of this case. The act clearly makes it the duty of the bank to list all of the shares of its stockholders not theretofore listed for taxation, and to pay the taxes imposed for the year or years in question, whether they be State, county or municipal. There is no conflict in this with the principle announced in Scobee v. Bean, 109 Ky., 526, wherein it was held that, prior to the act, national bank stock was to be listed for taxation at the domicil of the owner, as other personal property. The object of the act of 1900, so far as its retrospective feature is concerned, is only to give a situs for taxation at the domicil of the bank for those shares of stock not theretofore listed for taxation. Wherever they have been so listed, they are not subject to be again taxed for the same year. The petition contains no allegation that the shares involved in this action were listed by the owners at their domicil for the year 1899; if this omission was an oversight when the case returns, the appellees should be permitted to amend their pleading in order to make it conform to the facts.

Under the views we hold of the act of 1900, the demurrer to the petition should have been sustained; wherefore, the judgment is reversed for proceedings consistent with this opinion.

AYER & LORD TIE CO., &c. v. DAVENPORT.

(Filed May 18, 1904—Not to be reported.)

1. Sales of timber—Contracts—Instructions—Where a tie company holding a mortgage on certain timber in releasing its lien upon the payment of its debt endorsed the contract of sale by the mortgagee to another, the object in its endorsement being merely to release the lien on the timber, it can not be held liable with the seller who executed the contract to the buyer for a violation of its terms. The endorsement was prepared by an attorney who did not understand the conditions of it, and contained words that did not aptly express its purpose. In an action upon the contract, the tie company not being liable for the acts of the seller of the timber, its motion for a peremptory instruction, in an action against it for the damages of the seller in cutting timber in violation of the contract of sale, should have been sustained.

2. Same—The rule is that where things sold are to be identified by a subsequent measurement, the title does not pass by the contract; and this being true although the cutting of timber by the seller after its sale was a violation of the contract, the purchaser could have no claim against ties made from timber so sold in the hands of a purchaser of them.

Thos. W. Thomas and Sam C. Molloy for appellant Tie Co.

Nat H. Howard for appellant Taylor.

John M. Wilkins for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hobson.

In the fall of the year 1899, F. G. Taylor purchased of the heirs of Carroll Marcum the timber on a tract of land owned by them in Warren county for $2,400, and as he did not have the money he got the Ayer & Lord Tie Co. to advance it for him. To secure the tie company in advancing the money for him he had the Marcum heirs to make the deed for the property directly to it, the agreement being that it should be only a mortgage and give a lien on the property for the money. It was so regarded by the parties. About the same time the deed was made, the tie company entered into another contract with Taylor, by which it agreed to receive and pay for all the ties made by him on the land, to be not less than 17,000 nor more than 30,000, at the price of 25 cents each for first class ties and 10 cents each for second class. This contract recites an advance of $2,400 in cash paid, which was the money advanced for Taylor to pay the Marcums. The tie company also executed to Taylor a deed for the property subject to its lien. The deed to the tie company was caused by it to be recorded. Taylor failed to have the deed to him recorded. In this condition of the title in the spring of 1900 Taylor sold to C. G. Davenport certain timber on the tract, and the following contract was executed: "This contract made and entered into this 18th day of April, 1900, by and between F. G. Taylor, of Morgantown, Butler county, Kentucky, of the first part, and C. G. Davenport of Warren county, State of Kentucky, of the second part, Witnesseth: That the said F. G. Taylor for and in consideration of the sum of $2,069 cash in hand paid, has this day sold to the said C. G. Davenport, all the hereinafter described timber on the land known as the 'Marcum' land, near Riverside, in Warren county, Kentucky, being a part of the timber bought by F. G. Taylor from the Ayer & Lord Tie Co. (see contract recorded in Warren county court clerk's office), and being a part of the timber bought by said Ayer & Lord Tie Co. from Marcum, and as follows: All the poplar, walnut and ash timber on said land suitable for saw logs; all the chestnut oak, white oak, red oak and chestnut suitable for saw logs twenty-four inches and up across the stump, to be measured the smallest way, and one bark to be measured. Said stump to be not less than three feet high from the ground, except red oak, which shall be not less than thirty inches from the ground. Said Davenport is to have the same rights to cut and remove said timber from the land and such rights as to roads and landings as is given to F. G. Taylor by his contract above referred to and to have said timber removed from the land by September 1, 1902. It is understood that if F. G. Taylor's tie-makers, prior to April 18, 1900, had cut any of the timber described above, and over twenty-four inches across the stump, said Davenport is to have no claim on same, and if any timber twenty-four inches or above across the stump and suitable for saw logs has been cut by Taylor's tie-makers since April 18, 1900, said timber is to be left by Taylor and become the property of Davenport. It is also agreed by the parties that if one party, by accident or otherwise, should cut any timber belonging to the other, such party shall leave such timber for the other party. It is also understood that J. A. McDaniel has a contract from F. G. Taylor to peel tan bark on said land, and should he peel any timber that is suitable for saw logs and twenty-four inches and up at the stump, after April 18, 1900, said

Davenport is to have the timber so peeled and the pay for the bark peeled from such timber, and McDaniel is to pay Davenport therefor at the same rate paid Taylor as per his contract with Taylor. Nothing herein is intended to defeat the right of Taylor to the use of roads and landings, but they are to have equal right to the use of same.

"Witness our hands the day and date first above written.

"F. G. TAYLOR,
"C. G. DAVENPORT."

The following endorsement appears on said contract:

"The Ayer & Lord Tie Co., of Chicago, Ill., who purchased and owned the timber named in the within contract, and by special contract with said F. G. Taylor, authorized him to dispose of same, hereby ratify, approve and confirm the within contract, hereby releasing and acquitting to said Davenport all their right, title and interest in and to the timber embraced in said contract between F. G. Taylor and C. G. Davenport, the purchase price thereof, $2,069, having been paid to said company by said Davenport upon delivery to him of this contract. All changes and interlineations made before signing and delivery of the contract.

"AYER & LORD TIE CO.,
"By PHIL R. SMITH, Secy and Treas.

"Witness: W. H. VAUGHN."

On June 8, 1902, Davenport filed this action against Taylor and the Ayer & Lord Tie Co., alleging that in violation of the contract they had cut from the land and appropriated to their own use something over one hundred trees purchased by him under the contract and certain tan bark, in all of the value of something like $600. Taylor filed an answer stating that Davenport had cut from the land timber to which he was not entitled under the contract, and denying the cutting of the trees charged, except a few admitted in his answer. The Ayer & Lord Tie Co. filed an answer denying the allegations of the petition and pleading that it had cut no timber from the land; had only signed the endorsement on the contract to release its lien and that it had no other interest in the matter. The proof on the trial showed that Taylor and his hands had continued getting out ties after the contract was made, but it did not show that the Ayer & Lord Tie Co. had cut any timber from the land. The proof for Davenport tended to sustain the allegations of his petition as to the number of trees cut by Taylor and his hands, purchased by him under the contract, but the statements of the witnesses lack definiteness in that they do not appear to have measured the stumps or to have made a careful count. The proof for Taylor showed that Davenport and his men had cut more of the timber not sold to Davenport than Taylor and his men had cut of that sold to him, although both clearly cut some timber belonging to the other. The proof by Taylor showed a count of the stumps and seems to be more satisfactory than the proof by Davenport. The jury found a verdict for the plaintiff against both of the defendants for $979.75, and they have appealed.

It is insisted for the tie company that the peremptory instruction asked by it should have been given. The proof is unquestioned that the tie company had nothing to do with the cutting of the timber. This was done by Taylor and his hands. The only ground for holding the tie company liable seems

to be its execution of the endorsement on the contract. The endorsement was prepared by an attorney at Bowling Green who did not understand exactly the condition of the title, and it, therefore, contains some words not aptly expressing its purpose. It was signed by the tie company without much consideration, but the facts are clear. The tie company had only a lien on the timber for its advance of $2,400; it received the $2,069 paid by Davenport, and it released therefor its lien on the timber he bought. It did not thereby make itself responsible for the acts of Taylor, who afterwards went in on the land and cut timber which he had sold to Davenport. It is no more responsible for such acts of Taylor than it would be if the timber had been cut by a stranger to the contract, for it simply released its right in the timber. Davenport bought the timber of Taylor, and the contract itself shows that Taylor had bought from the tie company. There are no warranties or covenants in the endorsement. There is nothing in it obligagating the tie company as guarantor for Taylor. To impose on the tie company the obligation of a surety for Taylor would be to extend the writing beyond the fair import of its terms. There are words in it sufficient to evidence that Taylor was its agent in making the contract, and that it ratified his act, but the proof is clear that he was not its agent in fact and that he acted solely for himself. Besides, if the tie company had, by Taylor, as its agent, sold the timber to Davenport and made the contract with him, it would not be responsible for Taylor's acts if he had thereafter, on his account, and not as its agent, or within the apparent scope of his authority, gone on the land and cut the timber which had been sold to Davenport; for the principal is never bound by the acts of his agent beyond the apparent scope of his authority. Taylor was not an agent for the tie company to cut timber or get out ties. In fact he was not an agent for it for any purpose. He was simply a contractor getting out ties on his own account, and the tie company was no more responsible for what he did on the Marcum land than for what he did on any other land on which he cut ties. It is true Taylor hauled to the river and delivered to the tie company the ties he made, including those made from the timber which Davenport had bought, and the tie company paid him for them. But Davenport did not take title to any specific trees under his contract. What trees would come up to the dimensions required by the contract, was to be subsequently ascertained by actual test. To ascertain this, Davenport's men had some scry-boards made which they applied to the trees as they went through the woods cutting. The rule is that where the things sold are to be ascertained or identified by a subsequent measurement, the title does not pass by the contract. When this contract was made, therefore, the title to no particular trees vested in Davenport, and if Taylor cut a tree, though it was a violation of the contract, Davenport would have no claim upon the ties made from the tree in the hands of a purchaser. We, therefore, conclude that the tie company is not liable for damages for the acts of Taylor, and that its motion for a peremptory instruction should have been sustained.

By the terms of the contract Davenport bought only the trees of given dimensions, but notwithstanding this the court, by instruction 1, allowed the plaintiff to recover if the defendants "did in addition take and appropriate to their or his own use six or any number of red oak, or five or any

number of chestnut logs which had been cut by plaintiff." There was evidence that the plaintiff cut a number of trees that were under size, and the fact that he had cut the logs did not give him any right to recover for them under the contract, unless the trees were of the dimensions required by the contract. Taylor admitted in his answer cutting five trees by mistake, of the value of $1.25 per tree. Instruction 5 was prejudicial to him in that it told the jury that he admitted taking five trees, without stating the whole of the admission. For the value fixed in the answer for the five trees taken tended to show they were small trees. Instruction 5 should have been omitted, also the last clause of instruction 1 as to the $10 for repairing roadway, and in lieu of it instruction 4 should have been incorporated in instuction 1, with the additional statement that the defendant also admitted in his answer that he had cut and carried away, by mistake, five trees of the value of $1.25 per tree purchased by plaintiff. In view of the evidence on the trial and all the facts, we conclude, considering the instructions, that a new trial should be granted. On another trial the court will instruct the jury further to off-set the claims of the plaintiff and the defendant, as determined by them, and find a verdict for the party entitled thereto, and that in so doing they should estimate any timber wrongfully cut by either party, at its fair market value as it stood on the ground and any logs or tan bark wrongfully taken, at their fair market value at the time of the taking.

Judgment reversed and cause remanded for a new trial.

LEAHY v. LILLARD, &c.

(Filed May 18, 1904—Not to be reported.)

Contract to pay board—An agreement by a father, evidenced by a note, to pay his son for board will be upheld where it appeared that in order to care for his father, the son moved from Cincinnati to Covington, doing so until the father's death, giving him all needed attention, and where it further appeared that the father expressed his purpose to pay his son when he got his money on a judgment in his favor.

Robert C. Simmons for appellant.

John S. Rich for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Paynter.

The question here for review is the right of the appellant, John F. Leahy, to be paid out of the estate of his father, Patrick W. Leahy, the sum evidenced by a note, which reads as follows:

"$1,024. Covington Ky., December 15, 1900.

"One day after date, I promise to pay my son, John F. Leahy, or order, the sum of $1,024, for value received.

"This amount I owe my son is for my board and keeping since January 14, 1896, at the rate of $4 per week, and is to be paid out of the money coming to me from the C., N. & C. Street Railroad Co.

(Signed) "P. W. LEAHY.

Witness:

"JOSEPH RAYWOOD,

"ROBERT BAILEY."

Appellees make two defenses to the note, first, that it was given for diet of the maker of the note without an agreement for compensation; second, that the maker did not have mental capacity enough to enter into the contract evidenced by the note.

In January, 1896, Patrick W. Leahy had received an injury and was suffering from such other physical ailments as to render him practically helpless in the matter of making a living or of taking proper care of himself. The appellant was living in Cincinnati and his father needed his care and attention, so he moved to Covington, with a view of taking care of him, and did so until his death in January, 1901. During all this time the son gave him all needed care and attention. The son was a mechanic and worked for the support of himself, family and father. A number of witnesses testified that the father expressed a desire to pay his son for his board and clothing, and said that if he got his money on his judgment against the street car company, he could do so. If the suit was upon a parol agreement and this was the only testimony offered, under the doctrine of the cases of Price v. Price's Ex'or, 101 Ky., and Reynold's Adm'r v. Reynolds, 93 Ky., 556, it would be insufficient to establish an agreement for compensation for diet. In denying the right to recover, the court in Price v. Price's Ex'or, said: "Such claims as a rule rest entirely in parol; are based largely on loose declarations and presented years after the services are rendered when the lips of the party principally interested are closed in death. They require the closest scrutiny to prevent an injustice being done."

In Reynolds Adm'r v. Reynolds the court was discussing a case where a daughter sought to recover for services rendered after reaching the age of twenty-one, while living in her father's family, and the testimony tended to show that her father on several occasions said to others that the daughter would be well paid, but the court said: "There is no evidence of any express contract to pay, or any facts that would constitute an equivalent to such an agreement." It was further said by the court: "Courts ought to be well satisfied before exacting payment for services rendered the intestate by his children, that a contract existed, or such facts and circumstances as would necessarily lead to such a conclusion." This case differs materially from the Price and Reynolds cases. It is expressly recited in the note that the promise was made for a debt he owed the son for board and keeping. He could not have owed him the debt unless he had contracted to pay for his board. This is a solemn admission in writing that he owed the son the amount which he promised to pay. If the note could not be the basis of the action, the admission in it as to his indebtedness to the son "would necessarily lead to * * * a conclusion" that the father had made a contract to compensate his son for board and keeping.

Independent of the foregoing conclusion, the note in suit is an evidence of a contract by the father to compensate the son for board, etc. While the evidence shows that the intestate was quite an old man, feeble in health, diminishing with advancing years, but after a careful reading of all of the evidence there is no escape from the conclusion that he had mind enough to enter into the contract in question. It was in accord with his often expressed desire to compensate his son for the sacrifices which he had made for him.

The judgment is reversed for proceedings consistent with this opinion.

COMMONWEALTH v. BAVARIAN BREWING CO., &c.

(Filed May 13, 1904—Not to be reported.)

1. Indictment—Evidence—Upon a trial upon an indictment against appellees charging them with fixing the price of beer in pursuance of a conspiracy in violation of section 3915, Kentucky Statutes, there being no evidence that the increased price was the result of a conspiracy to increase it, the action of the lower court in giving a peremptory instruction to find for appellees, will not be disturbed.

2. Same—Where there was no avowal made as to what a witness would state, it is impossible for this court to say that the trial court erred in sustaining an objection to the questions.

3. Same—Where the transcript o' the evidence is not contained in the bill of exceptions, it can not be said that the trial court erred in overruling motion to file it.

N. B. Hays and Maurice L. Galvin for appellant.

George Washington and J. L. Elliston for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

The appellees, who are twenty-four brewing firms and corporations, constituting what is known as the Brewers Protective Association, were indicted by the grand jury of Kenton county, charged with the offense of unlawfully conspiring together for the purpose of regulating and controlling the price of beer in Kenton county, by agreeing to refuse to sell beer at less than a certain price fixed and agreed upon by and between them; and that in pursuance of such conspiracy, they did fix the price of beer to be thereafter sold by them in Kenton county, and refused to sell it at a price less than that so unlawfully agreed upon, in contravention of section 3915 of the Kentucky Statutes. A plea of "not guilty" having been entered, a trial was had, which resulted in the courts' peremptorily instructing the jury, after all the evidence of the Commonwealth was in, to find the appellees not guilty. Of this ruling by the trial court, the Commonwealth is now complaining.

To prove the substantive facts of the conspiracy, the Commonwealth introduced Bernard Lemker and Charles P. Lang, who were chief officers of two of the defendants in the indictment; it also introduced two or more saloon keepers in Covington, and a printed circular purporting to be signed by all of the appellees. Without stating in detail the substance of the testimony of the Commonwealth, a careful reading of it warrants us in saiyng that it resulted in a total failure to establish the existence of the offense charged. The Commonwealth undertook to show by Lemker and Lang that the Brewers Protective Association, after March 27, 1898, agreed and conspired with each other to add to the regular price of each barrel of beer sold by them, the sum of $1, that being the amount of the government tax added for the purpose of defraying in part the expense of the Spanish-American war. The witnesses failed, utterly, to give the required evidence, and there was nothing for the trial court to do, after the close of the Commonwealth's evidence, but to give the peremptory instruction in favor of appellees.

The Commonwealth filed several grounds for a new trial, among which was the fact that it was surprised at the evidence of Lemker and Lang; the affidavit of the Commonwealth's attorney being filed to show that these witnesses in a former trial had testified to sufficient facts to establish the offense charged in the indictment, and that, prior to the second trial, they had told him that their evidence would be the same as that upon the former trial. The affidavit, however, does not show, or even hold out the hope, that upon another trial the Commonwealth will be able to produce additional evidence to that of the witnesses whose testimony was such a disappointment. The rule is well established, that in order to entitle a party to a new trial upon the ground under consideration, there must be some evidence that he can produce other testimony which will probably change the result; any other rule would multiply trials to no wise purpose. (Rankin v. Commonwealth, 82 Ky., 429; Ivers v. Avery & Sons, 6 Ky. Law Rep., 220; Smith v. Morrison 8 A. K. Mar., 81; Theobold v. Hare, 8 B. Mon., 43, and Tuttle v. Commonwealth, 18 Ky. Law Rep., 665.)

The Commonwealth also complains that the trial court refused to permit it to contradict or "refresh" the witnesses by reading to them their testimony on the former trial, and then asking them if that was not what they testified to, and if it was not true. The Commonwealth would undoubtedly have the right to contradict the witnesses, although put upon the stand by it, if they had testified to any prejudicial fact against its interest, but in this case, the witnesses merely failed to testify as the Commonwealth excepted them to, and if its contention in this matter can be maintained, then, it will result that under the guise of contradiction, the former testimony of the witnesses can be produced as substantive testimony in the case on trial. This is not permissible. (Champ v. Commonwealth, 2 Met., 17-25; Blackburn v. Commonwealth, 12 Bush, 181; Howe, &c. v. Skidmore, 24 Ky. Law Rep., 2048; Loving v. Commonwealth, 80 Ky., 507; Boner v. Commonwealth, 19 Ky. Law Rep., 411.)

To the complaint that the court refused to allow the witnesses to answer certain questions propounded to them, it is sufficient to say that in no instance was any avowal made as to what the witness was expected to, or would, say, if permitted to answer the question. The failure to avow the substance of the expected answer makes it impossible for us to say that the court erred in sustaining the objection to the questions. (Rogers v. Commonwealth, 28 Ky. Law Rep., 1114; Moser v. South Covington and Cincinnati Street Ry. Co., 25 Ky. Law Rep., 154.)

The transcript of the evidence produced on the former trial, and which was sought to be introduced as evidence by means of the testimony of the stenographer, is not contained in the bill of exceptions, and we have no means of knowing its purport, and can not, therefore, say that the trial court erred in overruling the motion to file it. There was no evidence to show that the printed circular emanated from the Brewers Protective Association, which seems to have held its meetings in Cincinnati, and not in Covington; or that the added dollar to the price of the beer to cover the war tax imposed by the government, was the result of an agreement so to do. Upon the whole case we are satisfied that the court did not err in sustaining the motion for a peremptory instruction.

Judgment affirmed.

DAY, &c. v. LONG, CHAIRMAN.

(Filed May 13, 1904—Not to be reported.)

1. Action on lost note—In this action to recover of appellants upon a lost note which it is alleged they executed and delivered to appellee, the evidence sustains the chancellor's finding that the note was executed, and his judgment will not be disturbed.

2. Same—In an action upon a note which was executed to bear in part the expense of an election contest in which appellant was a party, the defense that the note was without consideration as it was a voluntary contribution to a campaign fund, will not be maintained, because the parties might agree among themselves as to how the burden of the contest should be borne, and when appellant agreed to pay his part of the contest expenses, it can not be said that his note for that part of the expense was without consideration.

C. W. Miller, S. H. Patrick, J. J. C. Bach and Hazelrigg, Chenault & Hazelrigg for appellants.

Breckinridge & Shelby for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hobson.

Appellee Long instituted this suit against appellants, Walter R. and Floyd Day to recover on a note for $1,010, which he alleged they executed to him in December, 1899, and which was lost. W. R. Day filed an answer, in which he denied the execution of the writing sued on and pleaded that he signed a note containing a stipulation to the effect that it was not to be paid, unless the other minor State officers contributed their proportionate part to defray the expenses of the contest proceedings then pending, and the further stipulation that it was not to be paid unless the attorneys employed should succeed in retaining their offices.

Floyd Day filed an answer, in which he denied the execution of the note at all. The proof for the plaintiff showed these facts: W. R. Day was the Republican nominee for State Treasurer and G. W. Long was chairman of the campaign committee in the year 1899. All the nominees were assessed, by the committee, in porportion to the salaries of their offices for campaign expenses. Day's assessment was $560, which he failed to pay during the campaign. The Republican candidates received certificates of election and their opponents filed notice of contest. They were again assessed to raise a sum to pay attorneys and the cost of the contest. Day's assessment for this purpose was $420, making, with the prior assessment of $560, the sum of $980.

Long, as chairman, needed money, and Day did not have it. Long requested him to give a bank note, with security, on which money could be raised and thereupon the interest for six months, $30, was added to the principal, and a note due in six months was drawn up for $1,010, which W. R. Day signed and agreed to have his uncle Floyd Day, sign as his surety. After a while he brought the note back to Long signed also by Floyd Day; Long accepted the note and employed attorneys relying on the note to pay them. He placed the note in a drawer in his office, with other papers of his, as chairman of the campaign committee, and in some way it was lost. The evidence for the defendants was to the effect that Floyd Day did not sign the note, but only W. R. Day, and that he signed it with the condition

In it set out in his answer, also that he lost the office of treasurer and the conditions were not complied with. The court gave judgment for the plaintiff and the defendants appeal. On the question of fact involved the weight of the testimony seems to be with the plaintiff. Several witnesses who read the note testified that there were no conditions in it and that both the names were signed to it. When Floyd Day was first approached about the note he said that he had signed a note for W. R. Day, his nephew, but that he did not think it was that much. When payment was demanded of W. R. Day he said he wanted to explain matters. When told by another, of the loss of the note, and requested to have another note executed by himself and Floyd Day in the place of it, he said that was all right and should be done. Finally on being pressed to pay, he wrote that he would be at Stanford on a given day and would then come over to see the attorney, but this he failed to do. The circumstances surrounding the parties also sustain the plaintiff's version of the transaction, and we think the chancellor's conclusion of fact can not be disturbed under the evidence.

It is also insisted for the defendants that the note is without consideration as it was a voluntary contribution to the campaign fund. We can not see this. The attorneys had to be employed for the contest and as Day had not paid his campaign contribution, it was agreed that this should go into the fund to pay the attorneys. The parties might agree among themselves how the burden of the contest was to be borne and when Day agreed to pay a certain sum for his part of the costs and this was acted on by Long, it can not be said that there was any want of consideration for the note. The law presumes a consideration for a note. The evidence fails to overthrow the legal presumption; on the contrary it strongly sustains it.

Judgment affirmed.

Whole court sitting.

LAUREL COUNTY COURT v. PENNINGTON.

(Filed May 18, 1904—Not to be reported.)

1. Epidemic diseases—Compensation to physicians—For necessary medical attention and services during the prevalence of epidemic diseases, physicians appointed as health officers, may be compensated by the authorities where they occur, but as to the persons receiving the benefits of such service who are able to pay therefor, the physician must look to them alone for compensation.

2. Burden of proof—Where it is sought, by a physician, to recover upon an account which is denied, the burden is on the plaintiff to establish the insolvency of the persons for whom he rendered the service and furnished medicine and other things charged for, and in such cases the items making up the claim should be set out in detail, giving the names of persons attended, treatment given, medicine furnished, and sanitary measures taken to prevent the spread of the disease.

Jas. Sparks and D. K. Rawlings for appellant.

W. R. Ramsey for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Settle.

This is an appeal from a judgment of the Laurel Circuit Court, whereby appellee recovered of appellant $670.72, subject to a credit of $300, as of the date of the judgment.

It appears from the record that appellee, who is a practicing physician and member of the board of health for Laurel county, made out and presented to the fiscal court of that county for payment, a claim of about $1,281.33, for medical services rendered, and certain items of medicine, and merchandise furnished, during an outbreak of smallpox in and about the city of London. Only $300 of the amount claimed by appellee was allowed by the fiscal court. From that part of the judgment disallowing the remainder of his claim, appellee took an appeal to the circuit court, and the trial in that court resulted in his favor, as hereinbefore indicated. The credit of $300 allowed in the judgment, being the amount recovered by him in the fiscal court.

An inspection of appellee's account will show that each of the first five items states only in a general way, that it is for "services in small pox," without indicating how, or to whom rendered. The sixth item does not state to whom the telegram charged for was sent, or for what purpose. The seventh and eighth items only give the initials of the persons to whom the cash mentioned therein was furnished, but does not indicate for what purpose it was furnished. The remaining items are fairly explicit, except that they do not state that the James Taylor therein mentioned was afflicted with smallpox. The account as a whole is indefinite, and extremely unsatisfactory. The evidence furnished by the record is likewise unsatisfactory. While it supplies some of the omissions of the account by giving the names of certain families and persons, who were either attended or quarantined by appellee while afflicted with smallpox, it is not definite as to the kind of medical treatment given, as to medicines furnished, or as to the sanitary measures taken to prevent the further spread of the disease; and there was no evidence conducing to prove that the persons to whom he furnished medicines or medical treatment were insolvent, or unable to pay him therefor. Upon cross-examination, however, it was incidentally brought out by appellant that one or more of the families attended by appellee were amply able to pay him for his medicines and services, and that James Taylor, who was boarded and attended by appellee while afflicted with smallpox, was the owner of an unincumbered tract of land, and neither a married man or housekeeper.

There was no evidence tending to prove that there was a contract between appellee and the fiscal court, or that any action was taken by that court directing or requesting the appellee to perform the services mentioned in the account. For necessary medical attention and services rendered during the prevalence of epidemic diseases, physicians appointed as health officers for cities, towns and counties, as provided by section 2060, Kentucky Statutes, may be compensated by the councils, trustees, or county courts, of the cities, towns or counties, where such epidemics occur, but where the persons receiving the benefit of such services are able to pay therefor, it would seem that the physicians must look to them alone for compensation.

In Hudgens v. Carter County, 24 Ky. Law Rep., 1982, the court said, in regard to Hudgen's claim, which was similar to that of appellee: * * *

"Also he can not recover against the county for his service and medicines rendered and furnished to persons who were able to pay the same. He can only recover for his services and medicines rendered and furnished to indigent persons, and for services and general supervision rendered by him, which was necessary or reasonably necessary to quarantine and keep the smallpox under control, and prevent the spread of the disease, and for attention to those quarantined."

We think in this, as in all other cases where it is sought to recover upon an account which is denied, the burden of proof is upon the plaintiff, and as appellee, plaintiff in the court below, failed to establish the insolvency of the persons for whom he rendered the medical services and furnished the medicines and other things charged for, the verdict to that extent was unsupported by the evidence. Furthermore, as it is not clear from the evidence how much of the services charged in items one to five inclusive of the account, were rendered in enforcing quarantine or other sanitary measures to prevent the spread of the smallpox, the verdict and judgment should have been set aside and a new trial ordered. We are of opinion that the evidence admitted by the trial court, for the purpose of showing the appointment of appellee as a member of the county board of health, was competent.

But for the reasons indicated the judgment is reversed and cause remanded, with directions to the lower court to grant appellant a new trial, and for further proceedings consistent with this opinion.

RUTHERFORD v. BATH COUNTY, &c.

(Filed May 18, 1904—Not to be reported.)

Sufficiency of evidence—Verdict of jury—Where the testimony was sufficient to sustain a verdict the Court of Appeals has no power to control the judgment of a jury and say that it should have believed the testimony of one side and rejected that of another, and where in an action for services rendered in the treatment of a smallpox patient by the fiscal court of a county, after an allowance by that court of something like $1,100, the verdict of the jury in the court below for the defendant will not be disturbed.

R. Gudgell & Son for appellant.

Appeal from Bath Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, J. W. Rutherford, a practicing physician at Sharpsburg, Ky., was employed by the county judge and the county board of health to look after and treat certain indigent persons afflicted with smallpox in Bath county, and to prevent the spread of the disease. There was no contract fixing the amount of compensation therefor. He treated about seventy persons who were afflicted with the disease, and was engaged in the work for ninety-two days. He presented to the fiscal court of Bath county an itemized account for his services at the rate of $20 a day, aggregating $1,840. The fiscal court rejected all of this claim except $750, which was allowed, paid and credited thereon. The appellant thereupon appealed to the Bath Circuit Court, where a trial, under instructions which are not complained of, resulted in a verdict for the defendant. An appeal has been prosecuted

to this court and a reversal asked upon the sole ground that the verdict of the jury was against the law and evidence, and the result of passion and prejudice against the plaintiff.

Upon the trial appellant introduced a number of reputable physicians who thought the charge of $20 a day reasonable, in view of the fact that appellant had been compelled, during this period of time to give his entire attention to his smallpox patients. Whilst on the other hand, the county judge and a member of the board of health, who had employed him, both testified that $750 was ample compensation for the services which had been rendered by appellant. They also introduced several persons who had been treated by appellant for smallpox, one of whom testified that appellant did not come into his house at all while he was sick, and only passed his house on one occasion. Another testified that appellant only came to see his family, five members of which had been afflicted with the smallpox, four times. The testimony for the defendant was sufficient, if credited by the jury, to sustain a verdict, and this court has no power to control the judgment of the jury and say that they should have believed the testimony for the appellant and rejected that for the appellee, or to set aside such a verdict because of a mere numerical superiority of witnesses on the side of appellant. (Alcorn v. Powell, 22 Ky. Law Rep., 1353.)

Judgment affirmed.

CAMPBELLSVILLE TELEPHONE CO. v. LEBANON, LOUISVILLE AND LEXINGTON TELEPHONE CO.

(Filed May 18, 1904.)

1. Telephone companies—Contract for joint service—Exchange of messages—Duration of contract—The Lebanon, Louisville and Lexington Telephone Co. and the Campbellsville Telephone Co. in April, 1896, made a written contract as follows: The L., L. and L. Co. was to build, equip and maintain a first-class telephone line from Lebanon, Ky., to Phillipsburg, Ky., to meet and attach to the line of the C. Co. at said place, and the C. Co. to build and maintain a first-class line from Campbellsville via Spurlington to Phillipsburg to meet and attach to the L., L. and L. line at that place, each party to keep its part of said line in good repair at its own expense, each company to have all the receipts for business which goes over only that part of the line belonging to it, and the receipts for all business which goes over all or any part of the line belonging to both companies shall be equally divided between them. Rates of toll to and from all points on these lines to be fixed by mutual agreement between the companies; all accounts to be settled monthly. Held—That no time having been fixed in the contract for the extent of its duration, the contract is not determinable at the will of either party to it, but must continue during the corporate existence of the two companies.

2. Limit of messages—Constitutional provision—Under said contract the parties to it are not limited to the exchange of such messages as emanated either at Lebanon or Campbellsville, but either party can require the other to transmit messages originating elsewhere. Section 199 of the Constitution providing "that telephone companies operating exchanges in different towns or cities, shall receive and transmit each other's messages without unreasonable delay or discrimination."

3. Injunction—Where either party to such an agreement fails or refuses to

transmit messages from the other over the joint wires of the two contracting companies, the party in default may be compelled, by mandatory injunction to perform said service.

Helm, Bruce & Helm for appellant.

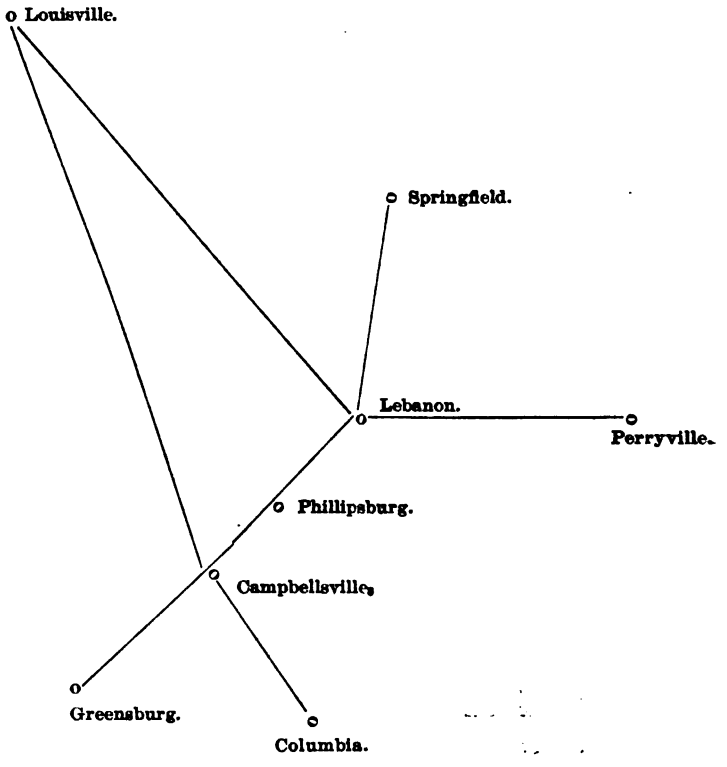
Fairleigh, Straus & Fairleigh and Humphrey, Burnett & Humphrey for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge O'Rear.

This is an appeal from a judgment dismissing plaintiff's petition, which, after being amended, was still held to state no cause of action.

From the statements of the petition it appears that appellant, the Campbellsville Telephone Co., built an exchange at Campbellsville; that appellee, the Lebanon, Louisville and Lexington Telephone Co., built an exchange at Lebanon. These two companies agreed to unite their lines at Phillipsburg, which was a point about midway between Campbellsville and Lebanon, the Campbellsville Co. building the line from Campbellsville to Phillipsburg, and the Lebanon Co., by which name we will designate appellee, from Lebanon to Phillipsburg. This diagram fairly presents the geographical situation:



The agreement under which this connection was made, and was to be operated, was written, and is as follows:

"It is hereby mutually agreed by and between the Lebanon, Louisville and Lexington Telephone Co. (incorporated) of Lebanon, Ky., and the Campbellsville Telephone Co. (incorporated), of Campbellsville, Ky., as follows: The Lebanon, Louisville and Lexington Telephone Co. to build, equip and maintain a first class telephone line from Lebanon, Ky., to Phillipsburg, Ky., to meet and attach to the line of the Campbellsville Telephone Co. at said place; and the Campbellsville Telephone Co. to build, equip and maintain a first-class telephone line from Campbellsville, Ky., via Spurlington to Phillipsburg, Ky., to meet and attach to the said line of the Lebanon, Louisville and Lexington Telephone Co. at that place, each company to keep its part of said line in good repair at its own expense. Each company to have all the receipts for business which goes over only that part of the line belonging to it; and the receipts for all business which goes over all or any part of the line belonging to both companies shall be equally divided between them. Rates of toll to and from all points on these lines to be fixed by mutual agreement between the companies. Accounts between the companies to be settled monthly.

"Signed in duplicate this April 26, 1896."

There are two points in the foregoing contract that have given rise to this controversy. First, it failed to state for what length of time the connection and the agreement were to continue. Appellant contends that it was to endure at least during the corporate lives of the two companies. Appellee contends that it was determinable at the will of either of the parties. Second, did the contract include messages originating elsewhere than at Lebanon or Campbellsville or on the line between those points? Appellant affirms that it did. Appellee insists that it did not.

The trouble between the litigants came up in this way: They were each "independent" companies, that is, not using the Bell patents. Susbequently a licensee of the Bell patents, the Cumberland Telephone and Telegraph Co., acquired a controlling interest in the stock of the Lebanon company, and built a line from Louisville to Lebanon, there connecting with the Lebanon Exchange. Later an "independent" line was built from Louisville to Campbellsville by the Independent Long Distance Telephone and Telegraph Co. Until then the customers of the Campbellsville Exchange used the line in connection with the Cumberland company's line to talk to Louisville, and customers of the Cumberland company used the same line in talking to persons at Campbellsville and contiguous connected points through the Campbellsville exchange. This was all done under the contract quoted. But when the independent line was built to Campbellsville from Louisville, and the Campbellsville company effected arrangements with it for transmitting messages to and from Louisville, and when it was attempted to use the joint line of these litigants via Phillipsburg to transmit messages from Louisville to Lebanon by way of the Independent and the Campbellsville companies, appellee refused to make the connection at the Lebanon Exchange and excluded the messages. This suit was for a mandamus to compel the Lebanon company to receive the message over its wires, and to make

the necessary connection therefor. The specific execution of the contract was thus sought by appellant.

If the contract and all rights under it are determinable at the will of either party, appellee argues that will end this suit, for, it is claimed, a court will not direct the specific execution of a contract that either party has the right to terminate the next moment. However, if the parties have not terminated the contract, as they have not in this instance, but are continuing it, and if one of them withholds a part to which the other is entitled, we perceive no good reason for refusing to compel him to bring up his end of the agreement, so long as it lasts. While the case might be rested here, we are not content to do so, but will decide the larger question which is also presented, and which has been ably argued and fully considered; that is, whether the contract is one determinable at the will of either of the parties.

The fact that no time is fixed in the contract for which it shall endure, is seized upon as affixing it to that class of contracts that run at the mutual will of the parties, and that may, therefore, be terminated when either of them elects to do so. The intention of the parties at the time of the making of the contract, to be gathered from its terms, and the surrounding circumstances, is the thing to be sought for and enforced if enforcible; that certain agreements are to continue only so long as the parties to them mutually will, is necessarily true. Such agreements may be lawful, and when so, and found to exist, are to be construed and enforced according to their true intent. But whether such was or was not the intention of the parties ought not to be settled alone by the presence or absence of a definitely stated term. If the intention be manifest otherwise, it is as controlling. In Smith v. Theobald, 86 Ky., 141, a contract for personal services of one as a hotel clerk, nothing being said in the writing as to the time it was to run, was construed not to be terminable at the will of the landlord. The court declared that the question of duration intended by the parties was one to be determined from the circumstances of each case. And this must be so. Otherwise the intention of the parties would be ignored, and there would be substituted instead an arbitrary rule of construction, frequently defeating the intention and doing great injustice. This contract evinces a purpose to make a telephone connection between two towns in which respectively the parties owned and operated telephone exchanges. To build the connecting line as contracted, necessarily required the outlay of a considerable sum, at least as proportioned to the income from it for a year or less. To say that the parties mutually intended that either of them might quit the arrangement the next day after the line was built, thereby practically destroying the value of the connecting line, would be preposterous. The contract provides for monthly settlements, which of itself indicates a protracted duration. The nature of the business was such that the more extended the service afforded its patrons, the more desirable it became to them, and the more profitable therefore, to the owners of the lines. They must have had in mind the continuance of those conditions which they were to bring about by this extraordinary outlay of expense, instead of abandoning them. In addition, all telephone companies operating exchanges in different towns or cities in this State, are required by the Constitution of this Commonwealth

to receive and transmit messages between their users. What is meant by the phrase "shall receive and transmit each other's messages," is the controlling feature of the sentence. For appellee it is contended that the requirement is satisfied by one company's receiving the message as taken down and transcribed by an operator of the other company, and by forwarding or repeating it over the line as received, to the person addressed. Such is the manner, doubtless, of forwarding telegraphic dispatches which pass over two or more lines. The telephone is a comparatively modern invention; yet its utility is so universally recognized and employed. as to be almost an indespensable factor among the business world's agencies, not to mention its very general employment for social purposes. It has largely superseded the telegraph, as it is a distinct improvement in many features over that means of communication. It is of scarcely less importance to business men than the post. Its practical utility, indeed, its distinguishing valuable features over the telegraph, is the means it affords not merely for instantaneously transmitting a message, but for a conversation, face to face, as it were, between persons remotely situated. To hear the voice of the speaker, to give the counterpart of the conversation, and at once, impress its use with a value entirely different from that of the telegraph. In a sense it takes the place of the telegraph and the post. So that "sending a telephone message" means usually that the persons in communication be afforded the means of talking to each other. The nature and commercial use of this great modern invention have made it a quasi public agency. To call a thing a common carrier can not make it so. It is the nature of the business in which it is engaged that determines its character. It would not be an inapt description to say of telephone companies that they are common carriers of messages, as truly as telegraph companies are. Being in the service of the public, their control to a reasonable and necessary extent by the State government within whose jurisdiction they ply their business, is a proper and legitimate governmental affair. All corporations so engaged, and created in this State since 1856, take their charters subject to amendment or repeal, or by operation of general laws with which they may be incompatible. This provision of the Constitution, section 199, is as if written into the charter of the two companies. The section reads: "Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines, and said companies shall receive and transmit each others' messages without unreasonable delay or discrimination, and all such companies are hereby declared to be common carriers and subject to legislative control. Telephone companies operating exchanges in different towns or cities, or other public stations, shall receive and transmit each other's messages without unreasonable delay or discrimination. The general assembly shall, by general laws of uniform operation, provide reasonable regulations to give full effect to this section. Nothing herein shall be construed to interfere with the rights of cities or towns to arrange and control their streets and alleys, or to designate the places at which, and the manner in which, the wires of such companies shall be erected or laid within the limits of such city or town."

When these two telephone companies did make such connection they com-

plied with a duty imposed by the law of their existence. The section of the Constitution implies that such connection shall not only be made, and the service allowed, but that they shall be maintained and continued.

Appellee's argument at this point is, that section 199 is not self-executing; that until the legislature has provided a way of compelling its execution, it is nugatory so far as enforcible rights growing out of it are concerned. It is true that the legislature has not provided a method for compelling the physical connection required by the Constitution, and has not prescribed the terms upon which one corporation may coerce the use of another's property. It is even insisted that such arrangement is so impracticable as to be impossible. The fact that these parties have made an arrangement which is not unreasonable on its face, and so far as has been pointed out to us, is not unreasonable in its application, would seem to answer the argument of impracticability. But, however, that may be, these parties have done voluntarily all that was required of them by the Constitution, have made the necessary connection, and have entered into an arrangement by which each is to use and is to pay for using the others' property. We are asked, for such is the reach of the argument, to suffer one of them to annul this arrangement, although in doing so it violates the Constitution of the State to the direct injury of the other party to the contract. The Constitution is as binding as a law upon all citizens of the State, and all persons doing business within the State, as a statute could be. The absence of a penalty for its nonobservance can take nothing from the duty of such persons to observe the law. This connection, positively enjoined by the Constitution, having been established, must be continued. Not even the consent of both parties could legally sever it. The public are concerned in it, as much as the maintenance of a railroad depot where one has been kept for a certain number of years, or the maintenance of a turnpike-railroad crossing, although the railroad company and the turnpike company might agree to abandon the crossing.

We conclude that this contract was not determinable at the will of either of the parties to it; but that it must continue during the corporate existence of the two companies.

Appellee's next position is that the contract limited the parties to it to the exchange of such messages as emanated at either Lebanon or Campbellsville. There is nothing in the language of the contract to exclude from its operation messages originating elsewhere and being transmitted via the Campbellsville and Lebanon lines. The nature of the business in which the contracting parties were engaged was to handle telephone messages to and from their patrons. Of course, connecting and independent lines would have to have their part of the tolls. But that was not against the desirability of using them in connection with the local lines where tariff rates could be agreed upon; that such is the fact is not left to even reasonable conjecture, but it is admitted as the record now stands, that for nearly eight years the parties to the contract have so interpreted its meaning, and applied it practically to their operations under it. Messages originating elsewhere were received and passed over the joint line and through the other exchange exactly as if they had originated in Campbellsville or Lebanon. Such contemporaneous practical construction by the parties to an agreement is

always accorded great weight by the courts in determining a dispute between those parties as to what the contract means. Book-keeping and accounting under this contract had evidently come to be either so burdensome, or the experience of former years had demonstrated that the tolls each way were so nearly the same, that the parties amended their original contract by another, covering the matter of accountings between them. The contract provides as follows:

"By mutual agreement of both parties, the contract heretofore made between the Lebanon, Louisville & Lexington Telephone Co. (incorporated) of Lebanon, Ky., and the Campbellsville Telephone Co. (incorporated), of Campbellsville, Ky., on the 28th of April, 1896, is hereby changed in the following particulars, to wit: The Lebanon, Louisville and Lexington Telephone Co. is to keep and retain as its own, all the receipts that it collects at its offices at Lebanon and Calvary for all messages that goes over all or any part of said line from Lebanon to Campbellsville; and the Campbellsville Telephone Co. is to keep and retain as its own, all the receipts that it collects at its offices in Campbellsville and Spurlington for all messages that goes over all or any part of said line from Campbellsville to Lebanon; and the division of profits between said companies are to be made in this way in lieu of monthly settlements and divisions of receipts as set out in the original contract, thus dispensing with book-keeping and monthly settlements. But each company is to account for and pay to the other company all moneys that it may pay out for the other company.

"This March 5, 1897."

These two contracts were construed by the parties in their practical application to mean, that if a message originated in Louisville and sent via Lebanon destined for Campbellsville was transmitted through the Lebanon exchange and over the joint wire and through the Campbellsville exchange, the tolls were altogether the Lebanon company's and the company's who had transmitted it from Louisville to Lebanon. But if a message originated at Campbellsville, or other point, coming through the Campbellsville exchange, destined for Louisville, via the Lebanon exchange and its connecting Louisville company, then the Lebanon company got none of the tolls; but, to the extent the Lebanon company was compelled to pay to the Louisville line toll upon the message, Campbellsville reimbursed Lebanon for it. And so on. The converse of the proposition must be equally true. The terms of these contracts are matters subject to change by mutual agreement of the parties. But until changed, they are enforcible.

We, therefore, conclude that when a message originating in Louisville, or on the line of the Independent Long Distance Telephone & Telegraph Co., destined for Lebanon or vicinity connected with the Lebanon exchange, and to pass via the Campbellsville exchange, it was the right of appellant to have the message passed over the joint wires of the two contracting companies, and through the Lebanon exchange under the terms of the contracts. The mandatory injunction prayed for should have been granted.

Judgment reversed and remanded for proceedings consistent herewith.

Whole court sitting.

Chief Justice Burnam and Judges Settle and Paynter dissent.

WHITLEY, &c. v. WHITLEY'S ADM'R.

(Filed May 18, 1904—Not to be reported.)

1. Contract for support for life—Limitation—A contract by which a son agrees to support his mother for life is a continuing contract from year to year, and all of such claim was barred by limitation except for the five years next preceding the institution of the action.

2. Attachment—Just claim—A party to sustain an attachment, must have a just claim, and as the validity of the claim sued on is unsettled, the judgment sustaining the attachment is set aside to await the final determination of the validity of the appellee's claim.

3. Evidence—Competency—Where an heir to an estate is allowed to testify as to conversations by the appellant with the deceased, in an action against the estate, the appellant should be permitted to testify as to the same conversation.

J. J. Osborne for appellants.

M. C. Swinford and Swinford & Webster for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Nunn.

Appellee, as administrator of Harriet Whitley, institute this action January 2, 1900, against appellant for the sum of $1,100, alleged to be due the estate of Harriet Whitley for the alleged violation of a contract in failing to support Harriet Whitley from the date of the contract to her death. A trial was had and a verdict and judgment was rendered against appellant G. W. Whitley for $500. The court overruled his motion for a new trial, and he has appealed.

The facts as they appear are in substance as follows: One Joseph Whitley, husband of Harriet Whitley, died in about the year 1880, and left surviving him his widow, Harriet Whitley, and eight children, the appellants, G. W. Whitley, T. J. Whitley and Sallie Clark, being three of them. Joseph Whitley left a small amount of personal estate and about fifty or sixty acres of land in one body, all of which was in Robertson county, except from nine to eighteen acres, which was in Harrison county.

It appears from a deed of writing filed, that on the 24th of September, 1884, T. J. Whitley, the brother of appellant, conveyed to appellant three interests, one of which he owned by descent, and two by purchase, in the Harrison county land. The consideration for this conveyance being that appellant would release the Robertson county land from any liabilities or claims which he had against it by reason of having paid off an execution against his father's estate, for which the whole of the land, except the life estate of the widow, was liable, to the amount of $210. His widow, Harriet Whitley, appended to this writing, executed by T. J. Whitley, the following language: "Be it known that I, Harriet Whitley, the wife of Joseph Whitley, deceased, do hereby relinquish all my right of dower interest in and to that portion of land in Harrison county, Ky."

She joined T. J. Whitley and wife in the execution of this paper. It is not stated in the writing the consideration which moved Harriet Whitley to execute it. It is claimed by appellee, and the proof tends to show, that the consideration was that G. W. Whitley agreed with her that he would help to

support her during the remainder of her life, and to help pay her burial expenses, and that he had failed to perform this contract, or any part of it. The proof also tends to show that T. J. Whitley was the other party who agreed to help to support her. It also appears that the Robertson county land was sold and conveyed, all parties in interest signing the deed; but the proof was very indefinite as to the amount it brought, or what became of the purchase price thereof. It is shown, however, that appellant did not receive any part of it.

T. J. Whitley cared for his mother until about the year 1890, and Sallie Clark, her daughter, cared for and supported her until the year 1899, when she died, at the age of ninety-seven years. The proof varies about the cost of supporting her from $60 to $125 per year. The appellant denies that he made any contract with reference to the support of his mother, and claims that the only consideration for the conveyance referred to was, that he released his claim against all the lands left by his father from the payment of the judgment for $210. He also pleaded the statute of limitation of five years as a bar to appellees' right of recovery thereon.

The court sustained a demurrer to his plea of the statute of limitation, but upon what grounds, we are unable to determine, unless upon the idea that the contract was a continuing one, and no right of action accrued thereon until the death of Harriet Whitley. Under our construction of this contract (if one was made,) it was a continuing contract from year to year so long as Harriet Whitley lived, and her right of action accrued yearly, or as least at the end of each year, for the value of appellant's portion of her support which he had failed to provide. And all of the claim sued on was barred by the statute of limitation except for the five years next preceding the institution of this action.

The statute of frauds section 470, Kentucky Statutes, does not apply to a contract like this for two reasons:

1st. Harriet Whitley parted with her property and completed the contract on her part.

2d. That it was a contract that might have been performed within a year from the making of it.

Harriet Whitley might have died within the year, and there was a possibility, in that event, of the completion of it within the time. (Berry v. Graddy, 1 Met., 553; Benge v. Hiatt's Adm'r, 82 Ky., 667; Jones v. Comer, 25 Ky. Law Rep., 774; Stowers v. Hollis, 88 Ky., 544; Dickey v. Dickinson, 105 Ky., 748; Myers v. Korb, 21 Ky. Law Rep., 168.)

Appellant complains that the lower court erred to his prejudice in failing to permit him to testify with reference to what was said by his mother and brother, T. J. Whitley, and himself at the time of the execution of the deed or writing referred to. The court erred in this, as appellee had introduced T. J. Whitley, a person interested in the estate, who testified with reference thereto. The case of Carpenter, &c. v. Rice's Adm'r, 25 Ky. Law Rep., 1705, was where Rice's administrator brought an action against Carpenter, and there was a contest about a certain credit which Carpenter claimed should have been for a greater amount than appeared to have been endorsed by the deceased upon the note. The administrator introduced a daughter and heir of the decedent, who testified with reference to the correctness of

this credit. Carpenter, over the objection of the administrator, was introduced as a witness, and was properly permitted to testify as to this particular transaction.

Under section 606 of the Code, a person may testify for himself concerning a transaction with a decedent where one interested in the estate of the decedent has testified as to the same transaction. A party, to sustain an attachment, must have a just claim to found it upon. Under the evidence, as appears in the record, the court properly sustained the attachment, provided appellee's claim was just, but as the validity of the claim is unsettled, the judgment sustaining the attachment is set aside to await the final determination as to the validity of appellee's claim.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

NICHOLS & SHEPARD CO. v. CALDWELL.

(Filed May 18, 1904—Not to be reported.)

Sale of engine and machinery—Warranty—Breach—Notice—Promise to repair—Equitable adjustment—In a sale by appellant to appellee of an engine and threshing machine outfit at $1,892, appellee put in his old engine at $750 as part pay, and gave his notes, with a mortgage on the outfit for the balance of the price. In the sale appellant warranted the engine and machinery as sound and all right. Appellee, discovering in a few days that the engine was defective, notified appellant thereof, who sent a man to fix it, but who failed to remedy the defects. Upon further notice appellant continued to promise to repair, but failed to do so. Finding that he could not profitably run the machinery, after a thorough trial, appellee offered to return it, but appellant refused to accept it or to rescind the contract, and brought suit on the notes and to enforce the lien. Appellee filed answer, alleging the machine was worthless and again tendered it to appellant, and also filed a counterclaim for $750, the value of the old engine. Upon the trial the court gave appellee judgment for $650, and cancelled the notes sued on. Held—That as the evidence showed that the machinery was inherently bad and of little value, and was kept by appellee upon repeated assurances by appellant that it would be repaired and made to do good work, this court is not inclined to disturb the finding of the chancellor. But it appearing that appellee, during the time he run the machine, made a net balance of $250 above his expenses, including his own services, and the chancellor having fixed the value of the old engine at $650, in order that the contract may be rescinded on equitable terms, and as far as practicable place the parties in statu quo, it is ordered that the judgment be reversed, with directions to allow appellant a credit for $250 for the excess received by appellee in the threshing, over and above his expenses and his own services, and for $200 damages to the machinery during the time it was used by appellee, leaving a balance of $200, for which appellee should have judgment on his counterclaim, with interest from July 30, 1901; appellant to recover his costs in this court and appellee will recover costs in the circuit court.

J. H. Shelton, A. C. Hergman and White & Ray for appellant.

Robbins & Thomas for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Hobson.

In May, 1901, the Nichols & Shepard Co. sold to J. I. Caldwell, a 16-horse traction engine, a 52-inch grain separator with steel bagger and wind stacker. In payment he delivered to it an old engine, which it took at $750, and he executed to it his notes for $1,160.75. He failed to pay the notes, and this suit was filed by the Nichols & Shepard Co. to recover on the notes and enforce a lien given to secure them. Caldwell answered that at the time he bought the machine and executed the notes therefor, the plaintiff warranted all the machinery to be well made, of good materials, and with proper management capable of doing well the work for which the machines were respectively made; that the machinery did not come up to the warranty, and was worthless; that as soon as he found this out he offered to return the machinery to the plaintiff, but it refused to take it back, or to give back to him the notes or the property which it had received from him, or its value; that the machinery was of no value for the purpose for which it was made, and that but for the warranty he would not have bought it; that the $750 obtained from him on the machinery in the old engine was obtained without consideration; that within less than five days after first starting the machinery he gave to plaintiff at Battle Creek, Mich., through its local agent, and to its general managing agent at Nashville, Tenn., notice that the machinery failed to fill the warranty, but that the defect was of such a nature that he could not tell what it was or where it was, and that plaintiff had not remedied the defect, and was unabel to make the machinery work. He made his answer a counterclaim against the plaintiff and prayed judgment against it for the value of the old engine. The written contract under which the machinery was sold was filed as a part of the answer and referred to as containing the warranty relied on. The warranty contained in the writing is in these words:

"This machinery is purchased and sold subject to the following express warranty and agreement, and none other, to wit: That said machinery is well made, of good material and with proper management, capable of doing well the work for which the machines respectively are made, and sold conditioned that if within five days from its first use it shall fail to fill this warranty, written notice shall be immediately given by the purchaser to Nichols & Shepard Co., at Battle Creek, Mich., by registered letter (and written notice also to the local dealer through whom the same was received), stating particularly what parts and wherein it fails to fill the warranty. Reasonable time shall be allowed the company to get to the machine with its workmen and remedy the defect, if any there be (unless it be of such a nature that a remedy may be suggested by a letter,) the purchaser to render friendly assistance and co-operation in making the machinery a practical success. If a workman visits the machine for the company and does not leave it working satisfactorily, the purchaser shall give immediate notice to the company at Battle Creek, Mich., by registered letter as before (and also to the local dealer,) and state in writing specifically any failure or neglect complained of, and allow time for another workman to be sent to examine the machine and its workings; if, after giving the notices as above provided, any part of the machinery can not be made to fill the warranty, that part which fails shall be returned immediately by the undersigned to the place

where it was received, with the option of the company, either to furnish another machine, or part, in place of the machine or part so returned, which shall perform the work, or return the money and notes which have been received by the company for the same, and thereby rescind the contract to that extent or the whole, as the case may be, and be released from any further liability herein. The failure of any separate machine, or any part thereof, shall not affect the contract or liability of the purchaser for any other separate machine, or for any part of such machines as are not defective. It is expressly agreed that said company shall be liable only for the return of cash and notes payable to its order actually received by it, and not for any machinery or other property taken hereon as part payment."

The plaintiff filed a demurrer to the answer, which was overruled to so much of the answer as set up a defense to the notes, but sustained so much of it as plead a counterclaim. The defendant then amended his counterclaim, pleading that the engine which he delivered to the plaintiff was of value $750, and was obtained from him without consideration. In another amended answer he pleaded that within five days of its first use, he gave notice by telephone and in person to the plaintiff's local agent and its traveling agent, Long, and that they were present when he was trying to operate the machine, and saw that it failed to fill the warranty; that he bought the machinery to be used in threshing wheat, and plaintiff's agents who sold it to him represented to him that the engine, separator and attachments were all that were necessary to thresh and separate wheat, and that at the time he bought the machinery and executed his notes therefor, plaintiff's agents from whom he bought it, knowingly, falsely, fraudulently, and with the fraudulent intent to deceive and cheat him, and to induce him to buy the machinery, represented to him that it was well made, of good material, and with proper management capable of doing the work for which it was sold, and that the engine was a good 16 horse power; that all these statements were false and fraudulent, and were made with intent to deceive him, and induce him to buy the machine; that relying thereon, he executed the contract and notes sued on, and but for them he would not have bought the machinery or executed the notes; that the machinery was of bad material and workmanship, but this was of a hidden nature, and could not be detected without opening it and going inside of it, but that it was so rudely and badly constructed that the defects could not be remedied without its being rebuilt. The plaintiff, by its reply, controverted the allegations of the amended answer, denying that its agents induced the defendant to buy the machinery by any false or fraudulent representations, or made to him any false representations at the time he executed his notes, or that they made any other statements about the machinery than those contained in the written contract; alleging that if they did, they acted beyond the scope of their authority, and the defendant never knew this. The case being submitted on the evidence, the court entered a judgment in favor of the defendant on the counterclaim for $600.30, and dismissed the plaintiff's petition, with costs.

The evidence for the defendant showed these facts: He had been running engines and separators for eleven years. He had an old engine of the plaintiffs' make, and in the spring of 1901 G. W. Long, the traveling salesman of the plaintiff, and A. D. Peyton, its general manager at Nashville, came to

his house after there had been some understanding with Moss & Reese, of Clinton, Ky., who were the plaintiff's local agents. A contract was made for the purchase of the new rig for $1,892, the old engine being taken in at $750. The new machinery was shipped to Stubbs, Ky., and was there received by the defendant and taken to his house. In going from the station to his house, after Long had turned over the machinery to him, he had some trouble in going up hill from the fact that the water came out of the boiler into the cylinder. At this time he had not executed his notes for it. After he had reached his house the engine was fired up on several occasions to exhibit the machinery to other persons proposing to purchase, and while the persons to whom the machinery was exhibited were satisfied, Caldwell noticed the same trouble he had had in bringing the machinery home from the station. He made complaint to Peyton, the general manager, and Peyton said he would make it all right. This was before he signed the notes. He refused to sign the notes when presented by Long until he talked with Peyton, and he said to go on and sign the notes, and he would make everything all right. Caldwell then signed the notes. This was while the machinery was at his house, and before he began to use it. He first used it on Monday, June 24, and they had to stop four or five times in going a half a mile. When they started it to running the engine failed to develop power, blew the water through the cylinder, and they could not keep up a head of steam. That evening he notified Moss & Reese and Long, at Clinton, Ky., also notified them the next day, and two or three days later notified Peyton, at Nashville. All of this was by telephone. Several times afterward notices were given by telephone, and in the next few days. Peyton answered that he would send a man at once to fix the engine, but the man did not come for some time, or until about July 9, and then did nothing. Caldwell worked with the machine about twenty days, and then quit. He paid his hands for fifteen days' work. The machinery was never satisfactory. The separator gave trouble from breaking, and the engine did not develop power. When Peyton was notified of the trouble he said he would make everything all right, but this he failed to do, and Caldwell offered to deliver the machinery back to them at the place where he received it. After he quit threshing, or about that time, he notified the plaintiff at Battle Creek, Mich., by registered letter, of the defects in the machinery, and would have done so sooner if Peyton had not said that everything would be all right. He threshed about 15,000 bushels of wheat with the machine in the twenty days. Its estimated capacity was about 2,000 bushles a day. The offer to return the machinery was after he stopped threshing, and was made to Peyton and Long. After this he threshed six bushels of peas with the machinery as an experiment, to see how it would do. The proof for the plaintiff contradicts the defendant on every point, but in view of some letters in the record and the testimony of disinterested witnesses sustaining the defendant, we are not disposed to disturb the chancellor's conclusion on the facts. The defendant was a man of experience in the business, he had several other experienced men to assist him in the operation of the engine and separator at different times, and we are inclined to the conclusion that the trouble was due to an inherent defect in the engine by reason of which it failed to develop proper power. We also conclude that he promptly notified Peyton by telephone, of the trouble, also

Long and Moss & Reese; and Peyton promised to send a man at once to remedy the trouble. The man came about the 9th of July, and he went away without doing anything. On these facts, what is the law of the case?

It will be observed that the written warranty is upon the condition that if, within five days from its first use, the machinery shall fail to fill the warranty, written notice shall be immediately given by the purchaser to Nichols & Shepard Co., at Battle Creek, Mich., by registered letter, and also to the local dealer; reasonable time shall then be allowed the company to get to the machinery and remedy the defect; if a workman visits the machine for the company, and does not leave it working satisfactorily, the purchaser shall give immediate notice to the company at Battle Creek, Mich., by registered letter, as before, and allow time for another workman to be sent; and if after all this any part of the machinery can not be made to fill the warranty, that part shall be immediately returned by the purchaser to the place where it was received, with the option of the company either to furnish another in place of it, which shall perform the work, or return the money and notes which had been received by the company, and thereby rescind the contract and be released from any further liability thereon. It is expressly agreed that the company shall be liable only for the return of cash and notes actually received by it, and not for any machinery or other property taken as part payment. Caldwell did not give written notice by registered letter to Nichols & Shepard Co., at Battle Creek, Mich., that the machine failed to fill the warranty, nor did he notify them by registered letter immediately, when the workman who visited the machine for the company did not leave it working satisfactorily. The only notices he gave were verbal notices to Peyton, Long, and the local agents, and while these were promptly given, they were not a sufficient compliance with the contract. It is said that the agreement to give a notice in writing was only an agreement to furnish certain evidence of notice, and when the notice was given verbally, and was acted on, or agreed to be acted on, this was a waiver of a written notice. But a waiver of this sort can not be implied simply from the fact that Peyton said he would send a man to fix the machine. There was not enough in this to show a waiver of a stipulation in the contract. Besides, the notice was to be given to the company at Battle Creek, Mich. Peyton was at Nashville, Tenn., and it can not be presumed on the facts shown that either party had in mind the notice to him, as he had made the sale, the notice which was required to be given to the company at Battle Creek, Mich. It is settled that to recover a warranty like this the purchaser must comply with its terms (Frick Co. v. Morgan & Co., 24 Ky. Law Rep., 836; Osborne v. Taylor, 8 Ky. Law Rep., 359), and where there is a breach of the warranty, the purchaser must offer to return the property within a reasonable time after discovering the defectiveness of the machinery, and if he fails to do so, the sale becomes absolute. (McCormick Harvesting Machine Co. v. Arnold, 25 Ky. Law Rep., 663.) But in this case, before Caldwell completed the contract by executing the notes, he became apprehensive that the machinery was not all right and refused to sign the notes. He was induced to sign them by the assurance of Peyton that he would make everything all right. While Peyton denies this, his letters to Caldwell tend to confirm Caldwell's statement, which is also con-

firmed by the subsequent conduct of both Caldwell and Peyton. We, therefore, conclude that the chancellor was warranted in finding, from the evidence, that the notes were executed upon the faith of the agreement of Peyton that he would make everything all right, and that this he failed to do. What then are the rights of the parties?

The parties might, by a subsequent parol agreement, modify the written contract which they had made. Peyton was the general manager of the company and had authority as such to make such a contract with Caldwell. It was within the scope of his apparent authority, and when he induced Caldwell to give the notes by assuring him that he would make the machinery all right, the company is bound by his agreement, and can not, when it failed to comply with it, enforce the notes. The contract between the parties must, therefore, be rescinded, and the engine and separator with attachments should be adjudged to appellant.

As to how the rights of the parties should be settled upon a rescission, we have had great difficulty in determining. Caldwell threshed with the outfit 15,000 bushles of wheat at 8 cents a bushel, amounting to $1,200. His expenses were $61.35 for fifteen days, amounting to $919.25, which would leave a net balance in his hands of $280.75. He delivered to the appellant the old engine, which it took at $750 in the trade, but we do not find in the transcript any evidence by appellant as to its real value, except it comes out incidentally, that the commissions to the agent for making the sale, which would depend upon the value of this engine, were to be taken up later when this was ascertained. The record does not show how old it was, or how long it had been used, or what was its state of repair. It is stipulated in the contract that the company shall not be liable for any machinery or other property taken as part payment thereon. There is no charge of mistake or fraud in the execution of the contract in this particular. But a court of equity will not enforce a contract which is harsh and oppressive. When the contract is rescinded it must be rescinded upon equitable terms, and as far as practicable the court must place the parties in statu quo. The parties can not, by previous contract, tie the chancellor's conscience and require him to do what is inequitable when he rescinds the contract. The circuit court seems to have valued the old engine at $650, and from such knowledge as we have of such transactions this seems to be a fair conclusion. We can not tell from the record how much the new machinery was damaged by the use Caldwell made of it, but that it was damaged is, we think, clear from the evidence. Upon the whole case, making the best approximation we can, we have reached the conclusion that Caldwell be charged with $250 for balance received by him for the threshing, over and above his own services, and that he should also be charged with $200 for damages to the new machinery, and that this sholud be set-off against the $650 allowed against the company for the value of the old engine. Caldwell tendered the machinery back as soon as he became satisfied that Peyton was not going to make it do all right. His delay in tendering it back was due to Peyton's assurance that he would send a man to fix it. And while he was not in the wrong in continuing to use the machinery as he did, he ought to compensate the company for the injury to the property while he was running it.

On the return of the case to the circuit court, a judgment will be entered

rescinding the contract and adjudging to appellant the property in controversy, and a judgment will be entered in favor of Caldwell for $200, with interest from July 30, 1901. Appellant will recover costs in this court, and Caldwell will recover costs in the circuit court.

Judgment reversed and cause remanded for a judgment as above indicated.

STANDARD OIL CO. v. COMMONWEALTH.

(Filed June 3, 1904—Not to be reported.)

1. Appeal—Submission—Motion to dismiss—A motion to dismiss an appeal after it has been submitted for trial in the Court of Appeals, comes too late.

2. Indictment—Peddling—An indictment charging that the defendant did sell, vend and offer to sell goods, wares and merchandise, to wit, oil to D. M. Young and G. W. Lane, six different, distinct and separate times within twelve months prior to the finding of the indictment, it being then an itinerant peddler without first having a license to do so, is good.

3. Evidence—In an indictment for peddling without a license, where the evidence shows that appellant had a storage plant at Mt. Sterling of about 50,000 gallons, from which it supplied the retail merchants in the neighboring towns with oil for illuminating purposes, delivered from a tank wagon from ten gallons up, and that appellant's agent sold from said wagon as often as six times in one year to a saloon in Owingsville, for its own use and not for retail, and at a price less than the regular retail price for such oil, such sales constituted the appellant guilty of being an itinerant peddler.

Humphrey, Burnett & Humphrey and Robert H. Winn for appellant.

N. B. Hays for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Settle.

The appellant was indicted, tried and convicted in the court below of the offense of peddling without license, and its punishment fixed at a fine of $300. A new trial was refused, and it asks at the hands of this court a reversal of the judgment of conviction.

The case was submitted at the September term, 1901, and appellant's brief was filed on October 1 of the same year. The case remained under submission awaiting a brief for appellee, until the 2d day of February, 1904, at which time the attorney general filed a motion to strike from the record the bill of exceptions, motion and grounds for new trial, and all the transcript which is contained in the bill of exceptions, and also to dismiss the appeal.

We are of opinion that the motions come too late, and that appellee has waived any right it may have had to make the objections now presented. It has been repeatedly held by this court that such motions come too late when made after a submission of the case. (Bailey v. Louisville & Nashville R. R. Co., 19 Ky. Law Rep., 1617; Welsh v. National Cash Register Co., 103 Ky., 192.)

One of the complaints of appellant is that the indictment is fatally defective, and that the court below erred in overruling the demurrer thereto. The contention of appellant being that the indictment does not charge that

the sales mentioned therein were made by appellant as an itinerant peddler, or in the course of its business as an itinerant peddler. The accusation in the indictment is that the appellant was guilty of the offense of peddling without a license; and the specific charge, that it did "sell, vend and offer to sell, goods, wares and merchandise, to wit, oil, to D. N. Young and G. W. Lane, six different, distinct and separate times, it being then an itinerant peddler, without having first secured a license so to do." * * * We think this language in substance and effect means to charge, and does charge, that the sales mentioned were made by appellant as an itinerant peddler. We are of opinion, therefore, that the indictment sets forth the offense charged in such manner as to comply with the statute upon which it is based, and with such certainty as to apprise the appellant of the nature of the accusation upon which it was to be tried, and to constitute a bar to a subsequent prosecution for the same offense. It follows, therefore, that the lower court did not err in overruling the demurrer. The case was tried by the court without the intervention of a jury, and on its own finding of the facts, it adjudged appellant guilty and fixed the penalty as stated.

Section 4215, Kentucky Statutes, provides that "all persons who are by this article deemed peddlers, shall, before the sale or attempted sale of any article or right, as herein contemplated, procure and pay for license, as required by law; and any peddler who shall violate the provisions of this section shall be deemed guilty of peddling without license and punished accordingly."

Section 4216 provides that "all itinerant persons vending * * * merchandise * * * and any other thing not hereinafter specially exempt, shall be deemed peddlers."

The offense denounced by the sections of the statute supra is peddling without license. It appears from the bill of evidence that the Standard Oil Co. had a storage plant or warehouse of oil in the town of Mt. Sterling with a capacity of about 50,000 gallons. From this warehouse it supplied the retail merchants in the neighboring towns, including Owingsville, in Bath county, with oil for illuminating purposes, the oil being delivered by appellant's agents from a tank wagon in quantities of from ten gallons up. The oil was then sold by the retail merchants to consumers. The evidence also shows that Young & Lane were engaged in the saloon business in the town of Owingsville; that they kept a pool room in connection with the saloon and that they carried a small stock of edibles, such as sardines, oysters, potted ham, crackers, etc., which were sold to, and eaten in the saloon by persons who drank at their bar. It is further shown by the evidence that in the course of twelve months before the finding of the indictment, as many as six sales, and perhaps more, were made by the driver of appellant's tank wagon to Young & Lane, and that each of these sales was made at the then prevailing wholesale price of oil in Owingsville, which was about two and one-half cents per gallon less than the retail price to consumers.

It is apparent from the evidence that the firm of Young & Lane were not engaged in the business of selling oil. They neither advertised nor held it out for sale to the public. The firm consumed large quantities of oil for lighting their place of business, and though they allowed Horace Lane, their clerk, and a porter in their employ, to take from their tank such oil as

was needed for personal use at the retail price then prevailing in Owingsville, it is manifest that the oil purchased by the firm of appellant's agent, was all for use in their saloon. It is true the members of the firm testified that they would have sold oil to any person applying to them, but they never did in fact make such a sale, or offer to do so. What oil they bought was for their own use, and not for sale to consumers.

Proof was introduced by appellant to the effect that the oil in the storage warehouse at Mt. Sterling, and all of the personal and real property owned by it and located in Mt. Sterling, was regularly and duly assessed for taxation in the years 1897 and 1898, and that the taxes were paid thereon to the State, county and city. And further that the regular business of appellant at Mt. Sterling at the time the sales to Young & Lane were made, was that of selling illuminating oil in that town and the surrounding towns in wholesale quantities, and that it had a regular line of customers who were engaged in the business of retailing oil in the surrounding towns, including Owingsville.

In Standard Oil Co. v. Commonwealth, 107 Ky., 606, it was held by this court that the Standard Oil Co. was not guilty of violating the law against peddling without license, where it appeared that it had oil stored at central points from which it delivered to retail merchants in neighboring towns, oil for the purpose of resale, such sales not being peddling within the meaning of the statute.

In Hayes v. Commonwealth, 107 Ky., 655, it was also held by this court that where an agent of the Standard Oil Co., who had been but a few days in its service, and was without experience in its business, made sales of oil to two persons, one of whom he supposed to be a retailer of oil and a regular customer of appellant, and the other had told him that his house sold oil, such sales would not authorize the conviction of the defendant of the offense of peddling without license. But in discussing the question as to what constitutes peddling under the statute, this court in that case said: "It will be seen that the statute supra defines a peddler, and the indictment under consideration clearly charges that the defendant was an itinerant person and that he sold the oil in question. It is undoubtedly true that in order to constitute a person a peddler, he must not only be an itinerant persons, but must be engaged in vending or selling the article mentioned in the prohibitory statutes as a business or occupation. It is not, however, necessary that it should be his sole business, nor even his principal business; but it must, nevertheless, be a considerable part of his occupation. A person may have a permanent home in this State, where he may store his principal goods, and may even pay tax thereon, and still be an itinerant person, in the meaning of the statute, if he travels about from place to place vending or selling the articles prohibited by the statute."

Obviously the sales to Young & Lane were not the result of mistake or accident, nor were they made by an inexperienced agent, who was ignorant of the names and business of appellant's customers. They were made repeatedly, and certainly not fewer than six times, we are unable to tell how many more, as they were continued throughout the year, and under circumstances that afforded the agents of appellant every opportunity to know that Young & Lane were not retailing oil, but were simply buying it for the use

of the saloon. It can not, therefore, be claimed that the agent supposed Young & Lane were dealers in oil. He must have known that they were not. It is further manifest that the fact that Young & Lane occasionally furnished their clerk and porter with oil for personal use, or that they would have sold it to others if requested to do so, did not make them retailers of oil, or authorize appellant's agent to so regard them. As Young & Lane were not retail dealers in oil, and the oil they received of appellant's agent was purchased for their own use, and that fact was known, or ought to have been known, to appellant's agent, we are constrained to hold, as did the trial judge, that as to the sales of oil to Young & Lane, appellant must be deemed a peddler; and it being admitted that it did not for itself, or agent, have a peddler's license, it follows that the lower court did not err in finding appellant guilty of the offense charged in the indictment, or in inflicting upon it the fine complained of.

Wherefore, the judgment is affirmed.

Whole court sitting except Judge O'Rear.

PHILLIPS, &c. v. PHILLIPS' ADM'R, &c.

(Filed May 19, 1904—Not to be reported.)

Judicial sales—Purchase by attorney—Inadequate price—While an attorney has no implied authority to purchase for his client land sold at a judicial sale, the law presumes that he acted for his client, and regards him as their trustee; and where an attorney purchased land at a decretal sale at a grossly inadequate price, where he represents the interests of infant children who are parties to the suit, a judgment of confirmation and deeds made in pursuance thereto should be set aside.

J. M. Roberson and Hazelrigg, Chenault & Hazelrigg for appellants.

T. L. Edelen for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Burnam.

Frank Phillips died testate, domiciled in Pike county, Ky., in July, 1898. He appointed his widow, Nancy M. Phillips, executrix of his estate, which consisted in the main of divers tracts of land located in Pike county, and a tract of 2,200 acres in Buchanan county, Virginia. He directed that the Virginia land should be sold and the proceeds applied to the payment of his indebtedness, and bequeathed his various tracts in Pike county to his wife and children. In January, 1899, Nancy L. Phillips, as executrix, brought this action in the Pike Circuit Court against the children and creditors, for a settlement of her accounts as executrix, and for a sale of the 2,200-acre tract of land in Virginia, to pay the debts of her decedent and carry out the provisions of his will. The case was referred to the master commissioner to settle the accounts of the executrix and to ascertain and report the indebtedness of testator. His report under the order of reference was confirmed on the 11th of February, 1901, and judgment was entered decreeing the sale of the 2,200 acres of land in Virginia, and also the various tracts of land in Pike county.

At the sale made under this judgment, Auxier & Butler, the attorneys of the executrix, became the purchaser of four separate tracts of land lying in Pike county, described in the judgments as tracts No. 3, 4, 5 and 6, at about 25 per cent. of their appraised value. They subsequently transferred the benefit of their bid to the tract known as tract No. 6, lying on John's Creek, to York & Williamson. Exceptions were filed to the confirmation of the sale of each of these various tracts of land, on the ground that the prices at which they had been sold were grossly inadequate, by the guardian ad litem and creditors of the decedent. Exception was also made to the confirmation of the sale of the various tracts purchassed by Auxier & Butler, the attorneys of the estate, on the ground that they were representing the estate as attorneys and could not acquire any interest in the land sold to the disadvantage of their client. The exceptions were sustained as to the Virginia land, but confirmed as to the various tracts lying in the State of Kentucky, and to reverse the judgment of confirmation, this appeal has been prosecuted by the guardian ad litem of the infant defendants and by certain creditors. The executrix and mother of the infants having died after the institution of the suit, the clerk of the lower court was directed to copy the entire record with the exception of the claims filed by creditors, the report of the commissioner and the confirmation thereof, etc.

It is insisted by appellee that, as appellants are prosecuting an appeal from a partial transcript, and no notice of the filing of the schedule for such transcript was served upon appellees as required by section 737 of the Civil Code, that the judgment of the lower court must of necessity be confirmed. As the case was submitted without objection, and the point is raised for the first time in brief of counsel, it comes too late, especially as the schedule filed by appellant distinctly sets out the parts of the record which the clerk was directed to omit from the transcript, and it is apparent that the omitted parts have no bearing upon the questions relied on for a reversal upon this appeal.

The trial court properly refused to continue this case until the determination of the litigation involving the title to the 2,200 acres of land in the United States Circuit Court for the district of Virginia, as it was impossible to determine when, or how, that litigation would terminate, and in the meantime the debts of the Kentucky creditors were continually growing, But the chancellor erred in confirming the sale of the various tracts of land which had been knocked off by the commissioner to Auxier & Butler. They were the attorneys representing the estate, and "public policy demands that there should be no temptation on the part of one occupying the important relation of attorney, to make private gain out of the subject-matter of his professional employment." Whilst an attorney has no implied authority to purchase for his client, land sold at a judicial sale, yet if he does purchase, the law presumes that he acted for his client, and regards him as the trustee of the client respecting the property, unless he can show that the transaction was in every way fair and not to the client's disadvantage. (3 A. and E. Ency. of Law, 340; 4 Cyc., 958; Howell's Heirs v. McCreary's Heirs, and others, 87 Ky., 359.) In the latter case Judge Roberson said: "A purchase by an attorney under his client's execution over which he has control predisposes a chancellor to look on the transaction with peculiar jealousy

and scrutiny, and should never be sustained when it was for a grossly inadequate price and exhibits a semblance of unfairness."

In Hall v. Hallett, 1 Cox, 134, Lord Thurlow said: "No attorney can be permitted to buy in things in course of litigation of which he has the management. This the policy of justice will not endure."

The judgment in this case was entered at the instance of the attorney's. They attended the sale thereunder. They were practically the only representatives of the infant defendants, as their mother had died, and no one seems to have looked after their interest. Under this state of fact they should not have been permitted to profit at the expense of their clients. For reasons indicated the judgment is reversed and cause remanded, with instructions to set aside the judgment of confirmation as to these tracts of land and, the deeds made the purchasers pursuant thereto, and for such other steps as may be necessary to conform to this opinion.

GLEASON v. KENTUCKY TITLE CO.

(Filed May 19, 1904—Not to be reported.)

Quashal of execution for costs—Where it does not appear that a purchaser took any part as to whether a sale should or not be confirmed, no costs should be recovered against him in a controversy between owner and lienholder.

Ed. M. Lewis for purchaser Bloom.

B. F. Washer for appellant.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Hobson.

It does not appear that the purchaser took any part in the contest as to whether the sale should be confirmed or set aside. The controversy was maintained between the owner of the property and the lienholder. No cost in this court should be recovered against the purchaser. The purchaser's motion to quash execution for cost is, therefore, sustained.

LEBUS v. DUNLAP.

(Filed May 20, 1904—Not to be reported.)

Contracts—Where one assists another under a contract, giving him the benefit of his experience in similar matters, procured for him the opinion of able counsel and assisted in the presentation of facts in defense of a claim of the auditor's agent, there is nothing in such services opposed to the public policy of interference with public officials in the administration of their affairs of government, and for his services he may recover.

J. J. Osborne for appellant.

Lafferty & King for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge O'Rear.

On the former appeal of this case (23 Ky. Law Rep., 1481) the law applicable to the facts set out in the petition and controlling the contract alleged therein, was discussed.

We adhere to the conclusion there announced. Upon the return of the case an issue was made by the answer upon the allegations of the making of the contract and the performance of the services under it by appellee. This issue was submitted to the jury under appropriate instructions, and they have found in favor of the contract. The jury were told, that although they believed the contract was made as alleged, and the services charged for were rendered under it, yet that if the services consisted in whole or part of the exercise of the personal influence of said Dunlap with the auditor of the State, or with any of the officers of the State, they must find for the defendant. There was no evidence whatever that appellee exercised, or attempted to exercise any sort of personal influence in the matter, or that he did offer to do what any person might not have done with entire propriety. The sum of it was, that he gave to appellant his experience in similar transactions, got for him the opinions of able counsel based upon the facts as given him by appellant, and assisted appellant in the arrangement and presentation of those facts, so that upon their being presented to the auditor's agent he admitted that the claim being prosecuted by the State against appellant, in excess of $2,400, was without just foundation. There is nothing in these services in conflict with that public policy that is opposed to interference by outsiders with public officials, by personal persuasion or importunity in their administration of affairs of government.

Judgment is affirmed, with damages.

HOWARD v. COMMONWEALTH.

(Filed May 20, 1904—Not to be reported.)

1. Criminal law—Where there is nothing in the record showing that the error complained of was not known to appellant at the time the jury was empaneled, this court, by the provisions of section 281 of the Code of Practice, is prohibited from reversing from such a cause.

2. Same—Continuance—There being nothing in the record to show that a defendant asked for compulsory process to compel the attendance of his witnesses, or that he asked the court to fix another day in the term for the trial of the prosecution against him, and in the meantime give him compulsory process, it can not be said that the court erred in overruling his motion for continuance on the ground that his witnesses were absent.

Byrd & Howard for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Magoffin Circuit Court.

Opinion of the court by Judge Nunn.

The appellant, Joseph Howard, was tried and convicted in the Magoffin Circuit Court on the charge of malicious shooting and wounding George Howard, with intent to kill, and his punishment fixed at confinement in the State penitentiary for a period of eighteen months, and from this judgment this appeal is prosecuted.

The facts are about as follows: George Howard, the party wounded, is an uncle of the appellant. On the day of the shooting and wounding appellant was at work on his farm. George Howard and one Kendall Howard, a brother-in-law of appellant, in passing appellant's farm, induced him to go with them over on Licking creek, where they purchased some whisky and all of them drank of it and became pretty drunk. On returning to appellant's house he invited them to stop and take dinner with him, it being about noon. George Howard accepted the invitation and took a seat on appellant's porch. Kendall Howard refused and remained at the outer fence. Appellant insisted on his coming in and getting dinner. Kendall answered and said "G—d d—n you and your dinner." They had some warm words at the gate when appellant ran into his house and got his shot gun. His wife caught hold of him, he presented the gun in the direction of Kendall Howard, and George Howard appealed to him not to shoot. Appellant then said to George "D—n you, do you take it up," and turned the gun on him and shot him through the arm.

The court gave to the jury proper instructions on malicious shooting, and shooting in sudden heat and passion. The court gave one on self-defense which was unnecessary. The appellant himself does not claim that he shot in self defense, but claims that he did not intend to shoot at all; that the gun was discharged by accident. The appellant complains that there was a second cousin of the wounded man on the jury which tried him, and that by reason thereof he did not get a fair and impartial trial. This fact is not made to appear until his motion for a new trial. There is nothing appearing in the record, by affidavit or otherwise, that appellant did not know this fact before and at the time the jury was being empanelled, and even if it did appear that he was ignorant of this relationship at that time, this court is prohibited by section 281 of the Code, from reversing for such a cause.

Appellant also complains that the lower court erred to his prejudice in refusing to grant him a continuance on account of the absence of several of his witnesses. The appellant filed his affidavit stating what he could prove by them, which the court permitted him to read as the evidence of the absent witnesses. The appellant contends that he was entitled to the presence of his witnesses or at least he was entitled to have compulsory process for them before he should be forced into trial, and cites the case of Adkins v. Commonwealth, 98 Ky., 539, as authority for his contention. We admit that this authority sustains him, but there is nothing in the record showing that he asked the court for such process nor did he ask the court to fix another day in the term, and, in the meantime, give him compulsory process for his witnesses.

Perceiving no error prejudicial to the substantial rights of the appellant the judgment is, therefore, affirmed.

FRISTOE, &c. v. GILLEN.

(Filed May 20, 1904—Not to be reported.)

1. Attorney's fees—Settling estates—Inequitable allowance—Separate counsel—Minutes of last day—In an action by the administrator against the heirs of his intestate to settle the estate and to sell or partition the land, four of

the six heirs employed separate counsel to resist the partition of the land. On the last day of the term a minute was made on the minute book of the court as follows: "C. Gillen v. Margaret Eden, &c. M. and E. allowed an attorney fee of $300 upon proof heard, to be taxed as cost," and at the close of the minute book of that day these words: "Ordered that court adjourned until court in course." This was signed by the judge. After the adjournment and before the next term, an order was written out at length, allowing Murphy & Eden, the attorneys who represented the appellees, $300 for their services, to be taxed as costs in the action. On the first day of the succeeding term, and before the orders of the last day's preceding term were read and approved by the court, appellants filed their affidavit and moved the court to refuse to approve the order allowing appellees' counsel $300. The court overruled the motion and approved the order. Held—That this was error, as it would be inequitable to compel appellants to pay four-sixths of the sum allowed appellees' counsel, and then in addition pay their own.

2. Unsigned orders—Control of court—We are of the opinion, under authority in 1 J. J. M., 114 and 80 Ky., 377, that the lower court had complete power and control over the minutes or orders made on the last day of the preceding term, and on the first day of the succeeding term could have approved or disapproved any of such orders. The minute was not a complete order, or of binding effect until spread on the order book and approved and signed by the court on the first day of the succeeding term.

Lee & Hester for appellants.

Murphy & Evers for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Nunn.

Prior to the year 1893 one J. W. Gillen departed this life intestate domiciled in Graves county, Ky. He left some personal estate and 160 acres of land situated in that county. He left no wife or children surviving him, his only heirs being his brothers and sisters and their descendants, who are appellants and appellees herein. His brother, C. Gillen, one of the appellees, administered upon his personal estate and settled and distributed it.

In the month of September, 1903, C. Gillen instituted this action, making his brothers and sisters, and the descendants of those who had died, parties defendant. By this action he sought to divide the 160 acres of land left by his deceased brother between his heirs, alleging that it was susceptible of division into six equal parts without materially impairing its value, and prayed for a division and asked if the court could not adjudge a division, that then it be sold for the purpose of a division of the proceeds. Afterwards C. Gillen filed an amended petition, in which it was alleged that one of the appellants, Alfred H. Gillen, was indebted to the estate of J. W. Gillen, but did not state the amount, and asked that this interest in the land be charged with the payment of this indebtedness. The appellants representing four of the six interests in this estate, answered and denied that the property could be divided without materially impairing its value, and asked that the land sold and the proceeds be divided. The appellant, Alfred H. Gillen, filed a demurrer to the amended petition, which was sustained.

These appellants representing the four interests, employed their own counsel who represented them in this litigation. The court adjudged a sale of the land, and on the last day of the term of the court at which the sale of

the land was ordered, there was placed on the minute book of the court the following words and figures: "C. Gillen v. Margaret Eden, &c. M. & E. allowed an attorney's fee of $300, upon proof heard, to be taxed as cost," and at the close of the minute book of that day these words and figures: "Ordered that court adjourn until court in course." This was signed by the judge.

It appears that between this day and the next succeeding term of court an order was drawn in full allowing Murphy & Eden, the attorneys who represented appellees, $300 for their services, to be taxed as cost in the action. On the first day of the succeeding term, and before the orders of the last day of the preceding term were read and approved by the court, the appellants filed their affidavits and moved the court that it refused to approve the order allowing appellee's counsel the $300, for the reason, as they claim, that they had employed their own counsel to represent them in the litigation, and that it would be unjust for them to contribute to the payment of appellee's counsel, and in addition, pay their own. The court overruled their motion and approved the order, and appellants have appealed.

We are of the opinion that the court erred in making this allowance. This court in the case of Bailey's Adm'r v. Barclay, &c., 22 Ky. Law Rep., 1246, in construing section 489 of the Kentucky Statutes, said: "The statute is only intended to apply to that class of cases where the parties have a common interest and a part, without objection from the others, prosecutes suits for their joint benefit and only such parties as are not represented in the case by attorneys selected by themselves. One jointly interested can not be compelled to pay for counsel employed by others, when he has himself employed counsel to represent his interest." (74 Ky., 168; 21 Ky. Law Rep., 75; 11 Bush, 166; 18 Ky. Law Rep., 616.)

Appellees desired a division of the land, appellants desired a sale, which was obtained. Appellees sought to deprive appellant, A. H. Gillen, of his interest in the land. He, with the other appellants, employed their own counsel, and it would be inequitable to compel them to pay four-sixths of the amount allowed appellee's counsel, and then in addition, pay their own. Appellees contended that as appellants did not except to and pray an appeal from the order entered on the minute book on the last day of the term, that they can not maintain this appeal; that their objection and exception to the approval of this order on the first day of the succeeding term was ineffectual; that it gave them no right or authority to prosecute an appeal from that judgment.

Under the authority of the opinions of this court found in 1 J. J. M., 114, and 80 Ky., 377, we are of the opinion that the lower court had complete power power and control over the minutes or orders made on the last day of the preceding term, and that on the first day of the succeeding term could have approved or disapproved any of such orders. This minute or order referred to was not a complete order and of binding effect, until spread upon the order book and approved and signed by the court on the first day of the succeeding term.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

TUTTLE v. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO.

(Filed May 20, 1904—Not to be reported.)

Railroads—Ejecting passenger—Damages—Peremptory instruction—Where a passenger on a train was drinking and did not pay or offer to pay his fare, the weather was mild and the time of the day was early in the afternoon, the fact that he was injured by a passing train after he had been put off the one on which he attempted to ride as a passenger, did not entitle him to recover in an action for damages, where he got off the train with a jug of whisky and after a while wandering on the track when he was struck by a passing train, his having been ejected not being the proximate cause of his injury.

W. A. Morrow for appellant.

O. H. Waddle and John Galvin for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant alleges in his petition that he purchased a ticket for passage on appellee's train from Somerset to Burnside; that he was at the time drunk and practically helpless, mentally and physically; that he boarded the train; that his ticket was taken from him by some employe of the train, or was misplaced by him, but that he is unable to say which; that the employes of the train, knowing his condition, negligently ejected him from the train at a point remote from any station or dwelling, in a dangerous place, and there left him; that while in this helpless condition he wandered on to the railroad track to reach shelter, and while there was struck by a passing train and injured. His proof tended to establish that he did purchase the ticket, and was at the time more or less drunk. He was able to get on the train and to control his own movements. When the conductor asked him for his ticket after the train had started he was unable to produce it. He refused to tell the conductor where he was going. A brakeman attempted to help him find his ticket, but it was not found. Appellant did not pay or offer to pay his fare. Thereupon the train was stopped, and he was invited to get off, which he did. The weather is not shown to have been inclement, the season was in the month of April, the time of day was shortly after noon. Appellant had with him a jug of whisky. He was not so drunk but what he remembered all that was recited above. He knew about where he was when he left the train, and started in the proper direction to reach his home; but he admits that he took more of his whisky, and continued to do so at intervals. He became so drunk that he laid out all night in the vicinity of the railroad track. Early the next morning he wandered on to the track, sat down on its edge, and went to sleep. It was then that he was injured by the passing train, whose operators were unaware of his presence or condition so far as anything in the record shows.

At the conclusion of plaintiff's evidence the court peremptorily instructed the jury to find a verdict for the defendant. It is of this action of the court that appellant complains on this appeal. While it is settled that those in charge of a railroad train in ejecting a drunken passenger who fails to pay his fare, or to produce a ticket, must exercise due care, such as may be required by the circumstances, in selecting a place for depositing such passen-

ger as that he will probably be able to protect himself, or can be afforded protection by others, from danger from passing trains at that point, and from danger on account of the inclement condition of the weather, etc., yet the condition of the person ejected must be such that it would reasonably indicate to the railroad employes that he, on account of his condition and the surrounding circumstances, would be liable to such injury. (L. & N. R. R. Co. v. Ellis' Adm'r., 97 Ky., 340; Fagg's Adm'r v. L. & N. R. R. Co., 23 Ky. Law Rep., 383; Brown's Adm'r v. L. & N. R. R. Co., 103 Ky., 211.) The proof in this case did not show that appellant was in that state of mind and physical disability that he would probably be not able to properly take care of himself. But the controlling reason why the peremptory instruction should have been given is, that whatever may have been appellant's condition at the time he was ejected from the train, it is manifest from the record that the injury sued for was not proximately due to that condition; but for the whisky drunk by him afterward, by which he voluntarily continued and increased his state of helplessness, there is no reasonable probability that his injury would have occurred.

Judgment affirmed.

ALFORD, &c. v. COMMONWEALTH.

(Filed May 24, 1904—Not to be reported.)

Criminal law—Instructions—In a prosecution for murder, where a witness was asked if she did not say to certain persons that deceased was killed while he was asleep, which she denied, and the witnesses upon being called stated that she had made the statement to them, the court should have instructed the jury that the testimony of these witnesses could only be considered for the purpose of contradicting the witness, and not as substantive testimony that the deceased was killed while he was asleep.

E. N. Ingram, B. B. Golden and J. D. Black for appellants.

N. B. Hays and Loraine Mix for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Hobson.

Thomas Alford was indicted for the murder of Andrew Collins; he was found guilty as charged, and his punishment was fixed at confinement in the penitentiary for life. Collins and Alford were miners on Straight creek in Bell county. They were both unmarried and boarded with Steve Alford, a brother of Thomas Alford. They had been friends until something over a week before the homicide, when Collins fell out with appellant about a girl and attempted to shoot him. After this he threatened to kill appellant and manifested hostility to him. There was some trouble between them on Saturday night at a merry-go-round. The following Monday morning Tom Alford got his breakfast and left. Collins came in afterwards and said to Steve Alford while at breakfast he was going to the merry-go-round that night and there was some one going down there that night who would be carried back. Steve asked him who it was and Collins replied with an oath that he knew who it was. Steve then told him to get another boarding house. Collins went in to change his clothes and Steve

Alford again told him he must get another boarding house. He answered that he would get one at 11 o'clock. Collins then had on his mining clothes and went on to the mine. At 11 o'clock he returned from the mine, washed and dressed, got out his things and said to Mrs. Alford that if Tom went to the merry-go-round that night he intended to kill him. She was sitting on the porch and he laid down on a board placed across the banisters saying to her "Nellie, I have to leave my boarding house, but I will do some dirt before I leave." While he was lying there Tom Alford, who had been interrupted in his work in the mines by water, came home. As to what followed the proof for the Commonwealth is circumstantial. A few minutes afterwards pistol shots were heard; Tom Alford was seen running away from the house up the hill and Collins was found lying on the plank shot through the head in three places. Two of the balls were imbedded in the plank and his face was powder burned. No weapon was found near him. While no witnesses produced by the Commonwealth so stated, the prosecution evidently proceeded on the idea that appellant shot Collins while he was lying on the board, asleep. On the other hand, the proof for the defendant was to the effect, by him and Mrs. Alford, that just as appellant got on the porch, Collins raised up and threw his hand back and as he did this appellant shot him in the head, and as he fell back on the plank, shot him a second and third time in quick succession. Mrs. Alford was asked if she did not say to Mrs. Callie Miller, Mrs. Gordon Haines, Mrs. Sarah Simpson and Sallie Durham at her house a few minutes after the killing that the defendant had killed Collins while he was asleep. She denied so stating. The witnesses referred to were called by the Commonwealth in rebuttal, and testified that Sallie Alford had so stated to them at the time and place referred to.

The court failed to instruct the jury that the testimony of these witnesses could be considered by them only for the purpose of contradicting the witness, Sallie Alford, and not as substantive testimony that the accused shot Collins while asleep. The case is in this respect on all fours with Feuston v. Commonwealth, 91 Ky., 230, where a judgment of conviction was reversed for this reason. The testimony of the four witnesses related to a statement alleged to have been made by Mrs. Alford soon after the homicide, and coming without restriction from the court as to its effect, the jury would naturally regard it in determining the question as to whether Collins was shot while he was asleep or when he was rising up to attack the accused. This was the turning point of the case. There was no other positive testimony in the case that the shooting occurred in this way, and while the facts stated by the Commonwealth's witnesses tended to show that the shooting might have been done in this way, the facts shown by the Commonwealth were not irreconcilable with the version of the difficulty as given by the defendant. The Commonwealth proved by several witnesses statements by the accused after he was arrested as to how the shooting occurred, but this proof was conflicting and taking it all, the jury were warranted on this evidence alone to conclude that his version of what he said was the correct one. The doctrine of the Feuston case was followed in Jones v. Commonwealth, 20 Ky. Law Rep., 355; Collins v. Commonwealth, 23 Ky. Law Rep., 743; Mullins v. Commonwealth, 23 Ky. Law Rep., 2433; Ashcraft v. Commonwealth, 24 Ky. Law Rep., 488.

Judgment reversed and cause remanded for a new trial.

VANSANT, &c. v. MILLER.

(Filed May 24, 1904—Not to be reported.)

Conveyances—Contracts—Where, upon a reservation in a mortgage to appellants, of a strip of ground which they subsequently sold in violation of the contract of sale, a judgment for the value of it will be upheld, the jury having heard all of the facts and knew the parties and witnesses.

Thos. R. Brown for appellants.

Edgar B. Hager for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1894 appellee became indebted to one George Wheatley in the sum of $1,000 and made and executed to him a mortgage, to secure this sum, on a lot in the city of Ashland, Ky. In the following year he became indebted to one Nicholas Becker in a like sum and executed a mortgage to him on this same lot and also another and adjoining lot. In the month of April, 1896, appellee became indebted to a bank in that city in the sum of $700, and appellants R. H. Vansant and O. L. F. Beckett became endorsers on this note for appellee, and to secure them appellee made and executed to them a mortgage on both of these lots mortgaged to Wheatley & Becker, and also agreed and bound himself, in the event appellants were compelled to and did pay this $700 note to the bank, that he would convey to appellants, by deed of general warranty, the two above lots, save and except a piece 25 by 50 feet in the rear of and abutting on a 16 foot alley, and in consideration for this deed appellants promised to assume and pay the Wheatley & Becker mortgage debts. Appellee was unable to pay this $700 note when it became due, and on that day and in compliance with the stipulations in the mortgage, made and duly executed a deed to appellants which was accepted by them, covering the property mentioned in the mortgage and also excepting the strip of 25 by 50 feet. We quote so much of the mortgage as applicable to the question at issue: "Witnesseth, That the party of the first part, in consideration of $700 cash in hand, the receipt of which is hereby acknowledged, and the further consideration that the party of the second part is to pay and discharge for the party of the first part the full indebtedness of George Wheatley and Nicholas Backer due them respectively from the party of the first part as evidenced by mortgage on the property hereby conveyed; the party of the second part accepts this consideration."

The appellants failed to pay these mortgages to Wheatley & Becker, as they obligated themselves to do, but sold the property covered by their deed to one Mrs. Henderson, receiving a small advance over the price they paid and she assumed the payment of the mortgages. She also failed to pay and Wheatley & Becker enforced their mortgage liens and all the property was sold, including the strip 25 by 50 feet and Mrs. Henderson became the purchaser thereof at the price of the mortgage debts and costs. This action was brought by appellee against appellants for damages for the value of this strip 25 by 50 feet for $600 for the alleged violation of appellants' obligation and covenant to pay these mortgage debts and save to him this small strip of ground. He also alleged that there was a conspiracy and agreement be-

tween appellants and Mrs. Henderson at the time of the sale to her, that these mortgages should not be paid and the mortgagees suffered to enforce their mortgage liens that the property might be sold that she might become the owner of it all. Appellants traversed the allegations of the petition except their failure to pay the mortgages and the enforcement of them by the mortgagees and alleged that their failure to pay the mortgage debts was caused by the fault of appellee; that they refused to pay same because appellee, at the time of the execution of the mortgage to them for the security of the $700, and also at the time of their acceptance of the deed from appellee to the property, he represented that the interest had been paid to Wheatley & Becker on their notes up to that date, and also that there were no other liens or incumbrances on the property, when in truth and in fact there was $120 interest then due on the note, and city taxes to the amount of $154 was then due and unpaid and was a lien on the property. Appellee denied making any such representations. A trial was had before a jury which resulted in a verdict in favor of appellee for $400, this being the second verdict, the first one having been for $500.

The court only gave two instructions, and they are as follows:

"1st. The jury will find for the plaintiff the fair market value of the piece of real estate in controversy on the date of sale of same, to wit.: December 27, 1897, not exceeding $600, unless they find for defendant under instruction No. 2.

"2d. If the jury shall believe and find from the evidence that the plaintiff, J. C. Miller, at the time he made the contract with the defendants, R. H. Vansant and O. F. L. Beckett, for their endorsement of the plaintiff's note for $700, and for their taking and acquiring the property described in said contract, or at the time of the conveyance by plaintiffs to the defendants of said property, represented to the defendants that all accrued interest on the liabilities to Wheatley & Becker had been paid, and that there were no other liens or incumbrances on said property, and shall further believe and find from the evidence that said representations, or either of them, were untrue when made, and that the defendants not knowing said representations to be untrue, and relying upon same, accepted said deed, the law is for the defendants, and the jury will so find."

These instructions were very favorable to the appellants. The proof shows that this lien for taxes was never paid by appellants or their vendee and the proof is conflicting as to the interest due on the Wheatley & Becker mortgages and as to what was represented by appellee with reference thereto at the time of the contracts with appellants. The jury heard all the facts and knew the parties and witnesses and found that appellants were not deceived by any representations made by appellee, and we are unwilling to disturb their verdict, especially as it is the second verdict in his favor.

Wherefore, the judgment is affirmed.

MOORE v. TYLER, &c.

(Filed May 24, 1904—Not to be reported.)

Sale of personalty—In this action to recover upon an alleged contract for the sale of a saloon and its contents, it being alleged that appellant had contracted to pay $500 for the property, when it was then levied upon by the

sheriff, but by agreement was sold by him to appellant for $300, when the latter refused to pay the remaining $200, while the evidence is conflicting the weight of it sustaining the allegations of the petition, the verdict of the jury upholding the original sale of the saloon will not be disturbed.

S. R. Crewdson and J. B. Grubbs for appellant.

W. F. Browder and J. C. Browder for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Nunn.

Appellees filed their petition against appellant in September, 1903, and alleged that they were in the saloon business in Adairville, Ky.; that on or about the 4th of April of that year they made a contract and sold to the appellant their saloon and all its contents and fixtures for the price of $500, the appellant agreeing to pay $300 in cash and to execute his promissory note, due one day after date, for $200; that within the same month a judgment was rendered against the appellees in favor of Thixton, Millett & Co. for about $330, which was, by the sheriff of Logan county, levied upon this saloon and contents before the appellees delivered same to the appellant.

Appellees alleged that they induced the plaintiffs in the execution and the sheriff to make a sale of this stock under the execution privately to the appellant, Amos Moore, and to accept $300 cash to be credited on this execution, which was done. The sheriff, not being informed of the private sale to appellant, turned over the saloon to him and gave him a receipt showing a payment in full for the stock for the price of $300. Appellee also alleged that after the stock was turned over to appellant by the sheriff he refused to execute the note for $200, as agreed, and denied his liability for the same.

Appellant answered, denying this private purchase of the stock or that he had ever agreed to pay any sum other than the $300, which he paid to the sheriff. A trial was had before a jury and appellees recovered the full amount sued for. The court overruled appellant's motion for a new trial, and he has appealed.

The evidence was conflicting; the appellee and two witnesses sustaining the allegations of the petition. The appellant denied any private or other purchase from the appellees and claimed that he purchased solely from the sheriff, and introduced a writing signed by appellees requesting a private sale by the sheriff, the sheriff's return on the execution and the receipt given him by the sheriff for the full purchase price of $300. The appellant also introduced proof to contradict and discredit one of appellees' witnesses. The court, by two instructions, gave the correct law and put the issue fairly to the jury and under the circumstances we do not feel authorized to disturb their verdict.

Wherefore, the judgment is affirmed.

ROACH v. DANCE, &c.

(Filed May 24, 1904—Not to be reported.)

1. Wills—Remainder—In a devise to the wife for life, and remainder to his children at her death, at the death of the wife each of the children took

under the will a vested remainder which might be defeated by their death without children before the death of the life tenant.

2. Homestead exemption—This court has never gone to the extent of holding that both the life tenant and remainderman can have a homestead in the same tract of land at the same time, and where the remainder interest was sold under execution before the death of the life tenant, such sale will not be disturbed on the ground that the remainderman was entitled to a homestead therein.

J. B. Wickliffe for appellant.

Reeves & Tharp for appellees.

Appeal from Ballard Circuit Court.

Opinion of the court by Chief Justice Burnam.

This appeal involves the construction of the will of A. W. Roach, which reads as follows: "I give and devise to my beloved wife, Nancy Jane Roach, in lieu of her dower, the farm on which we now reside, * * * containing 150 acres, more or less, during her natural life. * * * At the death of my said wife, the real estate aforesaid I give and bequeath to my seven children (naming them) in equal shares; but if either of said children should die before my said wife, leaving no children living at the decease of my wife, then the share of such property so devised to such son or daughter, is hereby devised to the survivors of said children."

The will of testator was duly probated in October, 1891. In 1897, the one undivided one-sixth interest of the appellant, Pink Roach, a son and devisee of A. W. Roach, in this tract of land was sold by the sheriff of Ballard county to satisfy an execution in favor of W. A. Powell, which issued from the office of the Ballard Circuit Court. At this sale the appellee, Wm. Dance, and W. A. Powell, the plaintiff in the execution, became the purchaser of such undivided interest, and in August, 1898, the sheriff executed to them a deed therefor. The interest of W. A. Powell in this purchase was subsequently acquired by F. W. Tharp. After the death of the life tenant, the appellees, Dance & Tharp, instituted this proceeding, asking that the one-sixth interest devised to Pink Roach should be set apart to them, which he resisted on two grounds: First, because his interest in the land was contingent at the date of the sale under the execution, and was, therefore, not liable; second, because he occupied the land with his family in connection with his mother during her lifetime, and was so occupying it at the date of the levy and sale; and that his interest was of less value than $1,000; and that he was entitled to have it set apart to him as a homestead. A general demurrer was sustained to the answer of Roach, and judgment rendered in favor of the appellees, Dance & Tharp, for the land in controversy, and Roach has appealed.

The first question to be determined is, whether the children of testator took a vested or contingent interest in remainder in the tract of 150 acres of land devised to their mother for life. Judge Kent, volume 4, section 202, says: "An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment."

Mr. Minor in his Institutes, volume 2, page 388, after quoting Fearne's definition of vested remainder, 212, says: "It is not the uncertainty of ever

taking effect in possession, that makes a remainder contingent, for to this extent every remainder is and must be liable, since the remainderman may die, and die without heirs before the determination of the particular estate. The present capacity of taking effect in possession, if the possession were to become vacant before the estate limited in remainder determines, universally distinguishes a vested from a contingent remainder."

Each of the children of A. W. Roach took under his will a vested remainder, which might be defeated by their death without children before the death of the life tenant, or what is generally called a defeasible fee, and an interest in the land which could be subjected by their creditors during the life of the life tenant. If appellant had died before his mother, the interest would have descended to his children, and appellees would have taken nothing under their purchase. But as he survived her, the interest acquired by appellees by their purchase ripened into a fee simple. (Birney v. Richardson, 35 Ky., 424; Forsythe v. Lansing's Ex'ors, 22 Ky. Law Rep., 1064; Lewis v. Shropshire's Trustee, 24 Ky. Law Rep., 332; Baxter, &c. v. Isaacs, 24 Ky. Law Rep., 1618.) Appellant's interest in the land was, therefore, subject to sale unless he was entitled to a homestead exemption therein.

He alleges that he resided with his wife and children upon the land with his mother at the time it was levied upon and sold by the sheriff under the execution; and that his interest being of less value than $1,000 was exempt as a homestead. It was decided in Robinson v. Smithey, 80 Ky., 636, that a party holding the title to a tract of land for life, with remainder to her children, and in the occupancy of the land was entitled to a homestead therein as against her creditors. In Merryfield, &c. v. Merryfield's Ass'ee, 82 Ky., 526, it was further held that the life tenant and remainderman could not have a homestead in the same tract of land at the same time. In the opinion in that case, this court said: "This court has never gone so far as to decide that both the widow and remainderman at the same time can have a homestead in the same tract of land. Nor do we think the statute can be so applied and extended. The rule of the homestead exemption is that the debtor required a prescribed amount in value of land to be set apart for the support of himself and family, but to accomplish such a benificent object he must have the right to occupy and use it, and it is indispensable that the party claiming the exemption must be in the actual possession. But a party having merely an interest in remainder is without any right to the possession, and, in the meaning of the law, not in possession."

It follows from these decisions that appellant was not entitled to a homestead in his interest in the land at the time it was sold by the sheriff under the execution to satisfy his debts; and that the judgment appealed from should be affirmed. And it is so ordered.

HENNING, &c. v. STEVENSON, &c.

(Filed May 24, 1904.)

1. Wills—Testamentary capacity—Undue influence—Instructions—In a will contest where the will was assailed on the ground of incapacity and undue influence, and where it is conceded that the will and codicils were

all written by the testatrix herself, the following instructions to the jury are approved:

"First. The court instructs the jury that they should find the paper dated January 5, 1897, read in evidence and purporting to be the last will of Fanny Speed, and the four papers read in evidence as codicils thereto, to be the last will of Fanny Speed, unless they shall believe from the evidence that at the time she wrote said papers, or wrote one or more of them, she was not of sound mind, or that she wrote one or more of them under the influence of some other person or persons.

"Second. But if she was not of sound mind when she wrote the said paper, or one or more of them, they should find the paper or papers written by her when she was not of sound mind, not to be her last will.

"Third. If she wrote the said papers or any part of either of them, under the undue influence of any other person or persons, as defined in instruction No. 5, the jury should find the paper or papers, or the parts thereof written under such undue influence, not to be the last will of the said Fanny Speed."

By instruction No. 4 the court defined mental capacity; by instruction 5 he defined undue influence; by instruction 6 he directed the jury as to the form of their verdict. These were all the instructions given.

2. Evidence—Instructions—Prominence avoided—In a will contest where testable capacity is the issue, the instructions should be so framed as to leave the jury to decide the question on all the evidence without any expression from the court giving prominence to any part thereof; the will being before the jury, will be considered in connection with all the other evidence, in coming to their verdict.

3. Witness—Wife of contestant—Competency—In a will contest the wife of one of the contestants is incompetent as a witness for the contestants, the meritorious cause of the action being in him and not in her.

4. Expert testimony—Where two physicians testified fully, as experts from a hypothetical case put to them, as to the testable capacity, of the testatrix, stating fully the symptoms of the disease known as arterio sclerosis of the brain, the court did not abuse its discretion in refusing to allow them to further testify as experts, by taking the will and explaining to the jury from the will, what evidence they saw from the handwriting and the structure of the instrument that the testatrix was suffering at the time with said disease.

5. Burden of proof—When the propounders of a will have proved the due execution of a paper, not irrational in it provisions nor inconsistent in its structure, language, or details with the sanity of the testator, the presumption of law makes out for them a prima facie case, and the burden of showing incapacity on the part of the testator, is shifted to the contestants.

Pirtle, Trabue, Doolan & Cox, William Lindsay, O'Neal & O'Neal and Julius C. Klein for appellants.

Helm, Bruce & Helm for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Hobson.

Appellees offered for probate in the Jefferson County Court, a paper purporting to be the will of Fanny Speed. Its validity was contested; the county court admitted the paper to probate; the contestants appealed to the Jefferson Circuit Court where the case was heard before a jury who also found in favor of the will; judgment having been entered on the verdict the contestants appeal to this court. Fanny Speed was the widow of Joshua F. Speed, who died in the year 1882 leaving an estate amounting to over $650,-

000. They had no children; Mr. Speed, by his will, after certain specific devises, gave one-half of his estate to his relatives and the other half to his wife. She received, under the will of her husband, about $335,000. She made her will in January, 1897, and died in the summer of 1902. At the time of her death her estate amounted to over $500,000. Her husband was the partner of her brother, J. W. Henning, and her brother's sons managed her estate for her with rare fidelity and good judgment. Some weeks before the will was made she sent and got some legal cap paper and also got a former will she had made. After this, on two afternoons, she remained in her room and wrote with her own hand, nobody being present or knowing what she had written, the paper in contest, placed it in an envelope and delivered it to a lady who was living with her, to keep as her will. The lady declined to keep it and finally it was delivered to her nephew, Mr. Henning, who had it placed in a box in the vaults of the trust company, whence it was taken after her death, she having subsequently made some codicils to it that are not important. By her will, after a number of specific devises of no great value, she disposed of her entire estate. There was no question on the trial under the evidence, but that the paper was wholly in the handwriting of the testatrix and was executed and published as her will. Its validity was assailed on the ground of incapacity and undue influence. The chief complaint made on the appeal is of the following instructions given by the court:

"1st. The court instructs the jury that they should find the paper dated January 5, 1897, read in evidence and purporting to be the last will of Fanny Speed and the four papers read in evidence as codicils thereto, to be the last will of Fanny Speed, unless they shall believe from the evidence that at the time she wrote the said papers, or wrote one or more of them, she was not of sound mind; or that she wrote one or more of them under the influence of some other person or persons.

"2d. But if she was not of sound mind when she wrote the said papers, or one or more of them, they should find the paper or papers written by her when she was not of sound mind, not to be her last will.

"3d. If she wrote the said papers, or any part of either of them, under the undue influence of any other person or persons as defined in instruction No. 5, the jury should find the paper or papers, or the parts thereof written under such undue influence, not to be the last will of the said Fanny Speed."

By instruction 4 the court defined mental capacity; by instruction 5 he defined undue influence; by instruction 6 he directed the jury as to the form of their verdict. These were all the instructions given. The only instruction complained of is No. 1. This is complained of on the ground that the burden of proof as to capacity, continues upon the propounders throughout the case. But in Milton v. Hunter, 13 Bush, 163, this court, in a well-considered opinion by Chief Justice Lindsay, condemned an instruction which placed the burden of proof as to testamentary capacity upon the propounders, and laid down the rule that when they have proved the due execution of a paper not irrational in its provisions nor inconsistent in its structure, language or details with the sanity of the testator, the presumption of law makes out for them a prima facie case and the burden of showing incapacity on the part of the testator, is shifted to the contestants. This rule has since

been followed in Flood v. Pragoff, 79 Ky., 611; Fee v. Taylor, 83 Ky., 259; Brammel v. Brammel, 101 Ky., 72; Howat v. Howat, 19 Ky. Law Rep., 756; King v. King, 19 Ky. Law Rep., 868; Boone v. Ritchie, 21 Ky. Law Rep., 864; Woodford v. Buckner, 23 Ky. Law Rep., 628; Dunnaway v. Smoot, 23 Ky. Law Rep., 2291. The evidence as to the execution of the will by the testatrix and as to its being wholly in her own handwriting. was uncontradicted; there being no conflict of evidence on these matters the court did not err in not submitting them to the jury and in assuming in the instruction that the testatrix had written the paper with her own hand.

But it is insisted that the court erred in not submitting to the jury whether the paper was consistent in its provisions and rational on its face. Our attention is called to the fact that the instruction approved in Brammel v. Brammel and Woodford v. Buckner contained words submitting this question to the jury. But in the Brammel case the instruction had been given on the trial and the judgment of the circuit court was affirmed. In the Woodford case the Brammel case was simply followed. In both these cases the only question considered by the court was as to the burden of proof. The form of the instruction in so far as it relates to the words referred to was not considered, and there is nothing in either of these opinions to show that these words were deemed material. On the other hand, in Howat v Howat and Boone v. Ritchie instructions were approved which were substantially the same as that complained of. It is a question for the court to determine when a prima facie case has been made out.

The court must determine this question in will cases as in others, for himself, and frame his instructions to the jury accordingly When the propounders have shown the execution of a paper rational in its provisions they have made out a prima facie case, and when the court comes to instruct the jury the rule is that he should not instruct them as to the presumptions of law, but should simply so frame his instructions as to indicate the burden of proof without expressly referring to it. (Davis v. Paducah Railway Co., 24 Ky. Law Rep., 185.) Under this rule the court must determine for itself on whom the burden of proof rests and so indicate in his instructions. When he has done this in a will case, it is a question for the jury under all the evidence, whether the testator was of sound mind at the time of the execution of the will. In determining this question they may consider all the evidence before them including the will itself, which, when wholly written by the testator, is potent evidence of the condition of his mind at the time. The rule is that the court should not in his instruction, single out or give prominence to any part of the evidence in the case. The instruction given by the court is preferable to the form referred to in Brammel v. Brammel and Woodford v. Buckner, for it gives no prominence to any of the evidence. The court did not determine for the jury that the will was rational on its face. It indicated nothing on this subject by the instruction. It simply indicated by the instruction the legal presumption in favor of sanity without expressly referring to it. The question to be determined by the jury as to the capacity of the testatrix was, whether she was of sound mind at the time she made the will. On this question the court by the instruction, indicated nothing except the party on whom the burden of proof rested. The jury were left to decide the question on all the evidence before them. The

will was before them and they could give it such weight as they saw proper, but after all, the question of testable capacity was the issue to be determined by the jury, and this was properly submitted to them in general terms without any expression from the court giving prominence to any part of the evidence before them. If the court had added to instruction No. 1 the statement that in determining the capacity of the testatrix they should consider all the evidence before them, and that in so doing they should consider the will itself and the nature of its provisions, its practical effect would not have been at all different; for the will was before the jury, it was read and exhibited to them as the sole act of the testatrix in which she was unassisted by any one, and it was of necessity, if rational or irrational, considered by the jury in coming to their verdict.

The wife of one of the contestants was offered as a witness for them. The court refused to allow her to testify and of this they complain. By section 606 of the Civil Code, neither a husband nor his wife shall testify for the other in actions of this character, except in actions which might have been brought by or against the wife if she had been unmarried, and in such actions either but not both of them may testify. The wife had no interest in the case, and if she had been unmarried might have testified. But the meritorious cause of action was in the husband and not in her, and it was not one of those cases in which either the husband or wife may testify. Those are the cases where the meritorious cause of action is in the wife. (Wise v. Foote, 81 Ky., 10.) It is insisted, however, that though she could not testify for her husband she might testify for the other contestants. It has been held that where the defendants are severally liable and separate judgments may be rendered as to each, the wife of one is competent for the others. (Dovey v. Lamb, 25 Ky. Law Rep., 1157.) But a will contest is not a case of this sort. The admissions of one devisee are competent against all the devisees because they have a common interest in the same question, and must stand or fall together, being thus consolidated by their testator and by their own act in claiming under his will. (Beall v. Cunningham, 40 Ky., 399; Rogers v. Rogers, 41 Ky., 244; Gibson v. Sutton, 24 Ky. Law Rep., 868.) The question to be determined here was, whether the paper was the will of the testatrix. All the contestants and all the contestees must stand or fall together. The judgment established a status which determined all their rights. The interest of one could not be separated from the interest of others.

The wife of one of the contestants or devisees was not, therefore, a competent witness for her husband or for any of the other parties joined with him as contestants or contestees. (Wise v. Foote, 81 Ky., 10; Williams v. Williams, 24 Ky. Law Rep., 1326.)

Appellants also complain of misconduct of counsel in asking certain questions, the purpose of which was to show that the contestants were already rich and that for this reason the testatrix acted rationally in only giving them one-half of her estate. The contestants are the heirs-at-law of the testatrix, the children of her deceased brother. If these people had been in indigent circumstances, this fact, if known to the testatrix, might have been shown by them as evidence that the testatrix ignored the natural objects of her bounty. The proof shows that she was on very affectionate terms with

her relatives and was justly attached to them. To explain why she, under these circumstances, gave them only one-half of her estate and devoted the other half to a certain charity, the propounders undertook to show that she had been for years much interested in this charity, and that her relatives were already abundantly provided for. The evidence was competent for it only placed the jury in the light of the circumstances surrounding the testatrix, and aided them in determining whether she took a rational survey of her estate and disposed of it according to a fixed purpose of her own. The questions objected to were excluded by the court on the ground that they related to the financial condition of the devisees at the time of the trial, and not to their condition at the time the will was made. As over five years had elapsed since the making of the will the ruling of the court was proper, although by statute the will speaks as if executed by the testator immediately before his death. (Kentucky Statutes, section 2849.) But we do not see that there was any misconduct of counsel in asking the questions, for the admissibility of the evidence was a subject on which lawyers might well differ. But the court not having admitted it, we must presume that the jury tried the case under the evidence before them. We do not see anything in the record to indicate that the appellants were prejudiced by this matter; on the contrary, it is hard to see how the jury could have reached any other conclusion under the evidence.

Appellants also complain that two physicians called by them as experts, were not allowed to take the will and explain to the jury from the will, what evidences they saw from the handwriting and the structure of the instrument, that the testatrix was suffering at the time from arterio sclerosis of the brain. The witnesses were allowed to state to the jury fully the symptoms of the disease, and also to state from a hypothetical case put to them, their judgment as to the testable capacity of the person indicated. To have allowed them to have taken the will and gone over it stating what here and there they saw in the omission of letters or proper punctuation, to indicate sclerosis, would have been to have opened up a wide field of inquiry. The court has a discretion in the matters of this sort. The record before us comprises something like 1,000 pages. The real facts about the testatrix were proved by a number of witnesses and we do not see that there was an abuse of discretion on the part of the court in refusing to allow the evidence in question, or that if admitted it could have had any appreciable effect on the case. The will was before the jury. They could see and any attorney could call their attention to anything in the will, either in the shape of the letters or the punctuation or the structure of the sentences that indicated sclerosis. The experts were permitted to tell all the signs of the disease, and one person could apply the symptoms to the writing as well as another. Bad punctuation or the omission of a letter here and there, or badly constructed sentences, are not confined to people who are suffering with sclerosis of the brain and, therefore, what the writing really indicated was to be determined, not alone from expert testimony, but from common experience, as other like questions. In view of the whole record we conclude that appellants got their whole case fairly before the jury and that there is no substantial error to their prejudice shown by the record.

Judgment affirmed.

HELM v. COMMONWEALTH.

(Filed June 14, 1904—Not to be reported.)

1. Town marshal—Jurisdiction outside town limits—Appellant was indicted and convicted for maliciously cutting the town marshal, Mike Jackson, while attempting to arrest him outside of the town limits, and his punishment fixed at two years in the penitentiary. Held—That the jurisdiction of a marshal of a town of the sixth class is not confined to the corporate limits of the town, but he may make an arrest any where in the county, without a warrant, where a public offense is committed in his presence.

2. Indictment—Malicious cutting—Instructions—Where a marshal of a town of the sixth class attempted to arrest the defendant who was guilty of disorderly conduct at a picnic outside of the town, and was cut with a knife by the defendant, on the trial of the defendant for maliciously cutting the marshal with intent to kill him, an instruction of the court "that the marshal had the right to arrest the defendant for a public offense committed in his presence without a warrant, if the defendant knew he was marshal, and that it was his duty to submit to the arrest, and if he refused to do so and assaulted the marshal with a knife, then the marshal had the right to repel said assault and use such force as was necessary to do so, and to compel the defendant to submit to the arrest," was proper.

3. Evidence—General moral character of the defendant—It is competent to introduce evidence of the general moral character of the defendant by way of impeaching him as a witness.

Sweeney, Ellis & Sweeney and C. M. Finn for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hobson.

Appellant, Sim Helm, was indicted and convicted in the Daviess Circuit Court for maliciously wounding Mike Jackson, his punishment being fixed at two years in the penitentiary. Jackson was marshal of the town of Whitesville in Daviess county, a town of the sixth class. There was a church picnic about two miles from the town. Helm was there misbehaving and the marshal was sent for. When he arrived he undertook to arrest Helm, who resisted arrest, and cut the marshal with a knife which he had in his hand. While the evidence is conflicting there was sufficient evidence to warrant the jury in finding that Helm committed a public offense in the presence of the marshal. The chief ground relied on for reversal is, that the court gave the jury the following instruction:

"4th. The court further instructs the jury that if they believe from the evidence that Mike Jackson was a marshal of the town of Whitesville, a town of the sixth class, in Daviess county, Kentucky, at the time of the cutting and stabbing alleged in the indictment herein, then it was his duty as such marshal to suppress any disturbance of the peace or any disorderly conduct committed in his presence in said county, and to arrest any person guilty of such offense where the offense was committed in his presence, and this he had a right to do without a warrant; it was likewise the duty of the said Mike Jackson acting as marshal, to arrest any person who was guilty of a public offense in his presence, such as using profane lan-

guage or being drunk in the presence of the marshal, and this it was his duty to do without a warrant; and if the jury further believe from the evidence to the exclusion of a reasonable doubt, that a public offense was committed in the presence of the marshal by the defendant, Sim Helm, and the said Helm knew that Mike Jackson was a marshal, then the said Jackson acting as marshal, had the right to arrest the said Helm, the defendant herein, without a warrant; and if the jury believe from the evidence, to the exclusion of a reasonable doubt, that defendant had committed a public offense in the presence of Mike Jackson, the marshal aforesaid, and knew said Jackson was marshal, and said Jackson attempted to arrest the defendant in Daviess county for said offense committed in his presence, then it was the duty of the defendant to submit to the arrest, and if he refused to do so, and assaulted the said marshal with a knife or deadly weapon, then said marshal had the right to repel such assault, and to use such force as was necessary to repel said assault, and to compel the defendant to submit to the arrest."

It is insisted for appellant that the marshal's jurisdiction was confined to the boundary of the town, and that he was without official authority outside of the corporate limits of Whitesville. By section 3687, Kentucky Statutes, applicable to towns of the sixth class, the marshal is given the powers that are now or may hereafter be conferred upon sheriffs by the laws of the State, and shall in all respects be entitled to the same protection. In Heather v. Thompson, 25 Ky. Law Rep., 1554, we held, following Rigley v. Grace, 17 Ky. Law Rep., 1008, that the marshal of a town of the sixth class may make an arrest outside of the corporate limits of his town. It is earnestly insisted that the decision is wrong, and should be overruled. But we see no reason for departing from a rule which has been laid down. Before the adoption of the present statutes, when the towns of the State were governed by special charters, it was common to insert in them provisions, giving the marshal the same authority as the sheriff within the county in which the town was situated. By section 26 of the Civil Code, in naming who are peace officers, marshals are mentioned, and in section 86, in naming those who may arrest without warrant, it is provided that a peace officer may make such an arrest when a public offense is committed in his presence. Under these provisions of the Code and the Statutes, in force when our present system of municipal government was devised, the marshals of the towns were recognized as peace officers in their respective counties, and if the legislature had intended to change the rule then in force it must be presumed that it would have done so in language evidencing such intention. This it did not do; on the contrary, the language would seem intended to continue in force the rule which had then so long obtained. Were the rule otherwise, evildoers would find in many cases a safe asylum from the municipal officers just outside of the town limits. The rule is admitted that ordinarily an officer's authority is limited to the district which elected him, but this is a matter within the legislative control and his authority may, by the legislature, be made co-extensive with his county, although he is elected by one of its subdivisions.

On the trial, evidence was admitted as to what occurred before Jackson reached the picnic grounds. This evidence was several times excluded by

the court, but afterwards it was admitted. Still by the instructions of the court the whole question was made to turn on whether the defendant committed a public offense in the presence of the marshal, and in view of all the evidence and the instructions of the court, we do not see that the defendant's substantial rights were affected by the proof as to what occurred when the marshal was sent for.

The Commonwealth was permitted to show that appellant's general moral character was bad by way of impeaching him as a witness. This also is complained of. But it is settled that the inquiry is not restricted to the witness' character for truth, but that his general moral character may be proved. (Hume v. Scott, 3 Mar., 261; Thurman v. Virgin, 18 B. Mon., 792; Tackett v. May, 3 Dana, 80.)

Judgment affirmed.

KELLY, &c. v. BRAMBLETT.

(Filed June 2, 1904—Not to be reported.)

Questions of law and fact—This case involves numerous land transactions and court proceedings between Middleton & Pace, Miller, DeBard & Everett and the Commonwealth Land and Lumber Co., and in which A. W. Couk and Maria Mott Davis were more or less connected, some of which were tried in the Harlan court of common pleas. There being no novel questions of law presented in the record, and the questions of fact being numerous and complicated, can best be gathered from the opinion in which the controverted questions of law and fact have all been affirmed.

H. L. Stone and Willson & Gifford for appellants.

Helm, Bruce & Helm for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Hobson.

In the spring of 1887, James Middleton and Calvin Pace conveyed to Miller, DeBard & Everett the land here in controversy, lying in Harlan county, in consideration of $5,645, of which $1,400 was paid, leaving a balance of $4,245 due Middleton & Pace. Subsequently Miller, DeBard & Everett, by written agreement, sold the same land to the Commonwealth Land and Lumber Co. for $10,571.60, of which $375 was paid. The company failed to pay the balance of the price as contemplated by the parties. During the negotiations on March 20, 1888, the company, by its agent, gave Miller, DeBard & Everett an order for $1,500, which was assigned to Middleton & Pace and finally passed to A. W. Couk. The order was not paid, and on June 21, 1888, Couk filed an action in the Harlan court of common pleas against the maker and endorsers of the draft, to recover thereon. In that action the land and lumber company filed its answer in which it set out the purchase of the property referred to, but alleged that Miller, DeBard & Everett had no title to it, and that the title was in one Mary Mott Davis. It made its answer a cross petition, praying that the court determine the condition of the title and that in the event that it be found that its vendors had no title, the title bond to it be cancelled; and that if the court should decide that its vendors had title to the land, then that they be adjudged to convey the land to it on the terms

and conditions set out in the title bond. Miller, as surviving partner of Miller, DeBard & Everett, filed an answer which he made a counterclaim against the land and lumber company, setting out that they had purchased the land from Middleton & Pace, the tender of a deed, on November 3, 1888, and denying that there was any defect in their title. Middleton & Pace obtained a quit-claim deed from Maria Mott Davis and filed their answer and counterclaim, praying judgment for the balance due them on the land, and Miller prayed judgment against the land and lumber company for the balance due by it to Miller, DeBard & Everett. In this condition of the pleading the case was submitted to the court on August 18, 1892, judgment having previously been rendered in favor of Couk, and the following judgment was entered:

"This cause having been submitted to the court upon the pleadings and exhibits relating to the cross petition and action of the Commonwealth Land and Lumber Co. against the firm of Miller, DeBard & Everett and the counterclaim of the firm of Miller, DeBard & Everett against the Commonwealth Land and Lumber Co., and the said firm of Miller, DeBard & Everett having tendered a deed of conveyance for the land sold by said Miller, DeBard & Everett to said Commonwealth Land and Lumber Co., which deed, in the opinion of the court, is good and sufficient, it is adjudged that the contract of sale be specifically performed; and the said Commonwealth Land and Lumber Co. having failed to traverse the allegations of the counterclaim of the said Miller, DeBard & Everett, the said counterclaim is taken for confessed, and the court being advised is of the opinion that the said firm of Miller, DeBard & Everett is entitled to the relief demanded. It is, therefore, considered by the court that the said Miller, DeBard & Everett recover of the defendant, the Commonwealth Land and Lumber Co., the sum of $10,571.60, subject to the credit of $375, with interest from the 16th day of July, 1891, until paid.

"The said firm of Miller, DeBard & Everett are also adjudged a lien on several certain tracts or parcels of land named in and described in the Commonwealth Land and Lumber Co.'s cross petition, and which is also described in the counterclaim of the said firm of Miller, DeBard & Everett, which lands the said Miller, DeBard & Everett may have sold for said firm in satisfaction of said judgment.

"It is furthermore adjudged that the cross petition of Middleton & Pace against Miller, DeBard & Everett be taken as true, and that the said firm of Middleton & Pace recover of the firm of Miller, DeBard & Everett the sum of $4,225, with interest thereon from the 16th day of July, 1891, and to recover payment of same they have a superior lien upon said land, and they may have said land sold in satisfaction of this judgment.

"It is furthermore adjudged that said land or a sufficiency thereof be sold to satisfy said judgment and lien. No part of the purchase money collected from the said Commonwealth Land and Lumber Co. shall be paid to said Miller, DeBard & Everett until the superior lien of Middleton & Pace shall have been paid to them." (Here follows order of sale.)

No sale of the land was made under this judgment. Executions were issued in favor of Miller, DeBard & Everett, which were returned no property found. On February 13, 1893, this action was begun in the Jefferson

Circuit Court by Miller, DeBard & Everett on the return of no property found under their judgment against the land and lumber company, under section 439 of the Civil Code. On March 4, 1895, execution was issued on the judgment in favor of Middleton & Pace against Miller, DeBard & Everett and levied on the land which was sold by the sheriff and purchased by appellants, and it not having been redeemed, was conveyed to the purchasers by the sheriff on January 22, 1896. Other actions brought by other creditors for the same purpose were consolidated with this action, and in these actions attachments were taken out and levied on the same land. The purchasers of the land at the execution sales referred to were made parties to the actions and set up their title. The land was sold under the execution as the property of Miller, DeBard & Everett. The appellees maintain that the legal title had passed out of Miller, DeBard & Everett to the land and lumber company, under the deed tendered by them by virtue of the judgment above quoted, and also insists that if this be not so, the land was encumbered by liens and, therefore, the sale under the executions only conferred on the purchasers a lien for their purchase money, with interest at 10 per cent., under section 1709, Kentucky Statutes. The circuit court adjudged that the execution sales passed no title to the purchasers, but adjudged them a lien on the property for their purchase money and ordered a sale of the property to satisfy all the liens. From this judgment the execution purchasers have appealed.

The judgment of the Harlan court of common pleas was not void. In its cross petition the land and lumber company prayed that its vendors be adjudged to convey the land to it pursuant to the title bond, if it turned out that they had title. The vendors of the land and lumber company in their counterclaim tendered a deed, denied any defect in their title and prayed judgment for the balance of the purchase money due them. Middleton & Pace also prayed judgment for the balance of the purchase money due them and set up the quit-claim deed from Maria Mott Davis. When the case was submitted to the court on these pleadings, the parties being all before him, he had jurisdiction under their prayer for general relief to enter a degree settling their rights, although Miller, DeBard & Everett had not in terms prayed the specific performance of the contract. None of the parties took an appeal from the judgment, and it had, therefore, become an absolute bar when the execution in favor of Middleton & Pace was issued. Not only so, but Middleton & Pace were parties plaintiff jointly with Miller, DeBard & Everett in this suit instituted in the Jefferson Circuit Court on February 13, 1893, and by instituting that action they elected to stand by the judgment. Having so elected, they are estopped to question its validity, for they can not claim under and against it, nor can they claim that it is valid in so far as it enforces the lien for purchase money and invalid in so far as it decrees specific performance of the contract; for unless the contract was enforced, there would be no lien for purchase money. Miller, DeBard & Everett tendered a deed and asked the court to enforce their lien for the purchase money. When the court decreed them the relief sought, the judgment operated as fully to pass the title as if the lumber company had accepted the deed out of court. The substance of the judgment is that the chancellor requires the land and lumber company to accept the deed and pay the price.

The land and lumber company acquiesced in the judgment, and the title, therefore, necessarily passed to it. It is true that by the terms of the bond and by the terms of the deed the land and lumber company was to pay the balance of the consideration when the deed was made, but when it did not pay, the court gave judgment against it for the money, and in this judgment, as shown above, Miller, DeBard & Everett acquiesced. If the court had added to his judgment words to the effect that the land and lumber company must accept the deed tendered and lodge it in the proper office for record, and this had been done, there would be no question that the title passed. But the legal effect of the judgment the court entered was that the land and lumber company must accept the deed, otherwise so much of the judgment as holds the deed to be sufficient and decrees specific performance, is meaningless. After that judgment was entered the land and lumber company could not have alleged that it had not accepted the deed which had been tendered it or have demanded another, for the court had held that it must accept the deed as tendered. The fact that the deed was not withdrawn from the record and recorded, is immaterial, for title passes by an unrecorded deed. The only purpose of recording a deed is to give notice; and this Middleton & Pace had as they were parties to the action.

We, therefore, conclude that the title to the land having passed to the land and lumber company the circuit court properly held that the purchasers under the execution obtained no title thereto by virtue of the execution sale, and properly adjudged them the money paid by them out of the proceeds of the sale made under the judgment in this case. (Smith v. Frankfort & Cincinnati Railway Co., 24 Ky., 2040; Burnley v. Stephenson, 15 Am. Rep., 621.)

Judgment affirmed.

GEORGE & BRO. v. CITY OF WINCHESTER, &c.

NUNAN v. SAME.

(Filed June 2, 1904.)

1. Local option—Operation in county—Separate vote in precinct—Effect—Under Constitution, section 61, and the act of the general assembly regulating the sale of spirituous liquors under what is known as the "local option law," where, by a vote of the people of a county, said law has been adopted in the entire county, a precinct of a city of the fourth class in such county, after three years from the adoption of said law, may, by an election held under said law, take a vote whether such law shall become inoperative therein; and if a majority of the voters in such precinct shall vote in favor of making such law inoperative therein, the board of council of such city may be compelled by mandamus to grant a license to sell such liquors therein to a proper person, at a proper place, who shall apply therefor in a proper way.

2. Constitution—Statutes—City ordinances—Conflict—It was the intention of the constitutional convention and the general assembly, that the voters in the counties, or political subdivisions thereof, or municipalities therein; should determine whether they would live under the license or prohibition system, and to the extent that section 3490, Kentucky Statutes, apparently authorizes the board of council to refuse to license to sell liquors where a majority of the voters voted to license it, or to license it where they have voted to prohibit its sale, it is invalid.

J. F. Winn and J. M. Stevenson for appellants.

Pendleton & Bush for appellees.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Paynter.

On June 27, 1896, by a vote of the people of Clark county the local option law was put in force in the county, including the city of Winchester. On June 28, 1899, an election was held in the North Winchester Precinct to determine whether the local option law should become inoperative in that precinct. A majority of the voters voted that it should become inoperative therein. Winchester is a city of the fourth class. The appellants applied to the board of council for licenses to sell spirituous, vinous and malt liquors in that precinct. Without giving the appellants an opportunity to be heard upon the question as to whether they were suitable persons to carry on the business, the board of council arbitrarily refused to grant a license; thereupon it adopted a resolution expressing the sense of the board that no license to sell spirituous, vinous or malt liquors should be "granted in the city of Winchester during the period of two years, our terms of office." The appellants instituted these proceedings to compel the board of council to grant to each a license to sell liquors. It is averred in the petitions that the plaintiffs are men of good character and suitable persons to conduct the business of selling liquors. The real question to be determined is, can the board of council of a city of the fourth class arbitrarily refuse to grant a license to retail liquor in a precinct which has voted in favor of the sale.

More than three years had elapsed from the time the vote was taken upon the question as to whether the local option law should be in force in Clark county, to the date when the vote was taken in the North Winchester Precinct on the question of the local option law becoming inoperative in that precinct. Section 61 of the Constitution makes it the duty of the general assembly to provide by general law a means whereby the sense of the voters of any county, city, town, district or precinct may be taken as to whether or not spirituous, vinous and malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated. As required by that section the general assembly passed a local option law for the State. The general assembly has left to the decision of each local community under which of two policies it shall live, the license system or prohibition, and authorized the people to take a vote at certain intervals, and thus change from one system to the other as they see proper. (Sections 2561 and 2563, Kentucky Statutes; Cole v. Commonwealth, 19 Ky. Law Rep., 824; Smith v. Patton, 20 Ky. Law Rep., 165; Commonwealth v. Overby, 21 Ky. Law Rep., 843; Commonwealth v. Bottom, 22 Ky. Law Rep., 412.)

It is urged that the voters did not vote upon the question as to whether liquors should be sold in North Winchester Precinct, because a vote that the local option law should be inoperative is not equivalent to voting that liquors might be sold. It is expressly provided in section 2554, Kentucky Statutes, that the question may be submitted to the voters "whether or not any prohibition law in force in any county, city, town, district or precinct by virtue of any general act or special act or acts shall become inoperative." The question, as provided by the statute, was submitted to the voters of the

precinct in question. It is evident that every voter when he voted knew that he was expressing his opinion upon the question as to whether or not liquors should be sold in the precinct. It is the substance of the act done, not the form, that determines its quality and effect.

It is insisted that the board of council had the right to arbitrarily refuse to grant the license to sell liquors by virtue of the charters of the cities of the fourth class, which is section 3490, Kentucky Statutes. It reads as follows: "The council shall have power, by ordinance, to license, permit, regulate or restrain the sale of all kinds of vinous, spirituous or malt liquors within the limits of the city, or to restrain or prohibit the sale thereof within one mile of the limits thereof, provided nothing herein shall be construed as granting the power or right to one town or city to license, permit, regulate, restrain or prohibit the sale of vinous, spirituous or malt liquors in any other town or city, and may fix the penalty or fine for violation of an ordinance under this section at any sum not exceeding $100: Provided, That no license to sell such liquors, to be drunk on the premises where sold, granted under this section, shall be for a less amount than $250 nor for a greater amount than $1,000. For license to sell same by retail, for medical purposes, they may charge not less than $50 nor more than $500. For license to sell same by retail in quantities not less than a quart, they may charge not less than $100 nor more than $500. The board of council, shall at any time, have the power and authority to refuse to grant any license, and to suspend or revoke any license granted under or by virtue of the authority conferred by this section, when the board shall deem it necessary so to do in order to preserve the peace or good morals of said towns, and said board of council shall be the exclusive judges of the necessity."

The act for the government of cities of the fourth class became a law before the local option law was passed. Until that act was passed and put in force, the board of council's authority was defined by that section. This section provides that the board of council may license, permit, regulate or restrain the sale of liquor within the limits of the city, or to restrain or prohibit the sale within one mile of the limits thereof. After Clark county, including the city of Winchester, voted that liquor should not be sold within the limits of the county, no one would seriously contend that the board of council could grant a license to sell liquor within the city of Winchester. Why not? Because the general assembly by virtue of the Constitution had placed it within the power of the voters to prohibit the sale of it in Clark county. The board of council could not nullify the action of the voters in putting in force a law which prohibited the sale of it. It was the intention of the constitutional convention and the general assembly that the voters in the counties or political subdivision thereof or municipalities therein, should determine whether they would live under the license or prohibition system. If the section in question would not authorize the board of council to grant licenses when the voters had put in force the local option law, it certainly would not authorize them to arbitrarily refuse a license when a majority of the voters had decreed that liquor should be sold within the given territory. To the extent that section 3490 apparently authorizes the board of council to refuse a license to sell liquor where a majority of the voters voted to sell it, or to license it where they have voted to prohibit its

sale, it is invalid. The section must be read in connection with the local option law. It is the duty of the board of council to grant the license to an applicant at a proper place, if he is a proper person and applies in the proper way. The board of council can not refuse to grant a license under the conditions averred in the petitions. (Riley v. Rowe, 23 Ky. Law Rep., 2168; Hodges v. Metcalf County Court, 25 Ky. Law Rep., 1553, 1706 (In Riley v. Rowe, a provision of the charters of cities of the sixth class was under consideration, and under that provision it was made the duty of the trustees to grant a license to sell liquors whenever a majority had voted therefor. The court in construing the section, held that they should be required to grant a license to a proper person and at a proper place. In our opinion mandamus is the proper remedy.

The judgments are reversed for proceedings consistent with this opinion.

RATTERMAN v. CAMPBELL.

(Filed June 2, 1904—Not to be reported.)

Contract—Specific performance—Separate propositions—Disconnected—Incapacity to contract—O. S. Kline & Co., who are real estate agents, had been endeavoring to purchase from J. O. Campbell for J. B. Ratterman, certain property in the city of Louisville on First street, which resulted in the following propositions:

"Louisville, Ky., February 25, 1902.

"O. S. Kline & Co.—

"I will give $5,500 cash for 49 feet 3 inches by 105 feet of ground on the west side of First street, between Main and Market streets, this city, with brick building on same, No. 218-220. The title to be good and merchantable and free from all incumbrances and taxes.

(Signed) "J. B. RATTERMAN."

This writing was taken by Kline to Campbell and read to but not shown to him, the name of the purchaser being withheld; thereupon Campbell requested until the next day at 10 o'clock to give an answer. The next day the following proposition in writing was signed by Campbell and given to Kline:

"Louisville, Ky., February 26, 1902.

"O. S. Kline & Co.—

"I will sell 49 feet 3 inches by 105 feet of ground on the west side of First street, between Main and Market streets, this city, with brick building on same, No. 218 220, for $5,500, and will pay you 2½ per cent. commission for selling the same, the title to be good and merchantable and free from all incumbrances and taxes.

(Signed) "J. O. CAMPBELL."

On March 1, 1902, Campbell, through his attorneys, addressed Kline & Co. a letter revoking the proposed sale, which they duly received, after which Ratterman indorsed under the signature of Campbell:

"I accept the above proposition.

"J. B. RATTERMAN."

Campbell refusing to convey the property, this action was instituted by Ratterman in equity for specific performance. Held—The proposition to purchase made by Ratterman on February 25, and that to sell by Campbell, made on the 26th, on their face purport to be entirely separate and distinct

transactions. There is no reference in either to the other, and they can not be connected except by the introduction of verbal testimony. The only memorandum in writing, signed by the party to be charged, is that of February 26. This, the evidence without contradiction, shows to have been withdrawn before it was accepted by Ratterman. It also appears in evidence that appellee, owing to extreme age (eighty-two years), and his many infirmities of body and mind, was incapable of making a contract, and, under the facts as they appear in the record, we hold that the chancellor's refusal to grant a decree of specific performance, was correct.

Dodd & Dodd and O'Neal & O'Neal for appellant.

Farnsley & Means for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

O. S. Kline & Co., who are real estate agents in Louisville, Ky., had been endeavoring to purchase from J. O. Campbell, for J. B. Ratterman, certain real estate on First street, between Main and Market streets, being No. 218-220, First street, in that city. These negotiations resulted in the following proposition:

"Louisville, Ky., February 25, 1902.

"O. S. Kline & Co.—

"I will give $5,500 cash for 49 feet 3 inches by 105 feet of ground on the west side of First street, between Main and Market streets, this city, with brick building on same, No. 218-220. The title to be good and merchantable, and free from all incumbrance and taxes.

(Signed.) "J. B. RATTERMAN."

This writing and taken by O. S. Kline to J. O. Campbell, and read, but not shown to him, the name of the purchaser being withheld; thereupon Campbell requested until the next day at 10 o'clock, in which to give an answer, desiring, in the meantime, as he said, to consult his family and friends. On the next day, the following proposition in writing, was signed by Campbell, and delivered to O. S. Kline & Co.:

"Louisville, Ky., February 26, 1902.

"O. S. Kline & Co.—

"I will sell 49 feet 3 inches by 105 feet of ground on the west side of First street, between Main and Market streets, this city, with brick building on same, No. 218-220, for $5,500 cash, and will pay you 2½ per cent. commission for selling the same, the title to be good and merchantable, and free from all encumbrances and taxes.

(Signed) "J. O. CAMPBELL."

On March 1, 1902, Campbell, through his attorneys, addressed Kline & Co. a letter revoking the proposed sale, which they duly received; after which, Ratterman indorsed on the proposition under the signature of Campbell:

"I accept the above proposition.

"J. B. RATTERMAN."

Campbell refusing to convey the property, this action was instituted by Ratterman in equity for a decree for specific performance. Upon final hearing, the chancellor dismissed the petition, and, in so doing, we are of opinion that he correctly ruled the law as applicable to this case.

The proposition to purchase, made by Ratterman on the 25th day of Feb-

ruary, and that to sell, by Campbell, made on the 26th, on their face purport to be two entirely separate and distinct transactions. There is no reference in either to the other, and they can not be connected except by the introduction of verbal testimony. Smith, in his work on the Law of Contracts, star page 84, thus enunciates the rule applicable to the case in hand: "But though, where there are several papers, the agreement may be collected from them all, provided they are sufficiently connected in sense among themselves, so that a person looking at them all together can make out the connection and the meaning of the whole without the aid of any verbal evidence; yet it is otherwise when such connection does not appear on the face of the writings themselves; for, to let in parol evidence in order to connect them with one another, would be to let in the very mischief which it was the object of the framers of the act to avoid, namely, the uncertainty and temptation to falsehood occasioned by allowing the proof of the contract to depend on the recollection of witnesses." * * *

The only memorandum in writing signed by the party to be charged, is that of February 26, wherein Campbell offered to sell his property for $5,500 cash. This, the evidence, without contradiction, shows to have been withdrawn before it was accepted by Ratterman. The question as to whether or not the attorneys for appellee had been instructed to write the letter of revocation by J. O. Campbell, himself, or by some one for him, is immaterial; they were so authorized, as the evidence shows, and that was sufficient.

One of the defenses of appellee was that, owing to his extreme age (eighty-two years), and his many infirmities of body and mind, he was incapable of making a contract, and there is much evidence in this case to substantiate that claim; so that whether we regard the conclusion of the chancellor, that the offer of sale had been withdrawn before acceptance, as correct, or whether we investigate the sufficiency of the evidence showing the incapacity of appellee to make the contract in question, we are constrained to the conclusion that his refusal to grant a decree of specific performance, was correct.

A decree of specific performance is not at all times a matter of absolute right, but rests largely in the sound discretion of the chancellor. In the case of Woolums v. Horsley, 93 Ky., 582, this court said: "There is a distinction between the case of a plaintiff asking a specific performance of a contract in equity, and that of a defendant resisting such a performance. Its specific execution is not a matter of absolute right in the party, but of sound discretion in the court. It requires less strength of case on the side of the defendant to resist the bill, than it does upon the part of the plaintiff to enforce it. If the court refuses to enforce specifically, the party is left to his remedy at law. Thus a hard or unconscionable bargain will not be specifically enforced, nor, if the decree will produce injustice or under all the circumstances be inequitable, will it be rendered. In other words, a court of equity will not exercise its power in this direction to enforce a claim which is not, under all the circumstances, just, as between the parties, and it will allow a defendant to resist a decree, where the plaintiff will not always be allowed relief upon the same evidence. A contract ought not to be carried into specific performance unless it be just and fair in all respects. When this relief is sought, ethics are considered, and a court of equity will

sometimes refuse to set aside a contract, and yet refuse its specific performance."

In the case cited, it was said in the opinion of the defendant: "He was then about sixty years old, uneducated, afflicted with disease disabling him from work, owned no other land, and but very little personal property. He knew but little of what was going on in the business world owing to his situation and circumstances in life. He moved in a small circle."

In the case of Horsley v. Asher's Heirs, 94 Ky., 314, it was said: "We think it is also clear that J. D. Asher did not, nor was able to, comprehend the nature, import and effect of the contract he made, and was, in fact, overreached and defrauded by Horsley acting through his agent. Asher was, at the date of that bond, upwards of seventy years of age. He had been diseased and suffered physical pain for several years to such an extent that he had not attempted, nor was qualified, to properly transact business, all of it having been done during a period of five or six years by his wife or sons. The witnesses also testify, without contradiction, that he, though originally a man of good sense and business capacity, had become, at the date of the bond, childish and notionate. In fact, he closed the contract and signed the bond at the agent's house, where he had gone for another purpose, without taking any time for reflection or consultation, and was in a few hours eager, and offered to rescind, but the agent refused to do so. * * * In our opinion the contract was not one fit to be enforced in a court of equity, but was made to such disadvantage of J. D. Asher as to induce belief, which the evidence makes a conviction that he was, by reason of want of capacity to understand the meaning and effect thereof, overreached and defrauded." To the same effect is the case of Cocanougher v. Green, 93 Ky., 519.

In the case of McCabe v. Matthews, 155 U. S., 558, it was said: "A decree for the specific performance of a contract for the sale of real estate, does not go as a matter of course, but is granted or withheld acording as equity and justice seem to demand, in view of all the circumstances of the case."

In the case of DeSollar v. Hanscome, 158 U. S., 216, the court, through Justice Brewer, thus announces the rule: "And where the existence of a contract is a matter of doubt, equity will not, as a rule, decree specific performance, especially in a case like this, where, as appears, the property was rapidly rising in value"

In the case at bar, the appellee was over eighty years old, infirm both in body and mind, and had, for a year or two, practically been able to do little or no business. It is true that he came to his place of business daily, when well enough, but seems to have relied entirely upon his son, E. C. Campbell, in all matters requiring an exercise of judgment. The price he was induced to name for his property was much below its real value, and, upon the whole case, we think the conclusion of the chancellor, in his refusal to decree a specific performance, rests upon sound equitable principles.

Wherefore, the judgment is affirmed.

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COURT OF APPEALS OF KENTUCKY.

COMMONWEALTH LAND AND LUMBER CO., v. CORNETT, &c.

(Filed June 2, 1904—Not to be reported.)

In an action which involved title to a large tract of land, the plaintiffs were entitled to a continuance upon an affidavit of one of their counsel to the effect that the chief attorney was absent, 150 miles away; that he had entire preparation of the case; that one of the defendants had told him that the litigation would be compromised and that absent counsel had been so informed, and over this affidavit was another from this defendant saying that conversation was had but that the the proffered compromise was all off. In view of these statements, time should have been given plaintiffs to prepare their case and take their proof.

W. S. Pryor and W. F. Hall for appellant.

H. C. Clay for appellees.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Barker.

This action involves the title to a large boundary of land situated in Harlan county, Kentucky. The only question for review on this appeal is the correctness of the judgment of the trial court in overruling appellants' motion for a continuance, in order that they might get in their evidence, and the submission of the case over their protest.

The issues were made up in December 1902. At a special term of the Harlan Circuit Court in July, 1903, appellees, who were defendants below, filed a supplemental answer. The special term continued up to the commencement of the regular August term of the court; during this term, the appellees (defendants), who had taken some evidence, moved for a submission of the case in chief, and that the allegations of the supplemental answer be taken as true, which was objected to by appellants; thereupon the counsel for appellants filed his own affidavits, in which he, in substance, states that appellant W. L. Bramlette, who had charge of the preparation of the case, was absent from Harlan county, and resided 150 miles therefrom; that when last in Harlan county, he had had a conference with A. B. Cornett, one of the appellees, with a view of compromising and adjusting the matters in

litigation between them, and that the counsel had been informed that the proposed compromise would be effected; he also filed the affidavit of one Huff to the same effect; that relying upon this information, he, as counsel for the appellants (plaintiffs), had not taken the testimony of his clients, and the case was wholly without preparation, so far as the evidence was concerned; that during the special term of the court in July, and since the regular term in August had commenced, he had been so engaged in the court with his professional duties as to render it impossible for him to take the evidence; that appellants (plaintiffs) had a meritorious cause of action, and if afforded an opportunity so to do, he could secure testimony sufficient to substantiate the allegations of the pleading.

Opposing this, the affidavit of appellee Cornett was filed, admitting the conversation with Bramlette in regard to the compromise, but stating that he had refused to accept the proffered terms, and that all propositions of compromise were at that time ended, and he had so informed Bramlette. It may be conceded that appellants had been guilty of laches in the preparation of their case, and that the counsel had relied upon rather vague talk of compromise; but considering the fact that appellees had filed a supplemental answer at the special term, immediately preceding the regular term, and that the counsel had been engaged busily in the court since that time, we are inclined to the opinion, that, under all the circumstances, the court should have given appellants an opportunity to obtain their evidence. Any other conclusion would result in the loss to them of the land involved in the litigation, and this, we are loath to see done, except by a judgment upon the merits of the case.

For the reasons indicated the judgment is reversed, each party to pay their own cost on this appeal.

BENEDICT, &c. v. WILHOITE, &c.

(Filed June 2, 1904—Not to be reported.)

1. Vacation of judgment—Pleading—In an action to vacate a judgment, where the petition alleges that plaintiffs are nonresidents of the State; that they had instituted an action for damages for the removal of timber; that while the action was pending their attorneys, without their knowledge or consent, and against their will, entered into an agreement with the defendants as to the location of their division line, and that by such agreement they would lose 300 acres of land, and that they had no knowledge of these transactions until shortly before the filing of their action, a cause of action is stated and the petition is sufficiently definite and specific.

2. Same—Attorney and client—It is a well settled rule that an attorney has no power by virtue of his retainer, without express authority, to compromise a pending suit of his client so as to bind him, although the client may live in a distant State.

W. O. Jones, H. W. Stoy, J. S. Lay and M. M. Logan for appellants.

J. S. Wortham for appellees.

Appeal from Grayson Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellants brought this action in equity in the Grayson Circuit Court.

to set aside and vacate a judgment which was entered by consent by attorneys representing them and Alexander Williams, the father of appellee, in a controversy over a division line between their respective tracts of land.

The defendants filed a general demurrer to their petition, and also a motion to make more specific. The motion to make more specific was sustained. Appellants thereupon filed an amended petition, and the trial court again sustained a motion requiring them to make the averments to their petition as amended, more specific. They then tendered a second amended petition which the court refused to allow them to file, on the ground that it did not cure the defects of their original and first amended petition, and dismissed their action, and they have appealed. The petition alleges in substance that they were nonresidents of the State of Kentucky; and that they had instituted an action in the Grayson Circuit Court against William Vanmeter, Aaron Scott and Alexander Williams, the father of the defendants, to recover damages for cutting and removing timber from certain lands owned by them; and that while this action was pending, the attorneys whom they had employed to represent them, without their knowledge or consent, and against their will, entered into an agreement with Alexander Williams, the father of the defendants, as to the location of the division line between their respective tracts of land, and which, on the 12th of April, 1894, they entered up as a judgment of the court in the pending action; and that subsequently, on the 26th of July, 1894, their attorneys, also without their knowledge or consent, and against their will, entered into another and distinct agreement with Alexander Williams, establishing another and distinct division line between their respective tracts of land, which was also entered upon the records of the court as an agreed judgment in the action; that the attorneys who assumed to represent them in this matter had no authority to do so; and that as a result of these unauthorized judgments, they had lost more than 300 acres of valuable land; that they had no knowledge of these transactions until shortly before the institution of this suit, and prayed that both of the agreed judgments entered in April and July, 1894, should be vacated and set aside. While the petition seems to be unnecessarily prolix, we are of the opinion that it sets out a good cause of action and was sufficiently definite and specific. It is well settled that an attorney has no power by virtue of his retainer, without express authority, to bind his client by a compromise of a pending suit, or any other matter intrusted to his care, although the client may live in a distant State.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

SUMMERS v. SUMMERS.

(Filed June 2, 1904—Not to be reported.)

1. Practice—Judgment of inferior court—This court will treat the judgment of a lower court as the verdict of a properly instructed jury; that is, a judgment thus rendered will not be reversed unless it is palpably against the evidence.

2. Contract for the sale of real estate—Commissions—Where the seller of land agreed to pay 5 per cent. commission to whoever would sell his property for as much as $6,500, the fact that one of the parties who helped effect

the sale had accepted $50 for his services, the judgment of the lower court in awarding the amount of the commission less the $50, will not be disturbed where it appears that the land brought a sum in excess of what the seller asked, and where the agent who took the $50 did so upon the understanding that if, upon its sale, it brought as much as the contract price, he was to share his part of the commission.

Allen & Ewing, Sandidge & Sandidge and Allen Sandidge for appellant.

Fox & Jackson for appellee.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Paynter.

This action was instituted by appellee to recover $335, the balance of a 5 per cent. commission for making the sale of land for the appellant. The law and facts were submitted to the court and a judgment was rendered for the appellee for the amount claimed, less $50. This court will treat the judgment of the lower court as the verdict of a properly instructed jury. The rule is that a judgment thus rendered will not be reversed, unless it is palpably against the weight of the evidence. There is no conflict in the evidence on some material matters. The evidence shows that the appellant employed the appellee to sell his farm in Barren county, and for making the sale he was to receive 5 per cent. commission, if it brought as much as $6,500. After this was done the appellee called the attention of W. T. Ewing, a real estate agent at Harrodsburg, to the fact that the appellant had the farm for sale; thereupon Ewing wrote to appellant for authority to make the sale of the land. Both appellee and Ewing testified that Ewing was to act with appellee in making the sale, and that they agreed between themselves to divide the commission for making it. It is agreed by all the parties that the commission was to be 5 per cent. of the amount for which the farm should sell, providing it be sold for as much as $6,500. Many letters were exchanged between the parties. On April 24, 1902, appellant wrote appellee a letter in which he said: "As to you and Ewing dividing the commission, you all will have to settle that yourself. I will give 5 per cent. to whoever sells the property, and nothing if do not sell. Now, I don't think there is any room for any misunderstanding in the matter. If you find a man, you and Ewing decide whose customer that he is. * * * I am not willing to pay but one commission on the sale of the property, so I think you will understand this."

This shows that the appellant had been apprised that there had been some arrangement made between appellee and Ewing as to the division of the commission for selling the land, and as to that matter he expressed a purpose to allow the appellee and Ewing to arrange that between themselves; but he made it plain that he was to pay but one commission. Under this arrangement between the appellee and Ewing, they procured a purchaser for the land. There were supposed to be 460 acres in the tract, and the purchaser had agreed to pay $6,000 for it, but before the sale was consummated he insisted that the land should be surveyed to ascertain the number of acres in the boundary, and they agreed that if the number of acres should be less than 460, there should be a corresponding reduction of the price, and if the boundary contained more than that number of acres, then he was to

pay for the land in excess at the price per acre agreed upon in the sale of the land. To evidence this contract a writing was executed. It was really a sale by the acre. By the survey it was ascertained that instead of there being 460 acres in the boundary, there was 515, which made the contract price $6,700, which was actually paid the appellant by the purchaser. None of the parties at the time the contract was consummated, knew what the purchaser would have to pay for the land under his contract. If there had been no contract other than the one we have mentioned, the appellant should have paid the 5 per cent. commission on the $6,700, because the purchaser was furnished by the appellee and Ewing, or rather by the appellee through the agency of Ewing.

The principal ground of defense is, that just before the writing evidencing the sale of the land was executed, Ewing agreed to take $50 in full of his commission for making the sale, and that subsequently that amount was paid to him.

We will assume that the appellee was bound by whatever Ewing did as to the adjustment of the amount of commission to be paid. We are of the opinion from the facts of this case, that in good conscience appellant should have paid the 5 per cent. commission, because the appellee and Ewing had furnished the purchaser of the land at a price greater than $6,500. Ewing testified that when he agreed to accept the $50, that it was agreed that if the purchase price should turn out to be as much as $6,500, he was to have the 5 per cent. commission acording to their contract. The court gave judgment for $335, less the $50 paid to Ewing. In doing this, he reached the conclusion that Ewing's version was the correct one. Under all the facts and circumstances of this case, we are unwilling to say that the judgment is so palpably against the weight of the evidence that it should be reversed for that reason.

The judgment is affirmed.

MILLER, &c. v. McCONNELL, &c.

(Filed May 24, 1904.)

Pleading—Technical errors—Trial on merits—Appeal—When the parties in a case have tried out the only issues presented, the judgment will not be reversed because the pleadings in the case are technically bad. Civil Code, section 134, requires that no error in a pleading shall be considered on appeal that does not affect the substantial rights of the party complaining, and where technical errors are invoked merely to injure the other party, they ought to be ignored by the courts, after judgment on the merits.

Z. Gibbons and A. B. Ambrose for appellants.

Breckinridge & Shelby and W. Worthington for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

The petition and cross petition seeking to collect debts owing by appellants to appellees, secured by mortgages, failed to set out the condition of the mortgages or their breach. The only issue made was whether the consideration had partly failed as to one debt and as to certain payments upon

the other. On these issues the circuit court adjudged the case in favor of appellee, the suing creditors. The judgment also decreed an enforcement of the mortgage liens and sale of the mortgaged property to satisfy them. This appeal presents the sole question whether the judgment of sale was proper under the state of pleading.

Undoubtedly, good pleading requires the conditions of the mortgage to be set out in the petition, as well as that the breach of the condition be alleged. The fact that the mortgage is filed with the pleading can not aid its defects or supply omissions in the pleading. The rule is, an exhibit may be looked to to contradict a pleading, and make it bad, but not to help it. (Riggs v. Maltby & Co., 2 Met., 88; Hill v. Barrett, 14 Ben Mon., 67; Murphy v. Estes, 6 Bush, 582; Huffaker v. Monticello, 12 Bush, 287; Gardner v. Con. Ins. Co., 25 Ky. Law Rep., 426.)

But the parties in this case have tried out the only issues presented. So far as the judgment goes upon the issues presented, it is not questioned, and seems to us to be right. The Code of Practice, section 134, requires that no error in pleading shall be considered on appeal that does not affect the substantial rights of the party complaining. The execution of the mortgages is expressly admitted The only effect of a reversal on account of the technical lapse of the pleaders, would be to impose costs upon appellees with no benefit whatever to appellants. While technical rules of pleading and practice are maintained and are valuable to protect the rights of parties, the modern practice and aim as brought about by our Code system, is to prevent them being used, as formerly, to defeat the ends of justice. When they cease to protect the complainant, and are invoked by him merely to injure the other party, they ought to be ignored by the courts, after judgment upon the merits. (Riggs v. Maltby, & Co., supra.)

Judgment affirmed.

OBERDORFER v. WHITE.

(Filed May 24, 1904.)

Lieber & Lincoln for appellant.

Samuel Avritt for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Judge Hobson delivered the following response to petition to correct mandate:

Appellee obtained a judgment in the Jefferson Circuit Court adjudging a deed executed by her to appellant to be a mortgage. He appealed from that judgment, with supersedeas to this court, and the judgment was affirmed. (Oberdorfer v. White, 25 Ky. Law Rep., 1629.) The clerk entered up a judgment affirming the judgment appealed from, with damages. A motion is now made to correct the mandate in so far as it awards damages. Section 764 of the Civil Code provides that 10 per cent. damages on the amount superseded shall be awarded against the appellant upon the affirmance of a judgment for the payment of money, the collection of which has been superseded. The only judgment for money in favor of appellee was the judgment for costs in the action. It has been the uniform rule of the court not to ad-

judge damages on costs. It was so held in Hanley v. Russell, 8 Ky., 152, and this rule has been uniformly maintained by the court since.

The motion to correct the mandate is, therefore, sustained.

TALLIFERRO, &c. v. THORNTON'S EX'OR, &c.

(Filed May 24, 1904—Not to be reported.)

Wills—Personal representative—Power of—Where it was provided in a will that the executor should continue the business of the testator, and exercise his own judgment in the management of the estate so as to produce the best results, he had the right to mortgage certain of the real estate in order to procure money to pay the indebtedness of the estate.

Brent Spence and Thos. Healey for appellants.

Wright & Wright and Matt Herol for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge O'Rear.

Appellants are legatees under the will of R. T. Thornton. A clause of the will authorized and empowered the executor to continue the business of the testator for a season, and to exercise his own judgment in the management and sale of his estate so as to produce the best results in reducing it to cash in order to pay the testator's debts and the specific legacies created by the will. It also empowered him to sell the property to pay the indebtedness, or to mortgage the property or any of it, if necessary to secure debts, which he was authorized to renew, and to convert simple debts into specialties. Some years after the qualification of the executor, he mortgaged certain of the real estate belonging to the testator's estate, to appellee, the German National Bank of Newport, to secure a note made to it for borrowed money obtained by the executor, it is alleged and undenied, to discharge the indebtedness of the estate. In this suit to settle the executor's accounts and sell the unsold lands to liquidate the estate, the bank asserted and was adjudged a lien under its mortgage. Appellants complain on the ground that the power vested in the executor was not broad enough to authorize the mortgage. In our opinion it was But, even if not, as the money was used to pay indebtedness which was a claim against the estate before devisees were entitled to anything, the bank ought to have been subrogated to the rights of the creditors whose debts were discharged.

In addition to the foregoing, Sarah J. Thornton, a sister and favored devisee of the testator, was given a certain interest in his estate, which was expressly given priority over all other devises. It appears that this interest was greater than the estate mortgaged to the bank—at least greater than it brought at the decretal sale. She joined the executor in the mortgage. It, therefore, appears that if any one was injured by the executor's act it was she, and as she is not objecting, it can not affect the rights of appellants whether the mortgage was or was not authorized by the will.

Judgment affirmed.

ORTH, &c. v. PARK, &c.

(Filed May 24, 1904—Not to be reported.)

Lane & Harrison for appellants.

H. H. Herr, Tyler Barnett and R. L. Greene for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Judge Hobson delivered the following response to petition for rehearing:

In the case of William Specht v. Barber Asphalt Co., this day decided, it was held, following Cooper v. Nevin, 90 Ky., 90, that to produce equality of burden contemplated by the statute, cross streets will be extended so as to intersect the street improved. The chancellor ordered the commissioner to charge the quarter squares contiguous to the improvement according to the rule laid down in the statute. The presumption is the commissioner did his duty and that the judgment of the circuit court is right. It is insisted in the petition that part of the territory in contest is not defined into squares by principal streets. To illustrate, the maps filed do not show a street parallel to Frankfort avenue west of Young avenue, nor a street west of Young avenue and parallel to it. But we know from the record that the territory in contest lies at the east end of the city of Louisville. The body of the city lies west of it, and that the city boundary extends a considerable distance east of it is shown by the records. The territory east of Young avenue for a considerable distance is defined by streets into squares, and we must presume, although it is not so laid down on the map, that the territory to the west of Young avenue is also defined into squares by streets. We also know that 420 feet is the depth of an ordinary square. The commissioner went back 210 feet, which i s one-half a square. The apportionment made by the commissioner seems to do justice between the parties, and we do not find in the record, evidence that it was not made in accordance with the chancellor's order. On the contrary, everything in the record supports the presumption of law in favor of the report. In this case the chancellor found as a fact in the judgment referring the case to the special commissioner, that the territory was defined by streets into squares, and this conclusion of his is borne out by the record before him at that time under the rulings of this court. In fact, we do not see that the defendant had taken any proof to contradict the proof taken by the city on the subject of the streets. The other questions discussed by counsel seem to be sufficiently disposed of in the original opinion. The petition was considered by a judge other than the one who wrote the opinion.

The petition for rehearing is overruled.

The whole court sitting.

ADAMS v. CITY OF ASHLAND, &c.

(Filed May 24, 1904—Not to be reported.)

1. Street improvements—Cost of—In an action to enjoin a city of the fourth class from entering into contracts for the paving of certain streets, judgment dismissing the petition and denying the injunction sought, will be upheld where the ordinance providing for the improvement was enacted

pursuant to section 3572 of Kentucky Statutes, and the various subsections thereof.

2. Same—The spreading of cinders and ashes upon a graded street can not be called original construction; it is only temporary in its nature and only intended to serve the passing needs of the city until such time as a permanent improvement can be made.

Proctor K. Malin for appellant.

Hager & Stewart for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant filed a petition in the Boyd circuit court seeking to enjoin the city of Ashland and the mayor and members of the city council from entering into contracts for the paving of certain streets in that city, and to enjoin and restrain them from issuing bonds of the city to provide a fund to pay for the improvement. The suit involves the validity of an ordinance of the city (a city of the fourth class), passed pursuant to the provisions of section 3572, and the various subsections thereof, of Kentucky Statutes. The ordinance provides that certain named streets of the city shall be paved with vitrified paving brick, with curbing and gutters. The cost was, by the ordinance, to be apportioned among the owners of abutting property according to the number of front feet owned by each. The ordinance also provides that bonds shall be issued for the cost of the improvement which is admitted to be $70,000, the bonds, principal and interest, to be paid out of the assessment against the property abutting upon the streets, and to be collected in ten annual installments in accordanec with the provisions of section 3575, Kentucky Statutes

It is admitted that appellant is the owner of a lot fronting fifty feet on one street, and ninety-two and one-half on another, which are embraced by the improvements ordered by the ordinance, and that prior to the adoption of the present charters of cities of the fourth class, the city of Ashland was an incorporated city of this State, incorporated under act of assembly, approved 26th of March, 1876; that under the provisions of that act the city council was empowered to grade, construct and improve the streets of the city, and apportion the cost among the owners of property abutting upon the streets so improved, according to the number of front feet owned by each; that the amounts so apportioned were liens upon such lots; that pursuant to the original charter the council of said city, in the years 1890 and 1891, adopted an ordinance for the improvement of these same streets by grading and macadamizing same with cinders and mill ashes, and that pursuant to that ordinance these streets were so improved in accordance with specifications adopted by the council, and the cost thereof apportioned against the property abutting upon the streets; that the cost apportioned against appellant for the improvement of Greenup avenue, one of the streets mentioned, was $34.60 for the lot mentioned, exclusive of gutters and curbing, and the cost thus apportioned for the improvement of Sixteenth street, another of the streets mentioned, was $42.25, exclusive of curbing and gutters. These figures apply to one-half of the width of the streets adjacent to the lots against which they were charged. It is also admitted that $70,000, for which

the bonds were to be issued, exhausts the revenue provided for the year in which the ordinance was adopted.

Greenup avenue is 100 feet wide and Sixteenth street (or Broadway) is also 100 feet wide. It will thus be seen that the cost of this so-called construction was, in the first instance, less than 70 cents a front foot, and in the second about 50 cents per front foot against appellant's lot, and proportionally of course against all others.

Under the statute applicable to cities of the fourth class the cost of reconstruction of a street, but not of curbing, must be borne alone by the city. The cost of reconstructing the curbing and of original construciton of a street must be borne by the abutting property according to the front feet of the lot.

The first question is, whether the proposed construction is an original construction or a reconstruction of that street. This is practically the same question which the court had under consideration in City of Catlettsburg v. Self, 25 Ky. Law Rep., 161. The spreading of cinders and ashes upon a graded street can scarcely be called an original construction of a street as contemplated by the statute. At best it was temporary in its nature, and intended only to serve the passing needs of the city until such time as its growth and the extent of travel over the proposed street was such as to require or justify a radical and permanent improvement. A construction by using cinders and ashes is but little more permanent than would have been the grade of the original earth. The nature of the material and its very slight cost alike, show that it was intended merely as a temporary affair.

Upon the other point this case differs but little in the facts, and not at all in principle, from Catlettsburg v. Self, supra. Here it is not proposed to issue the city's bonds as a municipal liability, or that the city shall at all become liable for the cost of this work. It is to be charged alone against the abutting property, and to be paid by that property. There can be no liability against the city for the work. The holders of the bonds would be compelled to look alone to the fund created by the collection of these assessments against the abutting property for their payment. The inhibition of section 157 of the Constitution against a municipality's becoming indebted in any year beyond the revenues of such year, without a favorable vote of two-thirds of the voters upon the proposition, can not apply.

The judgment of the circuit court denying the injunction and dismissing the petition is affirmed.

SCHERM v. GARRETT'S ADM'R.

STITES v. BARTLETT, &c.

(Filed May 24, 1904.)

Lien on land for ditching—Lis Pendens purchaser—The appellant's having purchased their lands after proceedings had been begun in the county court under the drainage act of March 17, 1896, section 2358a, Kentucky Statutes, and a judgment entered in said court that a ditch should be established and the cost thereof apportioned on the lands in the district, which included appellants' lands, they were lis pendens purchasers, and a lien attaches to their lands for their porportion of the cost of the ditch.

R. G. Hill for appellants.

J. R. Hays for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge O'Rear.

These actions were brought by the respective appellants to quiet their title to certain parcels of land in Daviess county, which they are the owners of, as against the claims of appellees for liens asserted by them for the cost of establishing a ditch under the drainage act. The lots were proceeded against as the property of Thomas S. Pettit. As a matter of fact, the beneficial owner was R. G. Hill. Hill was a party to the proceeding in the county court to establish the ditch at the cost of the property owners cited, but it was because of other property which he owned. However, he was an attorney for the petitioners in the proceeding, drew the orders, and urged and procured their entry by the county court, establishing the ditch and apportioning its costs against the lands of the district established by the order of the court, including the lands in controversy.

Pending the proceedings Hill was adjudged to be the owner of the title of the lots in question. After the judgment of the county court directing the opening of the ditch, and apportioning its cost according to the report of the viewers, Hill sold and conveyed these lands to the appellants. As was required by the statute, due advertisement was made, offering to the owners of the lots the right to do the work themselves, as required by the report of the viewers under the judgment of the court, but in default thereof the contracts were sold to the lowest and best bidder within the statutory price. Such bidder is called, in the statute, the purchaser of the contract. He completed the work without objection from appellants, and was thereafter given a certificate of that fact by the surveyor. The owner against whom the assessment had been made, Pettit, having refused upon demand to pay the ditch taxes assessed against him, the certificate was levied upon the land by the sheriff.

Appellants contend that this was illegal because Pettit had personal property out of which the sum could have been made, and until it was exhausted the sheriff could not legally destrain the real estate for taxes. This question, however, was presented on the appeal of appellant against the sheriff from the judgment of the court dismissing the sheriff from the suit, and was decided adversely to appellant's contention in that case. (Scherm v. Short, Sheriff, 25 Ky. Law Rep, 1108.)

The only other ground of complaint of enough importance to attract serious attention, is the claim of appellants, that as they were innocent purchasers of the land without notice of the proceeding in the dicth case, and that as no notice was filed under section 2858a, Kentucky Statutes (being the act of March 17, 1896), the land can not be charged in their hands with this lien. The court is of opinion that the section relied on would be applicable if the proceedings to create the lien against the original owner, Hill or Pettit, as the case may be, had progressed to the point where the contractor had obtained a lien or a right to a lien upon the land. But such was not the case here. At the time that appellants bought, the proceedings (which were had under section 2880, Kentucky Statutes) had gone only so far as the

determination, by judgment of the county court, that a ditch should be established and opened at that point, and that a certain proportion of its cost should be devolved upon the land in question. By the terms of the statute the owner is permitted to himself do the work, and not until he has refused or failed for a given number of days after the confirmation of the report of the viewers, and the contract be let by the county court clerk under subsection 19 of the act. So that when appellants bought the land the situation was, that it had been ascertained in a proceeding in rem against it, that it would be benefited or improved more than the cost assessed against it for the proposed public ditch, that the owner, appellants' vendor, had the right to himself then do this work so far as this land was assessed. Up to that time no one had a lien against the land, nor a right to such lien. After appellants' purchase the contract was offered for sale. It was then, upon appellees' buying the contract, that any one for the first time had a right to a lien against appellants' land for any sum in connection with this work. If such contractor wanted to protect himself against innocent purchasers from appellants, he could have done so only by filing the lis pendens notice provided for in section 2358a, supra. But as between the parties, that is, the contractor and the then owner, the lien was enforcible. The only chance the contractor took in the matter was that appellants might have sold and conveyed the land to another, an innocent purchaser, for value, without notice, and thus have defeated his claim for a lien. Hill, the vendor, did not sell the land improved by the ditch. Up to the time of sale the improvement was merely one in contemplation, that added neither to the value of the land, nor created a charge against it. There being neither a lien in existence against the land, nor a claimant of such lien, it was obviously impossible for the lis pendens notice provided for by section 2358a, supra, to have been filed. That section could not, therefore, have applied to this proceeding at that time.

The judgments in both cases are affirmed.

STAGGENBORG v. BAILEY, BY, &c.

(Filed May 24, 1904.)

1. Guardian ad litem—Right to appeal—Where an attorney is appointed guardian ad litem for infant defendants in the lower court, his services do not end with the judgment in lower court, but he may, under said appointment, prosecute an appeal to the Court of Appeals if he believed it to be to the interest of the infant defendant that he should do so.

2. Allowance for services—Where a guardian ad litem was allowed a fee of $50 in the lower court for his services in that court, for the infants in a will contest which was decided adversely to the infants, and he prosecuted an appeal to the Court of Appeals where the judgment was affirmed, an allowance of $300 as an additional fee by the lower court for his services in the Court of Appeals was excessive, his services being no more onerous in the appellate court than in the lower court. An additional allowance of $50 would have been sufficient.

3. How service to be estimated—In making such allowance the court should have in view the character of the litigation, the amount involved, the labor performed, and the results achieved by the guardian ad litem.

P. J. Ryan and T. J. Michie for appellant.

L. J. Crawford for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Burnam.

By the will of Bridget Kelley, a widow, a small estate was devised in trust for the benefit of her only child, Anna Staggenborg, during her life, with remainder over to her three infant granddaughters, children of Anna Staggenborg. The will was probated by order of the Campbell County Court. Anna Staggenborg prosecuted an appeal therefrom to the Campbell Circuit Court. Upon her motion, S. C. Bailey, an attorney, was appointed guardian ad litem for the infant defendants in the absence of a statutory guardian. A trial before a jury resulted in a judgment invalidating the will. S. C. Bailey, as guardian ad litem, at the termination of the trial in the circuit court, was allowed on his motion, $50 for his services, to be taxed as cost, and prosecuted an appeal as guardian ad litem from the judgment of the circuit court to this court in behalf of the infant defendants, which resulted in an affirmance of the judgment. (Staggenborg, &c. v. Staggenborg, 25 Ky. Law Rep., 1073.) He subsequently filed the mandate of affirmance in the lower court, and moved for an additional allowance for his services and expenses as guardian ad litem. Over the objection of Anna Staggenborg, he was allowed an additional fee of $300, the cost of the transcript of the record and the necessary cost incurred by him in the Court of Appeals, and a judgment was entered directing the payment to him of these various sums, and that they should be taxed as cost and paid by plaintiff, who has appealed to this court. She asks a reversal on the ground that the circuit court had no jurisdiction to make the order for the additional allowance to the appellee, after the affirmance of the judgment of the lower court by this court.

The duties of a guardian ad litem do not terminate with the rendition of a judgment in the trial court, but he may, when he thinks it to be to the interest of the infant defendants, take an appeal therefrom, and his duties continue until the final determination of the cause, unless removed by the court or terminated by the arrival of the infant at the age of majority. (15 A. & E. Enc. of Law, 15; Reed, &c. v. Louisville Bridge Co., 71 Ky., 69; Hussey v. Seargent, &c., 25 Ky. Law Rep., 315.) And there was no final determination of the litigation until the mandate of affirmance from this court was filed in the circuit court. In many States of the Union the allowance to a guardian ad litem is made by the court wherein the services were rendered; but in this State it has been expressly decided that the allowance to a guardian ad litem for the services rendered by him in the entire case, must be made by the court wherein he was appointed. (Robertson v. Fidelity Trust and Safety Vault Co., 11 Ky. Law Rep., 318; Williams v. Williams, 24 Ky. Law Rep., 1753.) Subsection 4 of section 38 of the Civil Code, provides that: "The court shall allow to the guardian ad litem a reasonable fee for his services, to be paid by the plaintiff, and taxed as cost. The affidavit of such guardian or other person, or other competent evidence, is admissible to prove the services rendered, but not to prove their value. The

court must decide concerning such value without reference to the opinions of the parties or other witnesses."

We are of the opinion that the lower court, upon the filing of the mandate of affirmance, had jurisdiction to entertain a motion for an additional allowance to the guardian ad litem for services rendered in this court. In making such allowance the court should have in view the character of the litigation, the amount involved, the labor performed, and the results achieved by the guardian ad litem. It seems to us that the services of the guardian ad litem in the lower court were certainly as onerous and valuable as those performed by him in this court, and for these services he was allowed $50. His services in this court consisted, in the main, of preparing and filing a short brief, and the appeal resulted in the same judgment as that entered in the trial court; and after a careful examination of the record upon the prior appeal, we conclude that the appellee should have been allowed for his services in this court, $50 and his cost and necessary expenses incident to the appeal, in addition to the $50 which had been previously allowed him for services in the circuit court, and the judgment is, therefore, reversed and cause remanded for a judgment in conformity with this opinion.

COMMONWEALTH, BY, &c. v. ADAMS EXPRESS CO.

(Filed May 24, 1904.)

1. Franchise taxation—Auditor's agent—Right to institute action—Under sections 4077, 4079, 4080, 4084, 4090, 4241 and 4260, Kentucky Statutes, providing the way and manner in which the board of valuation and assessment may determine the valuation of a franchise of corporations, and the duty of the auditor in apportioning and certifying the same to the clerks of counties in which the franchise is exercised, a proceeding instituted by the auditor's agent in the county court of Mason county, alleging that appellee, Adams Express Co., is a quasi corporation and common carrier, and had continuously, for the years 1896 to 1902 inclusive, done business within this State and exercised its franchise therein, and in Mason county, and had failed and refused to report and list its franchise and pay the tax thereon for any of said years, and that the value of its franchise for said years was $1,463,040, and in Mason county $26,000. is not demurrable in the county or circuit court, on the ground that the franchise is not liable to be assessed for taxation by any court, but could only be assessed by the action of the State Board of Valuation and Assessment.

2. Omitted property—Jurisdiction of courts—Proceedings—Kentucky Statutes, sections 4241 and 4260, make it the duty of the auditor's agent to see to it that omitted property be valued and listed for taxation, and to invoke the aid of the courts for that purpose; and while it was the intention of the legislature to authorize the county courts of such counties only, in which the corporation exercised its franchise, to take jurisdiction and list and fix the value of the corporate franchise, the county first assuming would have jurisdiction, and an action in that county will be a bar to any action in any other county in the State as to that particular franchise for the years named; and in order to avoid fragmentary taxation, the clerk of the court having jurisdiction of the case, is required to certify the value of the franchise as fixed by the court, to the auditor of the State, who is chairman of the board of valuation, and said board will apportion this assessment among the different counties in the State in which the franchise is operated.

Allen D. Cole for appellants.

W. H. Wadsworth for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Nunn.

This proceeding was instituted in the month of August, 1902, in Mason County Court by F. S. Watson, then auditor's agent.

It was in substance alleged in the statement and amended statements filed, that appellee, Adams Express Co., had continuously, since the year 1895, operated and done express business within the State of Kentucky, and exercised its franchise therein; that appellee was a quasi public corporation, a common carrier for hire, and required by section 4077 of Kentucky Statutes to report and pay taxes on its franchise; that appellee's franchise in question, exercised by it during the years mentioned, extended throughout the States of Ohio, New York and many other States of the Union, besides the State of Kentucky; that the property sought to be assessed is but a fragment of the entire franchise owned and exercised by appellee in the United States; that appellee had, since the year 1895, continuously done business and exercised its franchise in Mason county, Kentucky, and in many other counties in the State, nd the value of its franchise during each of the years named was $1,463,040, and in Mason county $26,000.

It was also alleged that the appellee had failed and refused to report and list its franchise and pay any taxes thereon from the year 1896 up to and including the year 1902.

The county court and circuit court, on an appeal, sustained a demurrer to the statements and decided, in effect, that the franchise of appellee was not liable to be assessed for taxation by any court, but could only be assessed and made liable for the payment of taxes by the action of the State Board of Valuation and Assessment, which board is composed of the Auditor, Treasurer and Secretary of State.

Section 4077 of the Kentucky Statutes provides in positive terms, that an express company is liable to pay annually a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised.

In sections 4079, 4080, 4084 and 4090 is provided the way and manner in which the board of valuation and assessment may determine the value of the franchise of corporations, and the duty of the auditor in apportioning and certifying the same to the county clerks of counties in and through which the company exercises its franchise. It is contended by appellee that these statutes referred to provide the only method under and by which the franchises of corporations can be assessed or valued, and that the county court has not the power to fix a value on them for taxation. We can not agree with appellee in this. It is true, however, that this was the method provided by the legislature for the valuation and assessment of franchises, but the legislature, anticipating that the corporations might not make a report of the extent and value of their property, to the board of valuation and assessment as contemplated by that body, and also that the board of valuation and assessment might be derelict in its duty with reference thereto, enacted sections 4241 and 4260. We quote so much of these sections

as are applicable to the point involved. By section 4260 it is provided: "It shall be the duty of the revenue agent to cause to be listed for taxes, in the manner required by law, of the property in the county, for which he may have been appointed, which may have been omitted to be assessed by the assessor, board of supervisors, board of valuation and assessment or railroad commission, or any license tax which may be due to the Commonwealth. It shall be the duty of the revenue agents for the State at large, to cause to be listed for taxes in the manner required by law of any property in any county, city or town of the Commonwealth which may have been omitted to be assessed by the assessor, board of supervisors, board of valuation and assessment or railroad commission, and it shall be the duty to enter proper motions and proceedings in any court of competent jurisdiction or before the State Board of Valuation and Assessment or railroad commission or other competent assessing authority, and cause the assessment to be made of any omitted property."

This section makes it the duty of the revenue agent to see to it that omitted property be valued and listed for taxation, and authorizes him to invoke the aid of any court of competent jurisdiction for that purpose.

We quote so much of section 4241 as will help to elucidate the question before us: "It shall be the duty of the sheriff or auditor's (i. e., revenue) agent, to cause to be listed for taxation all property omitted, or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment, or railroad commission, for any year or years. The officer proposing to have such property assessed, shall file in the clerk's office of the county in which the property may be liable to assessment, a statement containing a description and value of the property proposed to be assessed, and the value of corporate franchise, if any, and the name and place of residence of the owner, his agent or attorney, or person in possession of the property, and the year or years for which the property is proposed to be assessed." Upon which a summons against the owner may be issued to show cause why such property or corporate franchise shall not be assessed at the value named in the statement filed. This section also authorizes a trial of the question as to whether or not the property shall be valued and listed for taxation, and if it be decided by the court that the property is liable to assessment, the clerk of the county court shall certify to the auditor of public accounts a description of the property and the amount of the assessment for taxation, together with the amount of the penalty and cost of the assessment. This section expressly provides that the county court shall have the power to hear and determine and fix the value of corporate franchises, when the board of valuation and assessment has failed to perform this duty. It is admitted in this proceeding that the franchise of appellee was not reported for assessment to this board of valuation and assessment, and that the board had failed to assess it, and it was also admitted by the demurrer that the appellee had not paid any tax in this State on its franchise, during any of the years named in the statement. It is evident that the general assembly enacted these two provisions to meet just such a case as this one.

Appellee contends that this construction of the statute is erroneous and gives as a reason that if the construction be correct, it might be sued in every county in the State through which it operates its franchise; that the

general assembly did not intend or have thought of any such result. It was not the intention of the legislature, in enacting these statutes, to authorize the county court in every county in the State to take jurisdiction and list and fix the value of a corporate franchise, but only intended that the county court in a county through which a corporation exercised its franchise, should take jurisdiction and hear and determine this question; and the action of that court in any one county would settle and determine the valuation and assessment of that particular franchise. The county court first assuming would have jurisdiction, and an action in that court would be a bar to any action in any other county court in the State, as to that particular franchise for the years named in the statement filed.

This construction of the statutes obviates the appellee's fears of fragmentary taxation, as the clerk of the court having jurisdiction of the case is required to certify the value of the franchise, as fixed by the court, to the auditor of the State, he being chairman of the board of valuation and assessment, and this board will apportion this assessment among the different counties in the State through which the franchise is operated.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

SPECHT, &c. v. BARBER ASPHALT PAVING CO.

BARBER ASPHALT PAVING CO. v. EWALD, &c.

(Filed May 24, 1904—Not to be reported.)

1. Two orders must be read together—The order of May 3 and May 5, must be read together as one order, and as the order of May 5 was intended as the substitute for the one of May 3, we conclude that the order of May 3 is no longer in force, and the appeal of the Barber Asphalt Co. from that order is dismissed.

2. Defective pleading—Defense made—Proof heard—Duty of court—Upon the appeal of the property owners, although the plaintiff was not entitled under the pleadings to the relief sought, it prayed for all proper relief, and, defense having been made and the court having all the parties before it, it was its duty under section 2834, Kentucky Statutes, to make all corrections, rules and orders necessary to do justice to the parties. Its failure to order an additional pleading in no wise prejudiced appellants, and, under section 134, Civil Code, providing that the court must in every stage disregard any error which does not affect the susbtantial rights of the adverse party, and that no judgment shall be reversed for such error, the judgment of the lower court must be affirmed.

Gordon & Gordon and Lane & Harrison for Specht, Ewald, &c.

B. F. Washer and Wm. Furlong for Asphalt Co.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Hobson.

By an ordinance approved June 6, 1900, the carriage-way of Frankfort avenue was ordered to be improved 40 feet in width by grading, paving and curbing with asphalt, from Cayewood avenue to Raymond avenue, at the

cost of the owners of the adjoining ground, extending back from the street 195 feet, the council proceeding on the idea that the land was not divided into squares by principal streets. The contract was made with the Barber Asphalt Paving Co. to do the work. It performed the contract, the work was accepted by the city and apportionment warrants were issued to the contractor. Some of the property owners failing to pay, this suit was filed against them. Defense was made by the property owners on the ground that there was a principal street on each side of Frankfort avenue and running parallel or substantially parallel with it, and that the ordinance of the council was void because it fixed the taxing district at 195 feet instead of going back half way to the next street. Spoliation was also pleaded and relied on. It appeared that only a few feet of the property of John Ewald and Christopher Bader was taken. The court on May 3, 1909, delivered an opinion holding that as to these two defendants the assessment amounted to spoliation as the little strip taken was too narrow to be sold as a lot. The clerk on that day entered an order dismissing the petition against Ewald and Bader. On May 5 a fuller judgment was entered to the same effect. On May 7 a written motion was filed to set aside the order of May 5, and on a subsequent day the judgment dismissing the action was set aside, and it was adjudged that the territory was defined into squares by principal streets, the apportionment as made by the council was set aside and the case was referred to a special commissioner, with directions to re-apportion the cost of the improvement among the owners of lots of land in the quarter squares contiguous thereto, according to the number of square feet owned by each of the parties respectively. The re-apportionment was made, and having been confirmed by the court a judgment was entered in favor of the plaintiff against the defendants for the amount found due by them respectively. From this judgment the first of the above appeals is prosecuted. It is insisted for the appellants on that appeal that although the judgment of May 5 was set aside, the judgment of May 3 was not set aside; and that it having become final the court had no further jurisdiction to enter a judgment in the action. The second of the above appeals is prosecuted by the Barber Asphalt Co. from the judgment of May 3 to reverse it, in case the court shall be of opinion that it is still in force.

From an inspection of the entire record, including the orders made by the court and the grounds filed by counsel on motion to set aside the judgment of May 5, we are satisfied that the judgment of May 5 was intended as a substitute for the less formal order entered on May 3, although it does not in terms refer to that order. There could have been no other reason for entering it so far as appears from the record, and it was evidently so understood by the circuit court. The motion was made by the Barber Asphalt Co., and by the city of Louisville, to set aside the judgment rendered by the court adversely to them. But one opinion was delivered. The entries on the order book were intended to put in effect that opinion, and the order setting aside the action of the court was intended to set the parties in statu quo. The order of May 5 must, therefore, be treated as entered as a substitute for the less formal order of May 3, or, what is the same thing, the two entries should be read together. The rule that where the court has rendered one judgment in a case he can not at another term enter another

after the first has become final, has no application, for here the judgments were entered at the same term and while the court had control of the action. We, therefore, conclude that the order of May 8 is no longer in force. The appeal of the Barber Asphalt Co. from that order is, therefore, dismissed. (Lockhart v. Trabue, 2 Bibb., 251; Graham v. Lynn, 4 B. Monroe, 18; Smith v. Todd, 3 J. J. M., 299; Brown v. U. S. Home and Dower Association, 12 Ky. Law Rep., 283.)

On the appeal of the property owners it is insisted that the judgment against them is not warranted by the pleadings. The plaintiff alleged in his petition that the property referred to was not defined into squares by principal streets, and while the defendants alleged the existence of the parallel streets they did not allege the existence of cross streets. Still, when the proof was made, the facts were presented to the court and although the plaintiff was not entitled to the relief it sought, it prayed for all proper relief, and defense having been made it was the duty of the court, under section 2834, Kentucky Statutes, to make all corrections, rules and orders necessary to do justice to the parties concerned. The plaintiff was willing to stand upon the apportionment made by the council. The defendants insisted that this apportionment was invalid and in showing this they established the facts which, by law, required the apportionment to be made, as directed by the court. As the court had all the parties before him, it was incumbent on him under the statute, to proceed to do justice between them. The statute is mandatory. The court would have erred in refusing to obey it. If an additional pleading was necessary he should have ordered a forthwith amendment under section 130 of the Code. His failure to do this in no wise prejudiced appellants.

In Ellison v. Dunlap, 25 Ky. Law Rep., 1495, we said on this subject: "Section 129 of the Code provides that no variance between pleading and proof is material which does not mislead a party to his prejudice in maintaining his action or defense upon the merits; also that a party relying on the variance must show to the satisfaction of the court that he was misled, and then the court may order the pleading to be amended upon such terms as may be just. By section 130 it is provided that, if the variance is not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment. By section 134 it is further provided that the court must, in every stage of the action, disregard any error which does not affect the substantial rights of the adverse party, and that no judgment shall be reversed by reason of such error. Under these provisions of the Code, if the circuit court had concluded that there was a variance between the terms of the contract alleged in the petition, and that shown by the evidence, as the variance was not material and did not mislead the defendants in maintaining their defense upon the merits, it would have been the duty of the court to order an immediate amendment, and direct the facts to be found according to the evidence. The question seems not to have been presented to the circuit court, and, if the judgment was reversed here therefor, it would be with directions to the circuit court to order an immediate amendment, and find the facts according to the evidence. But this is unnecessary, as the substantial rights of appellants were not affected, and no judgment shall be reversed for an error not affecting the

substantial rights of the party complaining." (East Jellico Coal Co. v. Golden, 25 Ky. Law Rep., 2056.)

While the cross streets on the north side of Frankfort avenue were not extended so as to intersect the cross streets on the south side of Frankfort avenue, because of the right of way of the L. & N. R. R. Co., which intervened, for the purposes of assessment under the statute these cross streets must be treated as extended. This was so held in Cooper v. Nevin, 90 Ky., 90. The circuit court followed that case which seems to us in accord with the spirit of the statute. The assessment complained of was before this court in L. & N. R. R. Co. v. Barber Asphalt Co., 25 Ky. Law Rep., 1024, and while the point made here does not appear to have been made there, the assessment was sustained and the judgment in favor of the contractor was affirmed. Upon a re-examination of the subject we see no reason for receding from the conclusion we then reached.

On the appeal of William Specht and others the judgment appealed from is affirmed.

TORBITT & CASTLEMAN v. JACKSON.

(Filed May 25, 1904—Not to be reported.)

Homestead—Exemptions—Appellee having purchased a house and lot which after occupying as a homestead he sold, accepting so much cash and the purchaser assuming the payment a lien upon the property, in an action by appellants, his creditors, seeking to attach in the hands of the purchaser of the house and lot the purchase price of the lot, the chancellor properly held that he was entitled to have set apart to him the proceeds remaining after the lien debt was paid, it being less than $1,000, he being a housekeeper with a family, resident in this Commonwealth.

Pryor, Sapinsky & Castleman for appellants.

Wm. Carroll for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Chief Justice Burnam.

In May, 1900, the appellee, W. O. Jackson, purchased a house and lot in the city of New Castle, at the price of $1,200, from the Bank of New Castle, for which he executed his promissory notes due and payable on the 1st day of May, 1903, to the bank, which were secured by a lien upon the property. Immediately after his purchase, he moved into the house with his family, and occupied it as a homestead until September, 1903, when he sold it by executory contract to Miss Mattie Young and others, in consideration of $100 in cash and $1,900, which was due and payable on the 1st day of March, 1904, and for which, note was executed. It was further stipulated that the lien to the bank was to be paid out of the deferred payment, and a deed executed to the purchasers. He surrendered the possession under the contract to his vendees on the 15th of October, 1903, and on the 26th of October thereafter, appellants brought this suit against appellee for a personal judgment for their debt, and at the same time sued out a general attachment, upon the ground that he had no property in the State subject to execution, or not enough to satisfy appellants' demand. This attachment was executed upon

Miss Young and others as garnishees. Appellee controverted the ground of the attachment, and alleged that he was a housekeeper with a family resident in this Commonwealth, and that after the lien debts against the property sold the Youngs were paid, there would be less than $1,000 left from the proceeds of the sale, which he claimed to be exempt from the attachment lien of appellant. The cause being submitted on the pleadings and the facts heretofore recited, the lower court adjudged that the defendant, Jackson, had a homestead right in the funds.

Upon this appeal by the plaintiff, it is insisted that appellee was not entitled to a homestead in the property sold to the Youngs, for the reason that he had not paid any part of the purchase money therefor to the bank of New Castle, prior to the sale of the property, and not having acquired a homestead in the property itself, he could not claim the surplus proceeds as exempt. To support this contention we are cited to the case of Moseley v. Bevins, 91 Ky., 650, and a number of subsequent decisions which are rested upon the opinion in that case. In Moseley v. Bevins, it was decided that a debtor was not entitled to the homestead exemption as against a debt created prior to the payment of the purchase money for the land, although the debt was cerated subsequent to the purchase of the land, and the debtor's entry upon it as a homestead. The opinion in that case was bottomed upon the ground that there was no difference in principle or effect between purchasing and paying for a homestead with means that ought to have been applied to the payment of a pre-existing debt, and the purchase of a homestead on credit, and after the creation of the indebtedness paying for the homestead out of means acquired subsequent thereto. In this case no money was paid by the appellee in the purchase of the homestead after the creation of appellant's debt. He acquired a homestead in the property subject to the lien for the purchase money thereon, long before the creation of appellant's debt. In Morrow, &c. v. Bailey, 109 Ky., 359, it was decided, first, that a conveyance by a debtor of his homestead was not fraudulent as to creditors; second, that where a debt was created after the debtor had purchased and partly paid for the land, and erected improvements thereon, and after the creation of the debt, the unpaid purchase price was paid by selling part of the land, that the remainder of the land was exempt as a homestead. If the bank had enforced its lien and the property had been sold for $2,000, there can be no doubt that under section 1705 of the Kentucky Statutes, appellee would have been entitled to have had the overplus, after paying the lien debt to the bank, paid over to him for the purpose of enabling him to purchase another homestead. We, therefore, conclude that the trial court properly refused to subject the funds in the hands of Miss Young and others to the payment of appellant's claim.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. MAYES.

(Filed May 25, 1904—Not to be reported.)

1. Evidence—Examination of witness—The examination of a witness in an action against a railroad for damages, was improper in going into his peculiar religious belief.

2. Same—This court has held that under our Constitution, persons may

testify without regard to their religious belief or disbelief; and the action of the trial court in permitting the examination of a witness to turn upon his religious belief, with a view to affecting his credibility, was improper.

C. J. Waddill and Benjamin D. Warfield for appellant.

Jonson & Jennings for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Barker.

The appellee, J. H. Mayes, who is a colored preacher of the gospel, instituted this action to recover damages of the appellant because, as he alleges in his petition, its conductor, W. D. Bell, while taking up his ticket, insulted him by using toward him vile and profane language; all of which was denied by appellant. A trial resulted in a verdict of $200 in favor of appellee.

The only error that we find in the record grows out of the permission by the court to counsel for appellee, in the presence of the jury, to cross-examine W. D. Bell on the subject of his religious belief. A few of the questions propounded to the witness, and his answers thereto, will illustrate the character and extent of this cross-examination.

"Q. Don't you know that you don't believe in the existence of a God, as described in the Bible?"

"A. I don't know. I can not answer that."

"Q. You say that you can not answer the question as to whether or not you believe in the existence of an Orthodox God, as described in the Bible?"

"A. I don't know that I can."

"Q. Do you believe in the divinity of Jesus Christ?"

The witness not answering this question in response to the counsel, the court said: "Do you believe in the divinity of Jesus Christ?"

"A. I don't know whether he was or not."

"Q. Do you believe he was?"

"A. Well, in the teachings of the Bible, he was."

"Q. Do you believe the teachings of the Bible?"

"A. I don't know as I am required to answer all these questions; am I being tried for heresy? If so, why that would be all right."

"Q. Do you believe a whole lot that Christ is a son of the Orthodox God?" (No answer).

"Q. Do you believe a right smart or a whole lot of the teachings of the Bible, wherein it says that Christ is a son of the Orthodox God?"

"A. I believe it as much as any history."

These questions, and the answers, constitute but a small part of the cross-examination of the witness touching his religious belief, evidently made for the purpose of discrediting him in the eyes of the jury. The question involved here arose in the case of Bush v. Commonwealth, 80 Ky., 244, in which the court held that the then Constitution of the Commonwealth changed the common-law rule as to the incompetency of an Atheist to testify in a judicial examination. The thorough and enlightened manner in which the question is treated in the opinion by Judge Hines in the case cited, makes it unnecessary for us to do more than refer to it. After reciting the constitutional provisions bearing upon the question at issue, the court said:

"We think that this provision of the Constitution not only permits persons to testify without regard to religious belief or disbelief, but that it was intended to prevent any inquiry into that belief for the purpose of affecting credibility. It places the Atheist, in this regard, on the same footing as any other witness, and leaves the question as to credibility to be inquired into in the same way." Subsection 2 of section 1 of the Bill of Rights, and section 5 of the present Constitution, are substantially similar to those in the former Constitution, adverted to in the opinion. The opinion in Bush v. Commonwealth was approved in White v. Commonwealth, 96 Ky., 180.

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

MARSHALL, &c. v. WALKER, &c.

(Filed May 25, 1904—Not to be reported.)

1. Wills—Construction of—A clause in a will by which testator devised his property equally to his two children, "my son, Wm. Young, and my daughter, Ann Marshall, to her and her bodily heirs forever," vested in the latter the fee to the land embraced in the will.

2. Same—Construction of statutes—At common law a devise to one and her bodily heirs created an estate tail, which was by our statute converted into fee simple estate, and where, in a devise, such words not being used in a sense different from their legal and technical sense, the judgment of the chancellor having been in accordance with the reasoning herein, will be upheld.

L. M. Dembitz, C. M. Lindsay, H. L. Stone and Kohn, Baird & Spindle for Park Commissioners.

Forcht & Field for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Paynter.

This action involves the construction of the will of Walter Young, which was probated in 1840. The clause of the will necessary to be quoted reads as follows: "After all my just debts being paid out of my estate, I do hereby will and bequeath to my beloved wife, Sarah Young, all my real property and mixed estate, during her natural life, and after her death I wish it to be equally divided between my two beloved children, my son, Wm. Young, and my daughter, Ann Marshall, to her and her bodily heirs forever."

The daughter, Ann Marshall, lived until a short time before this action was instituted by her children to recover the real estate which was devised to Ann Marshall and her "bodily heirs." At the death of the testator she had one child.

For the plaintiffs, who are appellants, it is insisted that the testator's daughter, Ann Marshall, took a life estate, with remainder to her children. For the appellees it is urged that the will created a fee in her. At common law the clause would have created an estate tail, which, by the statute, has been converted into a fee. (Prescott v. Prescott's Heirs, 10 B. M., 56; Lochland v. Downing's Ex'or, 11 B. M., 82; Robb v. Belt, 12 B. M., 643; Brown v. Alden, 14 B. M., 114; Johnson v. Johnson, 2 Met., 331; True v. Nicholls,

2 Duvall, 547.) When an estate tail is converted under the statute into a fee, it becomes an absolute fee. (Pruitt, &c. v. Holland, 92 Ky., 641.) The words "to her and to her bodily heirs" are not words of purchase, but words of limitation. The court in Johnson v. Johnson, supra, said: "These words are words of limitation, and unless there is something in the deed or will from which a reasonable inference can be drawn, that the words were used in a sense different from their legal and technical signification."

Learned counsel for appellant urges in argument that as the court in Righter v. Forrester, 1 Bush, 278, Northcutt v. Curry, 6 Ky. Law Rep., 588, and in Mitchell v. Simpson, 88 Ky., 125, found from other provisions of the papers, the words were used in a sense different from their legal and technical signification, and that they are authority for his position. The court did not intend, to by these cases, depart from the rule of interpretation provided by the statute, which converts an estate tail at common law into a fee. There is no provision of the will under consideration, to show that the testator intended to use the words in a sense different from their legal and technical signification, as it was in the cases to which reference has been made. We are of the opinion that Ann Marshall was vested with the fee to the land in question. This conclusion is supported by many cases in addition to those cited.

The judgment is affirmed.

BRANSON, &c. v. EVERSOLE.

(Filed May 25, 1904—Not to be reported.)

Lands—Practice—In an action to quiet title to land, when issue was joined and an order of survey made, but the surveyor to whom the order was taken being sick and unable to make the survey, the court overruled a motion for continuance upon that ground, and this action of the court was erroneous and prejudicial to the party seeking the order.

W. F. Hall for appellants.

J. G. & J. S. Forrester for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Eversole, sued the appellants, Branson & Coldiron, and alleged that he was the owner and in possession of a certain tract of land and sought to be quieted in the possession and enjoyment of it. The appellant, Coldiron, filed an answer, denying that the plaintiff was the owner of the land, or that he was in the actual possession of it, and claimed that he was the owner of a tract of land, and that there was a lap in the boundaries, etc. The petition was filed in December, 1902. At a special term of the court in July, 1903, upon motion of appellants, an order of survey was made and one Reynolds, a surveyor, was directed to execute it. The special term continued until the August term of court. After the August term of court the appellant, Coldiron, obtained a copy of the order of survey and went to a place in Harlan county, where he had reason to believe the surveyor would be found, with a view of delivering it to him and having it executed. He

learned that the surveyor was seriously ill and had been taken to his home in Knox county, consequently the order of survey was not executed. At the November term of court the appellant, Coldiron, filed his affidavit, showing the facts stated, and moved the court for a continuance of the case. He stated that he had not prepared his case for trial, because the survey was necessary to an intelligent understanding of it, and to enable him to take his testimony. The case was in equity. The court overruled his motion for a continuance and gave judgment against him.

When the order of survey was made the court evidently was of the opinion that a survey was necessary. Nothing was developed in the record which shows it was unnecessary. In most of cases involving title to land a survey is necessary to enable the court or jury to understand the location of the boundary lines of the land. Where a survey is necessary, it is impossible to properly prepare a case for trial without it. The appellants had the right to rely upon the judgment of the court previously given that a survey was necessary. When the court changed its mind, the appellants had no time in which to prepare the case for trial. They were not afforded an opportunity to have their side of the case presented for hearing. The court erred in overruling appellants' motion for a continuance, as it was not his fault that the survey was not made. (Green v. Culver, Hull & Co., &c., 19 Ky. Law Rep., 186; Schamberg, &c. v. Leslie, 19 Ky. Law Rep., 599.)

The judgment is reversed for proceedings consistent with this opinion.

HEDDRICK, &c. v. HUFFAKER, &c.

(Filed May 25, 1904—Not to be reported.)

Contracts—Alteration of written instruments—Where notes have been executed in consideration of a contract authorizing the sale of books in certain territory, the fact that another county was added to the contract after the execution of the notes, did not release a surety, for the reason that such an enlargement of the contract was beneficial because it increased the opportunity to sell the books. A contract can only be invalidated by an alteration which is material and it can not be material unless it affects in some way the rights of the obligors or their obligations.

Sharp & Siler for appellants.

Harrison & Harrison and O. H. Waddle for appellees.

Appeal from Wayne Circuit Court.

Opinion of the court by Judge Paynter.

This action was instituted by the appellants on two promissory notes executed to W. P. Ennis for $135 each, for 300 copies of "Farmers Business Record," and the notes were assigned and transferred to the appellants. At the time the notes were executed the "Farmers Business Record Co." owned the copyright for the "Farmers Business Record," and it appointed the appellees, I. B. and Thomas Huffaker, sole and exclusive agents for the sale of the "Farmers Business Record" in the counties of Putnam and Coffee, Tennessee, and gave them the exclusive privilege of selling that publication in the counties named, for a period of three years. There are other provisions of the agency contract not necessary to be stated here.

The defense relied upon in the lower court and here, by I. B. Huffaker, is, that after the notes had been signed and the agency contract delivered, Coffee county was inserted in the agency contract by the "Farmers Business Record Co.," with the consent alone of the co-obligor, Thomas Huffaker, the claim being that the exclusive privilege for selling the publication was in Putnam county. The appellee, I. B. Huffaker, claims that he was only surety on the notes, and that there was a material change in the contract without his consent and, therefore, the notes are unenforcible. The record is against his claim that he was only surety on the notes. He signed the notes first, and in the agency contract it is recited that he and Thomas Huffaker are constituted agents for the sale of the publication within the specified territory. However, we will assume that I. B. Huffaker was only surety on the notes. The notes were not altered, only the contract of agency, which was in part the consideration for the notes. A contract can only be invalidated by an alteration which is material, and it can not be material unless it in some way affects the rights or obligations of the obligors. The duties of the obligors, their liabilities or obligations, must be increased or changed by the alteration. (Terry & Bell v. Hazlewood, 1 Duvall, 104; Smith v. Lockridge, 8 Bush, 480; Warren v. Fant's Trustee, 79 Ky., 1.) The purpose of buying the books was to sell them. The opportunities for selling them in Putnam county would be less than they would be in that and Coffee county. The opportunity of selling the books would certainly be increased by having the territory in which they might be sold enlarged, which was, therefore, beneficial to the obligors to insert Coffee county in the agency contract. If I. B. Huffaker was only surety, he was not prejudiced by this change because it increased the chance of his principal to sell the books and pay the notes. The court should have rendered judgment on the notes.

The judgment is reversed for proceedings consistent with this opinion.

LOUISVILLE PUBLIC LIBRARY CO. v. CITY OF LOUISVILLE.

(Filed May 25, 1904.)

1. Fire escapes—Valid ordinance—The following ordinance of the city of Louisville, approved August 14, 1899, with reference to fire escapes, is valid, viz.: "All buildings occupied by any person or persons, or in which any person or persons shall be employed or assembled (except such as are used as private residences exclusively), of three or more stories in height, shall be provided with one or more permanent, approved fire escapes when ordered by the inspector or his deputies, and the escapes must be in such number and constructed and located in such manner as directed in notice or order."

2. Repeal of former acts—Exclusive control by city council—The act of July 1, 1893, section 2758, Kentucky Statutes, providing that "the statutes heretofore enacted for the inspection of buildings and the appointment of building inspectors, shall continue in force until superseded by appropriate ordinances passed by the general council; but in no case shall such acts now in force continue longer than March 4, 1894," operated as a repeal of all former acts on this subject, and the whole question is to be regulated by the ordinances passed by the general council.

Hardin H. Herr and Marion W. Ripy for appellant.

Warwick Miller for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Paynter.

An ordinance, approved August 14, 1899, with reference to fire escapes, reads as follows: "All buildings occupied by any person or persons, or in which any person or persons shall be employed or assemble (except such as are used as private residences exclusively), of three or more stories in height, shall be provided with one or more permanent, approved fire escapes when ordered by the inspector or his deputies, and the escapes must be in such number and constructed and located in such manner as directed in said notice or order."

Is the ordinance valid. It is urged that it is invalid, because it is in conflict with the act approved February 13, 1888, which appears in sections 1830 and 1832, Kentucky Statutes. Section 1830 prescribes the conditions under which the owners of certain property shall place ladders or fire escapes thereon. Section 1832 provides a penalty of not less than $50 nor more than $250 for each thirty days the building may be unprovided with a ladder or fire escape. The compiler of the Kentucky Statutes supposed this act to be in force, and it is conceded that if it is, the ordinance is invalid under section 168 of the Constitution, which provides that no municipal ordinance shall fix a penalty for a violation thereof less than that imposed by the statutes for the same offense. On February 27, 1890, another act was approved in regard to fire escapes. (Acts 1889-1890, page 384.) Section 34 of that act is substantially the same as section 1830, except in the latter the chief of the fire department is authorized to require the erection of ladders and fire escapes, etc., while in the former the inspector of buildings does so with the advice of the fire chief. Besides, in the former act, the penalty is not less than $10 nor more than $200, and an additional fine of $50 for each week that the owner fails to comply with the order of the building inspector. This act also provides that all acts in conflict with it are repealed. On July 1, 1893, the act for the government of cities of the first class was passed. Section 2758, Kentucky Statutes, is part of that act. It reads as follows: "The statutes heretofore enacted for the inspection of buildings, and for the appointment of building inspectors, shall continue in force until superseded by appropriate ordinances passed by the general council; but in no event shall such acts now in force, continue longer than March 4, 1894."

It is unnecessary to enter into a discussion as to the extent the act of February 27, 1890, repeals the act of February 13, 1888, for by section 2758 the whole question is to be regulated by the ordinances passed by the general council. The Constitution made it the duty of the general assembly to classify cities and pass acts for their government, and it was deemed wise to allow the general council to regulate the matter of the construction of fire escapes. Our opinion is that the ordinance in question is valid.

The judgment is affirmed.

Judge Barker not sitting.

DYER v. CITY OF NEWPORT, &c.

(Filed May 25, 1904—Not to be reported.)

Municipal corporations—Taxation—Improvements authorized and begun before the adoption of the present Constitution—By an act of the legislature, approved April 16, 1890, the board of council of the city of Newport was authorized to divide the city into sewerage districts, having in view the construction of a sewerage system adequate to the needs of the city, and to issue twenty-year bonds to pay for same. The city having been divided into such districts, the city council passed an ordinance on April 26, 1904, for the completion of said sewerage in district E., pursuant to the said act of 1890, and for the issual of twenty-year bonds to pay for same, to meet the interest of which, a tax of 66 cents on the $100 will be required. Held—That although this will increase the tax rate beyond that allowed under section 157 of the present Constitution, yet the same is authorized under section 158 of the Constitution, which provides that municipalities may contract an indebtedness in excess of the limitation prescribed in section 157, when it has been authorized under laws in force prior to the adoption of this Constitution, or when necessary for the completion of an improvement undertaken and not completed and paid for, at the time of the adoption of the present Constitution.

H. Gunkel, Jr., for appellant.

Jas. T. Thornton and Aubrey Barbour for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hobson.

By an act, approved April 16, 1890, entitled "An act to provide for sewerage in the city of Newport," the board of council of the city was authorized to divide the city into sewerage districts, having in view the economical construction of a system of sewerage adequate to the needs of the city and the water sheds of the city included therein, and to have each district provided with sewers at the cost of the district, the city to issue sewerage bonds payable in twenty years, and a tax to be levied upon the property of the district sufficient to pay the interest on the bonds and provide a sinking fund to pay the principal. The city was divided into sewerage districts pursuant to the act, and sewers have been constructed in districts A, B, C and D. On February 8, 1894, the city passed an ordiinance providing for the sewering of district E. Pursuant to the act sewers have been built in part in district E. On April 26, 1904, the city passed an ordinance for the completion of the sewer system in district E pursuant to the act, and for twenty-year bonds to be issued to be paid by a tax as therein provided. To meet these bonds a tax of something over 66 cents on the $100 of property will have to be levied, which will increase the rate of taxation in this district to more than the limit provided for in section 157 of the Constitution. The reason for the passage of the ordinance in February, 1904, was, that a large part of the district was not sewered, although the work had been begun and the purpose was to complete the contemplated plan which had been begun under the act of 1890 soon after its passage. Appellant brought this suit as a taxpayer of the district on the ground that the proposed tax being in excess of the constitutional limit, was void, and that the bonds could not properly be issued. The court dismissed his petition and he has appealed.

In Warren v. Newport, 23 Ky. Law Rep., 1006, the court had under consideration the validity of bonds issued by the city for sewer district A, and it was held that the act of April 16, 1890, is in force. It was also held, upon the authority of several previous cases, that the constitutional limitation as to indebtedness did not apply to debts authorized under laws in force prior to the adoption of the Constitution, and necessary for the completion of a public improvement undertaken at the time of its adoption. After calling attention to section 3072, Kentucky Statutes, the court said: "It will be observed that this section was enacted with reference to the constitutional provisions in question and with reference to the opinion of this court in Holzbauer v. City of Lexington, and this court in the 'city of Lexington on appeal' recognized the validity of this section. Section 158 of the Constitution provides that the municipality 'may contract an indebtedness in excess of such limitations, when the same has been authorized under laws in force prior to the adoption of this Constitution, or when necessary for the completion of and payment for a public improvement undertaken and not completed and paid for at the time of the adoption of this Constitution.' The legislature interpreted the Constitution as meaning that cities of the second class were authorized to issue bonds for an amount sufficient to construct, complete and pay for any sewer authorized to be constructed under laws theretofore enacted, or for completing and carrying out any contract made after the construction of any such sewer. So the legislature expressly authorized the city of Newport to complete its sewer system as provided for by the act of 1890 "

It is said that this case is not conclusive of the one before us, because there the additional tax incurred by reason of the issue of bonds to pay for the construction of sewers in district A, did not increase the total rate to $1.50. But section 157 of the Constitution is applicable to the tax rate in the city. It has no application to local assessments to pay for local improvements. (Gosnell v. Louisville, 20 Ky. Law Rep., 519; Catlettsburg v. Self, 25 Ky. Law Rep., 161.) The bonds here are to be paid by the tax on the local district which gets the benefit of the improvement, and we do not see that there is any substantial distinction between such bonds and the bonds issued for the improvement of a street. The legislature might have required the cost of the improvement to be assessed directly against the property. If it had done this, no question could have been raised of a violation of section 157 or 171 of the Constitution. But the issuing of the bonds was simply an expedient to divide the burden and distribute it over a number of years so that it would not fall all at once on the property owners. Still in the end it is the same thing in this class of improvements. The objection that no vote of the people was taken authorizing the indebtedness under section 157 of the Constitution, and that the tax rate was exceeded, was expressly disposed of in city of Lexington on appeal, 93 Ky., 258, and cases cited.

Judgment affirmed.

KENTUCKY AND INDIANA BRIDGE AND RAILROAD CO. v. SHRADER.

(Filed May 25, 1904—Not to be reported.)

1. Carriers—Negligence of motorman — Injury to passenger—Excessive verdict—In an action by a young lady, twenty-five years of age, for injury in which her nose was broken, impairing her breathing and greatly disfiguring her face, by reason of the negligence of the motorman in leaving his brake wound up in such a manner that it came loose and reversed itself and struck her as she got on the car, a judgment of $2,250 is held not to be excessive.

2. Instruction—The court did not err in defining negligence to mean "the failure to use such care as ordinarily prudent persons exercise under like or similar circumstances," because the word "usually" did not precede the word "exercise" therein.

Humphrey, Burnett & Humphrey for appellant.

Bennett H. Young and Stottsenberg & Weathers for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Barker.

The Kentucky and Indiana Bridge and Railroad Co. is a corporation operating a railroad over its bridge across the Ohio river, between the cities of Louisville, Ky., and New Albany, Ind. The appellee, Carrie J. Shrader, does business in Louisville, and lives in New Albany.

On the 21st day of August, 1901, about 6 o'clock in the evening, appellee, while getting aboard an electric car, owned and operated by appellant, at its Fourth street station in Louisville, was struck by the handle of the car brake, with such force that her nose was broken, and other painful and serious injuries inflicted upon her, to recover damages for which this action was instituted, the jury rendering a verdict of $2,250 against appellant. The claim for damages is based upon the alleged negligence of appellant's motorman in leaving his brake wound up in such manner that it came loose and reversed itself, with such speed and velocity, just as appellee, a passenger, was boarding the car, that she was struck and injured in the manner indicated. The errors seriously argued by appellant are, first, that the negligence of its employe, the motorman, was not established by sufficient evidence; second, that the verdict was excessive; third, that one of the jurors was guilty of such misconduct as indicated hostility to appellant, and, fourth, that the court erred in its instruction defining negligence. Without going into the evidence in detail, a careful reading of the record convinces us that the jury did not err in arriving at the conclusion that appellee's injuries were caused by the negligence of the motorman in charge of the car. By his own admission, after he had wound up and set the brake, in order to avoid being jostled by the incoming passengers, he abandoned it, and stepped back into the vestibule, leaving this dangerous instrument wholly unguarded, although it was apparent that an awkward step of a passenger or even the jostling of the car, might unset it, and start the fly-wheel of the brake upon its rapid and dangerous revolution; that appellee's injuries resulted by reason of the motorman's failure to hold the brake until

the passengers were on, is shown by his own admissions. His familiarity with the brake was bound to teach him, but for his own negligence in failing to learn the lesson, the danger to incoming passengers in leaving the set brake unprotected and unguarded.

The appellee, who is a young lady of twenty-five years, had her nose broken by the accident, greatly disfiguring her face, and her breathing is so much impaired, that, unless she can be relieved by a successful surgical operation, her health will undoubtedly be permanently injured. As to how far this operation can be successfully performed, the evidence is contradictory, as it is also on the question of whether or not her lip is paralyzed. We think that the jury were the best judges of these questions, which were fairly submitted to them by the instructions of the court, and we are not willing to say that the verdict is excessive.

We are unable to agree with counsel, in their claim that the juryman, whose conduct they criticise, in asking questions of its witness, the motorman, showed hostility to it. The interrogation complained of is as follows:

"Q. If you had stood up by the brake and held your hand on the crank, would it have hit the lady?"

"A. If I held my hand on it, it would not have hit the woman."

"Q. If you had stood by the brake and held it, would you have been liable to be run over?"

"A. They would have run over me if I had not gotten out of the way."

"Q. Would it not have been better for you to jump off the car and let everything go?"

"A. Just as well, because they crowded in on both sides."

We do not perceive that these interrogatories deviated from the line of propriety. Perhaps, the last question is subject to the criticism of being inconsequential, but certainly not of being improper.

The learned trial judge, in overruling the motion for a new trial, in apt language expresses our views on the question in hand. "This case is before me on a motion for a new trial, and the only ground urged is misconduct of a juror during the trial. The misconduct complained of is that the juror indicated, by questions asked by him and his manner in asking the questions, that he was opposed to the defendant. At the time the questions were put, defendant moved to discharge the jury, and the motion was overruled with an exception. I was of the opinion then, as I am now, that it would be very unwise for a trial judge to discharge a jury every time a juror asked a question which indicated which way he leaned. My own experience teaches me that there is nothing more deceptive than the manner of jurors during a trial. Jurors who seem to be your best friends, turn out to be strongly against you, and vice versa. I see no misconduct in this case that would justify granting a new trial, and the motion is overruled."

It is insisted that the court erred in the second instruction, by which is defined negligence, "Negligence, as used in the first instruction, means the failure to exercise such care as ordinarily prudent persons exercise under like or similar circumstances." It is insisted that the word "usually" should have preceded the word "exercise" in the last line of the instruction. The instruction, as written, gives, substantially, the law upon the question to which it is directed, and is not subject to the criticism made by counsel.

For the reasons indicated the judgment is affirmed.

LOUISVILLE HOTEL CO. v. KALTENBRUN.

(Filed May 25, 1904—Not to be reported.)

1. Master and servant—Damages—Appellee, who was the foreman in charge of the laundry of appellant, slipped on the wet floor of the laundry, and in an attempt to regain his balance, his arm was caught in a centrifugal machine and torn off at the elbow. He was awarded $3,000 by the jury in this action for damages against appellant. It appearing that a certain box which was used in carrying the wash from one part of the machinery to another had become so defective as to leak badly, allowing water to run upon the floor, which, when wet, was dangerous to walk upon, and the appellee had called the attention of appellant's manager to this condition of the laundry and was promised that the necessary repairs would be made, but before they were done the injury resulted as above indicated. Held—The verdict of the jury will not be disturbed.

2. Same—Ordinarily when the master makes a general promise to repair without naming a time, the rule is that this should be construed to mean such time as would be reasonably necessary for performance of the promise; but when the master fixes a definite time within which the repair is to be made, there is no rule which would preclude the servant from waiting the expiration of the time named, but the servant does not assume the risk of an injury caused to him within such a period of time, after the promise to repair would be reasonably allowed for its performance.

Forcht & Field and O'Neal & O'Neal for appellant.

Clarence C. Hiett and Henry M. Johnson for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third division.

Opinion of the court by Judge Barker.

The appellee, August Kaltenbrun, was a foreman in charge of the laundry of appellant. The floor of the laundry room was made of cement somewhat elevated in the middle, and slanting toward the walls, so as to carry off any water which might be spilled thereon. A certain box, which was used in carrying the wash from one part of the machinery to another, had become so defective that it leaked badly, allowing the water to run out and spill upon the floor. When this happened, the wet floor became slippery and danegrous to walk upon. Appellee had called the attention of George Mulligan, appellant's manager, to the defective condition of the box, and the consequential dangerous condition of the floor, and he seems to have promised appellee that, when the carpenter was through with a certain work in which he was engaged up stairs, he would have him make a new and perfect box. Before this promise was complied with, appellee slipped on the wet floor, and, throwing out his arms in an attempt to regain his balance, one of them was caught in a centrifugal machine, and torn off at the elbow; whereupon he instituted this action to recover damages, and was awarded a verdict of $3,000 by the jury.

We think appellee's action is in tort for the negligence, and not on the contract, as contended for by appellant, although the petition alleges the facts of the promised repair with minute detail; these do not change the character of the action from ex delicto to ex contractu.

Counsel for appellant concede that the verdict of the jury establishes the

fact that appellant promised to make the repair as alleged by appellee, but contend that the box was an instrument so simple in its nature, and the danger so apparent, appellee was not justified in relying upon it. To this, we can not agree. The difference between a simple instrument and a complex one vanishes when the servant fully understands that it is dangerous to further use it; and, we do not understand the rule to be that the servant, after obtaining knowledge of the danger and, complaining of it to his employer, is precluded from continuing his service, if the employer promises to repair, unless the danger is so imminent and manifest that no prudent person would be justified in taking the risk of the continued service. Shearman & Redfield, in their work on Negligence, 5th edition, section 215, thus state the rule: "In some old cases, the mere continuance of a servant in his work, with knowledge of defects in his associates or his materials, was treated as conclusive evidence of his having waived objections thereto. Such rulings were unjust; because a servant has the same right that any one else has to complete his contract in reliance upon its original terms. And those opinions have now been distinctly overruled. A party to any other contract, having mutual obligations, is allowed to perform fully his part, notwithstanding the failure of the other party to fulfill a condition precedent, without necessarily waiving his right to insist upon performance of such condition at a later period. It is not fair to require from servants a more peremptory assertion of their rights against masters, than would be required between parties standing upon a more equal footing. Indeed, the dependent positions of servants generally, makes it reasonable to hold any notice on their part sufficient, however timid and hesitating, so long as it plainly conveys to the master the idea that a defect exists and they desire its removal. The real question to be determined in each case is whether, under all the circumstances, the master believed and the servant intended to make him believe, that all objections to the unfitness of a fellow servant, or to the defects in the materials provided for the work, were waived; and that an implied contract exempting the master from liability was freely accepted. This is a question of fact, not of law; and if not free from doubt, it must be left to the jury. There is no longer any doubt that where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused thereby, within such a period of time after the promise as would be reasonably allowed for its performance, or, indeed, within any period which would not preclude all reasonable expectation that the promise might be kept."

In the case of Hough v. Railway Co., 100 U. S. Rep., 213, the foregoing quotation was approved and adopted, as was the following quotation from Cooley on Torts: "If the servant," says Mr. Cooley, in his work on Torts, 559, "having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative; and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume the risks."

And the court further said: "We may add, that it was for the jury to say

whether the defect in the cowcatcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence; that the engineer knew of the alleged defect was not, under the circumstances and as matter of law, absolutely conclusive of want of due care on his part."

In the case at bar, the servant knew of the danger and complained of it to his superior; the superior promised within a certain time to remedy the defect. We think he had a right to rely upon this assurance until the time indicated in the master's promise had expired without its fullfilment. Of course, the servant was not absolved from exercising due care in performing the master's labor under the dangerous circumstances with which he was surrounded, but that appellee was negligent in the manner of performing his work at the time he was hurt, is not contended for in this case.

We can not agree to the proposition that the danger in walking on the slippery floor was so apparent and imminent, that none but an utterly reckless person would have used it under the circumstances. The other employes in the laundry were walking on it at the same time, and did not fall; it was not at all probable that, if appellee fell, he would receive such terrible injury as happened to him on this occasion. This is not like the Sullivan case, where the employe was working on a narrow plank over a deep and rapid river, where to fall meant almost certain death; or that of the servant who uses a ladder without nails in the end, on ice, where it was almost certain that the ladder would slip when used, and equally certain that the fall would inflict serious injury, if not death, when it took place. At any rate, this, as was said in Hough v. The Railway, was a question for the determination of the jury. It is believed that the foregoing principles are sustained by Breckinridge Co. v. Hicks, 94 Ky., 362; Bell & Coggeshall Co. v. Applegate, 23 Ky. Law Rep., 470, and Reiser v. Southwestern Planing Mill and Lumber Co., 24 Ky. Law Rep., 796.

The following instruction, No. 3, given by the court, is complained of: "If the jury believe from the evidence that the defendant failed to exercise ordinary care to furnish plaintiff a reasonably safe place in which to work, by reason of said box being defective, and the plaintiff was injured by reason of the defective condition, if any, of said box; and if they further believe from the evidence that the defendant, through its manager, Mulligan, upon complaint being made to him by plaintiff, of the defective condition, if any, of said box, promised to repair the same, and relying upon said promise, if any, plaintiff continued to work, and plaintiff was injured within a reasonable time after such promise, if the same was made, that is, such a time as an ordinarily prudent man would have a right to expect that said promise, if any, would be complied with, they shall find for the plaintiff, etc."

It is contended that the court should have said to the jury, that the plaintiff could only rely upon the promise of the master to repair, for such a time as would reasonably be allowed for the performance of the promise, or only so long as would reasonably be necessary to make the repairs, instead of

using the words contained in the last four lines of the instruction. We think the instruction is more favorable to appellant than it was entitled. Ordinarily, when the master makes a general promise to repair, without naming a time, the rule is that this should be construed to mean such time as would be reasonably necessary for the performance of the promise; but when the master fixes a definite time within which the repair is to be made, we know of no rule which would preclude the servant from waiting the expiration of the time named. In the case at bar, the promise was that the new box should be made as soon as the carpenter was through with some work up stairs. The accident seems to have happened before this took place, and appellee was authorized to wait until the expiration of the time named; or, as Shearman & Redfield state the rule, "the servant does not assume the risk of an injury caused thereby within such a period of time after the promise, as would be reasonably allowed for its performance, or, indeed, within any period which would not preclude all reasonable expectation that the promise might be kept."

For the reasons indicated the judgment is affirmed.

THRELKELD v. LIVINGSTON COUNTY FISCAL COURT, &c.

(Filed May 25, 1904.)

Jailer—Fees—Services not rendered—Special terms of court—Where the county judge holds special terms of his court in his own office or in the county clerk's office, of which he fails to give the jailer notice, and thereby fails to use the court room, the jailer of the county is not entitled to the statutory fee, or any fee, for the holding of such special terms, though he was daily in attendance upon the court room and courthouse, as, under section 1749, Kentucky Statutes, "no officer shall demand or receive any fee for services not actually rendered."

J. W. Bush and C. C. Grassham for appellant.

C. H. Wilson for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Hobson.

Appellant was elected jailer of Livingston county in 1897 and re-elected in 1901. He filed this suit on October 21, 1903, to recover of the county an account amounting to $904 for fees coming to him for special terms of the county and fiscal courts, alleging that the county judge failed to use the court room in holding these special terms without any legal reason, and held these terms in the county clerk's office or in the county judge's office and thus prevented the plaintiff from giving his actual attendance upon these terms of court, though he was daily in attendance upon the court room and the courthouse; that in every instance the county judge opened the term of court without notifying him and refused to use the court room for these special terms. The circuit court sutained a demurrer to his petition, and he has appealed.

He relied upon section 1780, Kentucky Statutes, which is in these words: "The fees of jailer shall be as follow: For attending county and quarterly

court, to be paid out of the county levy, per day, not exceeding * * * $2. For furnishing fuel and light to county and quarterly court, a reasonable compensation, not exceeding $2 per day, to be paid out of the county levy. For putting a prisoner in irons, for an offense other than a felony or contempt, besides the cost of the irons, to be paid out of the county levy, * * * 50 cts. For keeping and dieting prisoners in jail, when confined for an offense other than a felony or contempt of court, 50 cents per day, to be paid out of the county levy, unless confined for a breach of the by-laws or ordinances of a city or town, or for the violation of a statute, where the city or town gets the benefit of the fine; in that case to be paid by such city or town. For imprisoning and releasing a prisoner charged with a misdemeanor, 60 cents, to be paid out of the county levy, unless confined for a breach of the by-laws or ordinances of a city or town, or for a violation of statute, where the city or town gets the benefit of the fine; in that case, to be paid by such city or town. And for imprisoning and releasing a prisoner charged with a felony, 60 cents, to be paid out of the State treasury. For all other services performed by him, the same fees as sheriffs."

This section must be read in connection with section 1749, which contains this provision: "No officer shall demand or receive for his services any other or greater fee than is allowed by law, or any fee for services rendered when the law has not fixed a compensation therefor, nor any fee for services not actually rendered."

The meaning of section 1730 is that the jailer is to be paid for attending county and quarterly court, not exceeding $2 per day, and for furnishing fuel and lights a reasonable compensation, not exceeding $2 a day; for putting a prisoner in irons or for keeping a prisoner each day, 50 cents, or for imprisoning and releasing a prisoner, 60 cents. But he is not to be paid for any of these things unless he actually renders the services. If he does not attend the county court he can no more recover a fee therefor, because the county judge did not notify him and give him an opportunity to attend, than he could recover for fuel or lights if the county judge chose to hold the court in the dark or in a cold room, and not have fuel or lights furnished. We know of no statute requiring the county judge to hold his special terms in the court room. The county judge's office is in the courthouse, and so is the county clerk's office. Both these offices are set apart for the public business, and we see no reason why the county judge may not hold his special terms at his convenience either in his own office or in the county clerk's office. As a matter of fact, we know that this has been the universal custom throughout the State, which was of course well known to the legislature, and its continued silence on the subject would certainly indicate that the practice was not disapproved. The county judge in holding his special term usually transacts only routine or ex parte business, and his office is large enough for this purpose without using the court room. When the county judge uses the court room for a special term, and the jailer in fact attends the court, he is entitled to his fee under the statute; but under the facts stated in the petition he is entitled to no fee for the four hundred and fifty odd special terms of the court which were not held in the court room and which he did not attend.

Judgment affirmed.

SINGER MANUFACTURING CO. v. WITT, &c.

(Filed May 26, 1904.)

1. Appellate jurisdiction—While the judgment appealed from, $175, exclusive of interest and cost, is not sufficient to give this court jurisdiction of the appeal, the counterclaim of the defendant, which is germane to the original action, is for $60.53, which makes the real amount in controversy $235.53, and thereby this court acquires jurisdiction.

2. Parol evidence to vary writing—There being no ambiguity in the written contract sued on, and no allegation that it does not contain the agreement between the parties, it must be accepted as conclusive, and it was error to admit parol evidence, the effect of which was to vary or contradict the terms of the writing.

Robbins & Thomas for appellant.

Bullock & Smith for appellee.

Appeal from Fulton Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, J. W. Witt, was in the employ of the appellant, the Singer Manufacturing Co., as salesman and collector, from the 8th of August, 1901, until the 7th of April, 1902, under a written contract, which provided that he was to be paid a premium of $7.50 for each sale or lease of family machines when approved by the company, and a commission of 15 per cent. on the net amount of cash received and paid over to the company by him. The written contract further provided that all accounts or machines sold by him which were uncollectible, and in all cases in which the company were compelled to take back the machine, he should refund the cash premium of $7.50 that may have been paid to him by the company thereon. The contract also contained many other stipulations and provisions which it is not necessary for us to consider. On the 7th of April, 1902, he had fallen behind $351.14 in his accounts with the company, after he had been credited with the full amount of premiums on machines sold by him and commissions on collections paid to the company. But on that date there remained outstanding and uncollected claims due the company for machines sold by him, on which, when collected, he would be entitled to the commission provided by the contract, which were not credited to him in the settlement. To enable Witt to pay the balance due by him to the company, F. S. Moore, J. A. Noonan, J. W. McElroy, S, D. Luten, H. M. Kerby, G. L. Carpenter and J. H. Pollock signed their names as sureties for Witt to a promissory note for $351.14, which was discounted in a bank at Hickman, and the proceeds paid to the appellant. Contemporaneously with the execution of this note, the following contract was written by F. S. Moore, one of the sureties, and signed by J. W. Witt and E. H. Lamm, appellant's agent in this transaction:

"Whereas I, J. W. Witt, of Hickman, Fulton county, Ky., am indebted to F. S. Moore, etc., in the sum of $380.50, for money loaned, I have this day transferred, assigned, set over and conveyed, and by these presents do hereby transfer, assign and set over to F. S. Moore the following goods and chattels, to wit: All commissions and earnings accrued and accruing under my contract with the Singer Machine Co., prior and subsequent to the termination of said contract, in amounts, both all and singular whatsoever, to have

and to hold in trust to pay the above indebtedness, and hereby giving, granting, constituting and appointing said F. S. Moore my true and lawful attorney, both in law and fact, to collect and draw above-mentioned commissions and earnings, and to receipt in my name for same, which shall be binding and of as full force and effect as if I myself was present.

"The Singer Machine Co. covenants and agrees to pay said commissions and earnings to the said F. S. Moore as per terms of said contract, making first settlement with F. S. Moore six months after termination of said contract between said company and J. W. Witt, and remainder thereof as said commissions and earnings accrue. In witness whereof all parties have hereunto set our hands and seals this April 7, 1902.

(Signed) "J. W. WITT,
"E. H. LAMM.

"Attested by: F. S. MOORE."

Witt's connection with the company ceased on that day. When he entered their service he was required to and did execute a bond of indemnity which was signed by a guaranty company. When the note in bank fell due, it was paid by the securities thereon, and the appellee, Witt, thereupon brought this suit in his own name for the use and benefit of these sureties against the appellant. He alleged in substance that he had represented to his sureties in the note, in the presence of E. H. Lamm, the agent of the defendant, to induce them to sign the note to raise the money to pay his indebtedness to the company, that there would be due to him as commissions upon uncollected claims due the company for machines sold by him, $175, before the proposed note would fall due, and which could be applied to its payment; and that Lamm made similar representations to them; and that relying upon these representations of defendant's agent, they signed the note. The defendant filed a general demurrer to the petition, which was overruled. It thereupon denied that their agent, Lamm, had represented that there would be due to the plaintiff, Witt, $175, for unaccrued commissions which could be applied as a credit upon the note, or that he promised that they should be so applied, admitted the execution of the contract by Lamm, and alleged that the accounts for nine sewing machines turned over to the company by Witt on the 7th of April, 1902, had proved worthless, and that they had been compelled to take back these machines, and that under their contract with him, they were entitled to have refunded $7.50 allowed and paid him as a premium on each of these machines; and that they had also been compelled to refund $3.93 commissions paid him, making his indebtedness to them since the settlement, $81.43, and admitted that there was due to him commissions on collections made since the payment to them on the 7th of April, 1902, $20.90, leaving a balance due to the company of $60.53, for which they prayed judgment against Witt, by way of counterclaim. The affirmative averments of the answer were controverted by reply, and a jury trial resulted in a judgment for the plaintiff for the amount sued for.

Upon the trial, the court instructed the jury in substance, that if they believed from the evidence that the company's agent, Lamm, had represented that there would be $175 due Witt on commissions, and guaranteed a credit of that amount on the note, and the plaintiffs were induced by his representations and guaranty to become the sureties of Witt upon the note to the

bank, they should find for them. The converse of this instruction was also given. The defendant insisted that it could only be made liable in accordance with the terms of the written contract which had been signed by its agent, and asked the court to so instruct the jury. It also asked that the jury be directed to return a verdict for the defendant. All of which were overruled, and it has appealed.

It is insisted for appellee that, as the judgment is only for $175, that this court has no jurisdiction of the appeal. While the judgment rendered against appellant, exclusive of interest and cost, is insufficient to give this court jurisdiction, the counterclaim of the defendant is for $60.53, which makes the real amount in controversy $235.53; and in a number of cases it has been decided that when the defendant relies on a counterclaim against the plaintiff, which is germane to the original cause of action, and the original sum sued for and the sum named in the counterclaim exceed $200, then the amount in controversy is sufficient to give this court jurisdiction. It is conceded that the alleged parol representations made by the agent of the company as to the unearned commissions which would be due to Witt when collected, preceded the execution of the written contract between the parties and the contract itself is not assailed. The law is well settled that where contracts between parties are reduced to writing, the written contract must control, and not mere verbal declarations, which may have preceded its execution. (Van Sant v. Runyon, 19 Ky. Law Rep., 1981.) The rule is thus stated in 1 Greenleaf on Evidence (Lewis' Edition), section 275: "When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing; and all oral testimony of a previous coloquium between the parties or of a conversation, or declarations at the time when it was completed or afterwards, as it would in many instances substitute a new and different contract for the one which was really agreed upon to the prejudice possibly of one of the parties, is rejected."

We find no uncertainty or ambiguity in the terms of the written contract. In it the appellee, Witt, only assigned such commissions as might be due or become due to him from the company; and the company only agreed to pay Moore what should be found due Witt after the settlement of his accounts with the company in accordance with the terms of the contract. It follows that the trial court erred in admitting parol evidence, the effect of which was to contradict and vary the terms of the written contract between the parties by proof of alleged representation by the agent of the company before the execution of the written contract. The court also erred in giving instructions based upon this testimony to the jury. In the absence of any allegation that the written contract did not contain the agreement between the parties, it must be accepted as conclusive. The trial court should have sustained defendant's motion for a peremptory instruction to find in their favor on the cause of action set out in the original petition. And as the appellee, Witt, did not deny the correctness of appellant's account against him, they were entitled to a judgment against him on their counterclaim for $60.83.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

KOCH, &c. v. KENTUCKY AND INDIANA R. R. AND BRIDGE CO., &c.

(Filed May 26, 1904—Not to be reported.)

1. Railroads—Building siding on street—Damage to abutting lots—It was formerly held by this court that a legislative grant coupled with a municipality grant to a railroad company to lay its tracks upon a highway or street, was not an additional servitude upon the dominant estate and, therefore, did not entitle the owners of abutting property to claim compensation therefor unless the work was done negligently, or so near the property as to prevent ingress and egress to and from the same, for which a special action could be maintained; but under the provision of Kentucky Statutes, section 768, subsection 5, enacted in 1893, allowing compensation to such abutting owners, these former rulings can not be relied on in this case.

2. Estoppel—The fact that appellants or their vendors stood by and suffered the switch to be constructed under the belief that it was to be temporary, without saying or doing anything to mislead the appellees or to induce them to believe they would not claim compensation in case the switch should become permanent, will not serve as an estoppel to the appellant's from now claiming damages, and as the appellees have now made the switch a permanent construction and propose to maintain it as such, a matter over which the abutting lot owners has no control, such owner under the statute is entitled to compensation for the damage thereby done to his abutting property.

Pendleton C. Beckley and G. Garner Clark for appellants.

McDermott & Ray for appellee Third National Bank, etc.

Humphrey, Burnett & Humphrey for K. and I. Bridge and R. R. Co.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge O'Rear.

Appellants who own lots on 29th street in Louisville, have brought this suit against the Kentucky and Indiana Railroad and Bridge Co., and against the owner of a manufacturing plant, formerly William Bennett, now the Third National Bank and the Ginnick Furniture Manufacturing Co., to enjoin the operation of a switch or railroad siding extending along 29th street, and in front of appellants property; also to compel the removal of the track from the street. By an amendment filed some while after the beginning of the case, appellants also prayed for $4,000 damages, which they claim their lots have suffered by reason of the construction of the track and the operation of trains upon it. The suit is based upon the idea that the placing and maintenance of the track upon the street is a purpresture and a nuisance, by reason of which appellants have suffered special damage. The facts are that Bennett and the railroad company built this siding to connect with the main line of appellee railroad company's road, about 1890. At that time the territory traversed by the siding in question was not within the corporate limits of the city of Louisville, nor any other town or village. In

fact, the lots were an uninclosed common, although its former owner, Dr. Elliott, had, by the plat which he had caused to be recorded in the Jefferson County Court, subdivided the original tract into lots, public streets and alleys, which latter he had expressly dedicated to the public use. These streets and alleys, however, had not been accepted either by or on behalf of the public in any manner. Bennett applied to Mrs. Elliott, the then owner of the property, for permission to build the siding over the strip known as Twenty-Ninth street, and fronting her other property, which she granted. The terms of the grant or license, whichever it may have been, are not clearly shown, although they were set forth in letters which passed between the parties, but which are now lost. It is conceded that there was no consideration for this permission by Mrs. Elliott. She claims that it was upon the understanding that it was to be temporary only, and that the track was to be removed upon her demand. The contrary contention is that it was to be permanent, and that the cost of building the switch and of certain extensive improvements in the enlargement of their plant done by Bennett's company upon the faith of its permanency, all indicate that they understood it was to be permanent, and that Mrs. Elliott herself likewise so understood it. In 1898, and about that time, Mrs. Elliott sold and conveyed the abutting property to some of the appellants, but with the understanding between her and them, that the railway track was only a temporary obstruction and that it was to be removed at her request. Therefrom appellants argue that the railway company and the furniture company, in building this siding, were mere licensees, whose right was permissive only, dependent upon the will of the licensor, and that the fact alone of Mrs. Elliott's conveyance of the property to others, was itself a revocation of the license.

We think it is sufficiently shown that appellee railroad and bridge company, was authorized by the legislature to construct the siding, but of course subject to the rights of the property owners whom it particularly affected. In 1895, by an ordinance duly adopted, the city of Louisville extended its boundary so as to include the territory where this road and Twenty-Ninth street are located, and by other ordinances the city generously granted to the bridge company and its vendors the right to build such spurs, sidings and switches as to have justified its building the one now in suit. Prior to the adoption of the present Constitution, and of certain legislation had thereunder, which will be presently noticed, it was formerly held by this court, that a legislative grant coupled with a municipal grant to a railroad company to lay its tracks upon a highway or street within the municipality, was not an additional servitude upon the dominent estate, and, therefore, did not entitle the owners of the abutting property to claim compensation therefor; that it was only in the event that such road was built so negligently or so near the property as to actually impede the ingress and egress to and from the lots, that they had a special right of action therefor. Those decisions are relied on as conclusive of this case. They can not apply because of a radical change in legislation on that subject, since the cases cited became authority. The statute alluded to is quoted further along.

A plea in estoppel is also interposed by appellees, based upon the fact that appellants and their vendors had stood by and suffered appellees to incur the extraordinary expense in building the switch, and erecting certain last-

DANCE'S ADM'R v. MAGRUDER.

(Filed May 26, 1904—Not to be reported.)

Decedent's estate—Claim against for board—Account against for services rendered decedent—In an action against a decedent's estate for board and for services rendered in caring for deceased during his last illness, it was error to render judgment for the amount of claim for board, there being no evidence showing a contract to pay board, but under the rule that there may be an implied contract when the person receiving necessaries is incapable of contracting for them, compensation for services rendered deceased during his last illness will be allowed, where it appears from the ravages of disease he was incapable of making a contract with reference to the payment of services received by him.

F. L. Turner and Jacob Corbett for appellant.

J. B. Wickliffe for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Nunn.

Appellant's intestate, William Dance, and the appellee, Annie L. Magruder, were brother and sister. William Dance died in the year 1902 and appellee brought this action against his administrator on an account for board of the deceased for the three last years of his life amounting to $872, for washing, $8, and for nursing him in his last illness, $100. The appellant traversed appellee's petition and on a trial in the lower court the jury found for appellee the full amount of her claim, $480, from the judgment on which verdict appellant has appealed.

The proof shows that the appellee was poor and with several children, and that she and her husband resided upon the farm of the deceased as renters, giving him a portion of the crop as rent; that the deceased was very fond of his sister and her children, and he frequently expressed the intention of giving this farm to his sister and the proof clearly indicates that, when on his death bed, he sent for the county judge for the purpose of writing his will, but when the judge arrived he was not in a condition to make a will. While, under the testimony, we are confident that if he had been in a proper state of mind at that time he would have devised the property to her and possibly her children, but we have been unable to find any evidence proving a contract for the payment of board. Nor was there any proof showing an intention on his part to pay board or on her part to receive it. (Thomas, &c. v. Arthur, 7 Bush, 245; Miller v. Swan & Brown, 91 Ky., 36.)

The proof showed that appellee did the washing charged in her account, and that it was worth the price of $8, and that she gave her constant care and attention to and nursed the deceased for fifteen days during his last illness, and that $100 was reasonable for such nursing, considering his condition. The proof also showed that he was not in a state of mind to have made a contract during this illness.

In the case of Frailey's Adm'r v. Thompson, &c., 20 Ky. Law Rep., 1179, the court said: "The jury should also be instructed that for such services rendered, if any, not personal to decedent—and this would include such as washing and making or mending clothes—the law implies a contract to pay, and as to such services the burden is on defendant to show that they were

rendered, if at all, gratuitously; and unless the jury should find that there was not an agreement not to charge for such services, the plaintiff would be entitled to the reasonable value of such services."

The case of Combs v. Beatty, &c., 8 Bush, 614, was one wherein appellant cared for her brother or half-brother, and a suit was brought to subject his estate to the payment of the claim for such services. The court in that case, said: "Although no express agreement for compensation to the appellant is shown to have existed in this case, yet, as Robert Beatty was an idiot, and, therefore, incapable of making a contract, and as his sustenance was necessary and requisite to the support of his life, we think he was liable therefor upon an implied promise to pay, according to the well-settled principle, that persons incapable of making contracts generally may, nevertheless, be charged for necessaries."

Under this rule of law, and it is a just one, appellee is entitled to receive pay for her services rendered him in his last illness at which time it is shown by the evidence he was unconscious by reason of the ravages of disease, and incapable of making a contract. Under these authorities and the evidence in this case appellee was only entitled to a verdict of $108. The judgment of the lower court having been for $480, it is evident that the jury allowed her this claim for $108 and erroneously allowed her the claim for board, of $372, in addition thereto.

Wherefore, the judgment is reversed and cause remanded, with directions to the lower court to enter judgment for the appellee for the sum of $108, that being the amount allowed her by the jury for washing and nursing him in his last illness, and to dismiss her action as to her claim for board.

LINTHECUM, &c. v. VOWELS' EX'OR.

(Filed May 26, 1904.)

1. Wills—Executor—When to settle estate—Time fixed by testator—The will of Thomas Vowels was probated November 16, 1903; the executor named, qualified and executed bond, and on December 5, made sale of the personal property and filed sale bill in the county clerk's office on December 14. Testator left six children and nine grandchildren, the latter being the children of his daughter, who married J. C. Linthecum. On December 25 Linthecum, as next friend for his infant children, filed this suit against the executor, claiming that he had failed to appraise certain articles of the value of $505.50 and prayed, first, that he should settle his accounts; second, that he be charged with the articles omitted from the appraisement, and, third, that the land devised by the testator be sold and the proceeds divided according to the will. A general demurrer was sustained to the petition. The will directs that the executor "should make a partial settlement with the court at the expiration of one year after entry upon the duties of administration, and that he should be prompt in making final settlement at the end of the second year." Held—That while such a provision in a will would not be enforcible as against the rights of creditors, it is enforcible as between the heirs and devisees, and the demurrer to the petition was properly sustained.

2. Wrongful conversion—Liability on bond—If as alleged the executor has converted property of the estate to his own use, he will be liable therefor on his bond; but this fact would not be sufficient to justify the court at the

instance of a devisee under the will, to disregard its provisions as to the time when settlement of the executor's accounts might be enforced.

Sweeney, Ellis & Sweeney for appellants.

Miller & Todd for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Burnam.

The will of Thos. Vowels, a citizen and resident of Daviess county, was probated by the Daviess county court on the 16th of November, 1903, and his son, Tavian Vowels, the named executor thereof, qualified by taking the oath and executing the bond required by law. Appraisers were promptly appointed, and on the 24th of November, 1903, thereafter, filed an inventory and appraisement of the personal estate of decedent in the county court clerk's office, attested by the executor as required by law. On the 14th of December thereafter, the executor filed in the office of the county court clerk, a sale bill of personalty belonging to the estate of decedent sold by him at public auction on the 5th day of the preceding December. Testator was survived by six children and nine grandchildren, who were the children of a daughter who married J. C. Linthecum. On the 25th of December, J. C. Linthecum brought this suit as next friend of his infant children against the appellee as executor, in which he alleged that the defendant had failed to have appraised certain articles of personal property of the value of $505.50, which belonged to the estate of testator, and prayed, first, that the defendant should be required to settle his accounts as executor; second, that he should be charged with the various articles of personal property alleged to have been omitted from the appraisement and sale bill; and, third, that the land devised by testator should be adjudged to be sold and the proceeds divided among the devisees according to the will. To this petition the appellee filed a special demurrer because of a defect of parties defendant, and also a general demurrer, both of which were sustained. Appellant thereafter filed an amended petition, in which he made all the heirs and devisees of testator parties to the proceeding, and alleged that the defendant had fraudulently and with a view of converting to his own use, omitted to have appraised the various articles of personal property recited in his original petition; that he was in the possession of the land devised, and had neither sold nor offered to sell it, and was proposing to use and occupy it for the present year; that there was cash on hand after the payment of the debts of testator of from $150 to $250, which he had failed to divide among the heirs, and prayed as in his original petition. A general demurrer was sustained to the petition, as amended, and plaintiff declining to plead further, the petition, as amended, was dismissed, and he has appealed to this court.

The main question to be decided upon the appeal is, whether a testator can fix a time for the settlement of the accounts of his executor, different from that named in the statute, which will be binding on his devisees. Section 428 of the Civil Code provides who may institute an action for the settlement of the estate of a deceased person. Subsection 2 thereof provides that the representatives of the decedent and all persons having an interest in the property left by the decedent, or any part thereof, and the creditors of the decedent must be made parties to the action, plaintiff or defendant.

Under these provisions of the Code, we think it quite clear that the trial court properly sustained the special demurrer for defect of parties.

Section 3847 of the Kentucky Statutes provides that: "Six months must run after the date of the qualification of the first personal representative of a decedent's estate by a court of this Commonwealth, before an action shall be commenced against any executor or administrator thereof, except to settle an estate, or against an executor de son tort. Any action brought in violation of this section shall be dismissed, with cost."

In construing this section of the statute this court has uniformly held that actions to settle the estates of decedents may be brought within less than six months from the appointment of the personal representative. (Holland v. Lowe, 101 Ky., 98; Brand v. Brand, 22 Ky. Law Rep., 1366.) There is no question of an executor de son tort in the proceeding, and unless controlled by the provision of the will fixing a time for the settlement of the accounts of the executor, appellants having an interest in the property left by the decedent, could maintain their action for a settlement under the statute and decisions quoted, supra. But in this case the will of testator not only disposes of his estate among his children and appoints an executor to execute it, but he has willed and decreed that his administrator "should make a partial settlement with the court at the expiration of one year after entry upon the duties of administration; and that he should be prompt in making final settlement at the end of the second year thereafter."

It is evident from this provision of the will that testator believed that it would be best for his estate that his executor should have at least one year from the date of his qualification to convert his estate into money and to make a partial settlement; and that it would require two years for him to finally settle up the estate. Of course, such a provision in the will of a decedent would not be enforcible as against the rights of creditors, but we know of no rule of law which prohibits a testator from fixing a time for the settlement and distribution of his estate among his devisees. If he has the right to say to whom his estate shall go, he can fix the time and manner for settlement and distribution to his devisees. In Trimble's Ex'or v. Lebus, &c., 94 Ky., 304, it was decided by this court that the statute which provides that no administrator or executor should sell any dividend paying stock, bonds, or other property, which the decedent owned at his death, until so ordered by a court of general equity jurisdiction in the county where the letters of administration were granted, or the will recorded, did not apply where a testator had, by his will, invested his executor with discretionary power to make such sales. The statutes require that an executor or administrator shall execute bond with good security. But a testator has the right, notwithstanding the statute, to provide in his will that his executor shall be permitted to qualify without security, and in this way dispose of the provision of the statute. There is no allegation that the executor has not executed a good bond for the estate which came into his hand. Section 3857 of the statutes provides a way for enforcing the return of an inventory or sale bill. If, as alleged, the executor has converted to his own use property belonging to the estate, he will be liable therefor on his bond. But this fact in our opinion would not be sufficient to justify the court, at the instance of a devisee under the will, to disregard its provision as to the time

when settlement of the accounts of the executor might be enforced. Besides, it appears to us that appellee was proceeding with sufficient promptness in the discharge of his duty as executor prior to the institution of the suit.

Perceiving no error in the judgment of the chancellor, it is affirmed.

HENDRICKSON v. COMMONWEALTH.

(Filed May 27, 1904—Not to be reported.)

1. Homicide—Deputy sheriff—Arrest—Offense committed in officers presence—One who fires a pistol in a town in the presence of a deputy sheriff, commits a public offense for which he may be arrested by said officer without a warrant.

2. Killing officer in making arrest—Competency of threats made by accused—Where an officer went to the house of defendant to arrest him for a public offense committed in his presence, knowing the desperate character of the defendant, it was his duty to arm himself before going so as to be prepared for an emergency; and in such case where the officer was killed by the defendant, it was competent for the Commonwealth to prove that on the day defendant fired the pistol, for which the officer had gone out to arrest him, he said as he went home "that he had killed one deputy sheriff and that he would kill another." Also just before deceased reached defendant's house defendant was informed that the officer was coming with another deputy to arrest him, he said "let them come, the whole dam posse can't take me." Also that accused told another witness a short time before the killing, "that deceased had arrested him at one time when he was having a difficulty with his wife and that he intended to kill him for it."

3. Jury—Reasonable conclusion—No one being in the room when deceased entered except accused, who swears that deceased fired the first shot, under all the facts proven the jury were authorized to conclude that if deceased fired the first shot, he did so to save his life from the peril which the hostile acts of the accused made imminent.

4. Leading questions—Where the attorney for the Commonwealth had difficulty in eliciting from a witness what accused did and said on his way home from the place where he fired his pistol in the street, the court properly allowed the attorney to refresh the witness' recollection as to what accused said.

B. B. Golden, E. N. Ingram and C. W. Logan for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Paynter.

The appellant was indicted for the murder of Tom Stewart. The jury found him guilty of voluntary manslaughter and fixed his punishment at confinement for ten years in the penitentiary. The evidence conduces to show that Tom Stewart was a deputy sheriff; that about 11 o'clock on the day of the homicide appellant was engaged in a conversation at a point in the street of the town of Four Mile, Bell county; that one of the party was Press Hendrickson, a brother of the appellant; that their position and conversation was such as to annoy persons passing along the street, when the deceased appealed to them to change their position and conversation so as to

allow ladies to pass; thereupon the appellant fired his pistol once or twice into the ground not far from the deceased; he then moved away a few feet and again fired his pistol. As he went towards his house he said that he had killed one deputy sheriff and that he would kill another. He went on to his home. In the meantime the deceased and another deputy armed themselves and proceeded to appellant's home with the view of arresting him. Just before the deputy sheriffs reached his house, John A. Miller, a friend of Hendrickson, went to his house and informed him that the deputy sheriffs were coming to arrest him, when he said, all right, let them come when they get ready. Ernest Withrow testified that a few minutes before the arrival of the deputy sheriffs, Cal Baker handed the accused a memorandum book with some writing in it. When he read it, he said "let them come, the whole damn posse of them can't take me." The accused admitted in his evidence that he had read the writing in the book, and it apprised him of the fact that parties were coming to arrest him. While Withrow was at the accused's house immediately before the homicide, he saw the deceased and the other deputy sheriff approaching the house, and testified to facts from which the inference might be drawn that Hendrickson saw them approaching it. Another witness testified that a short time before the homicide the accused told her that the deceased had arrested him at one time when he was having a difficulty with his wife, and that he intended to kill him on account of it. When the deputies, Taylor and Stewart, approached the house Taylor carried a Winchester rifle and Stewart a pistol. Taylor did not enter the house. Stewart approached it and the door seems to have been open, and he immediately entered, when the firing began. The evidence tends to show that a number of shots were fired in the house, and there is evidence tending to show that the deceased fired the first shot. After the shots were fired in the house the deceased staggered from it, over the porch, fell on the ground, and soon expired.

The defendant claims that he killed Stewart in self-defense. His evidence tends to show that Stewart, immediately upon entering the house, shot him and was preparing to shoot again, and did so about the time the accused fired the first shot. There are two facts that the evidence establishes: First, that Stewart went to the house for the purpose of arresting the accused; second, that the accused was fully apprised of his purpose, knew that he was approaching the house and was determined to resist arrest, and, if need be, kill him to prevent it. It is a fair inference to be drawn from the evidence of the Commonwealth, that the accused was in a hostile attitude when the deceased entered the house, and was attempting to execute his design. The jury was authorized to draw the conclusion from the evidence introduced by the Commonwealth that if Stewart shot first, that he did so to save his life from the peril which the hostile conduct of the accused made imminent.

Stewart had been duly appointed a deputy sheriff, and the accused had committed a public offense by firing his pistol in the streets of the town. Such an act is declared to be a public offense by section 1817, Kentucky Statutes. So the accused committed a public offense in the presence of the deceased, and the law made it his duty to arrest him therefor, and authorized him to do so without a warrant. The court, therefore, properly told the jury that the deceased was a deputy sheriff, and it was his duty, under

the law, to make the arrest. The deceased knew the desperate character of the man he had to arrest, and he knew the admonition he received before going to make the arrest, that he would be killed, was timely. It was the part of wisdom to prepare himself for such an emergency.

It is urged that the court should have given a peremptory instruction to the jury to find the accused not guilty. We are of the opinion that the court properly overruled the motion for such an instruction, for we are thoroughly convinced that it was a case where a public officer was attempting to perform his duty in attempting to arrest one who had committed a public offense in his presence, and in making that effort he was slain by the public offender, who resisted the arrest, pursuant to a predetermination to slay the officer rather than submit to it.

The chief complaint as to instructions is as to instruction No. 5. In that instruction the court told the jury that the deceased was a deputy sheriff and had the right to arrest the accused, if, in the opinion of the officer the accused had committed a public offense in his presence, and if the defendant resisted arrest and shot and killed the deceased to prevent his arrest on the charge, they should find him guilty of murder. It was a question of law for the determination of the court whether the deceased was a deputy sheriff. The uncontradicted testimony shows that the defendant fired his pistol in the streets of Four Mile in the presence of Stewart. The defendant admitted that he fired his pistol, so the court with propriety could have told the jury that the accused did commit a public offense in the presence of the officer. Assuming that the instruction was erroneous in allowing the officer to make the arrest without a warrant, if in his opinion the accused had committed a public offense in his presence, it was not prejudicial to him, because the jury did not find him guilty of murder.

It is claimed that the court erred in its rulings on the questions of the admission of evidence.

C. B. Ricketts was on the stand and the Commonwealth had difficulty in eliciting his knowledge as to what the accused did and said on his way home from the place where he had fired his pistol in the street in the presence of the deceased. Under the circumstances, we are of the opinion that the court properly allowed the Commonwealth's attorney to refresh the witness' memory as to what the accused said. A witness, by the name of Hubbard, testified that he advised the deceased to overlook the conduct of the accused in shooting his pistol at the time herein mentioned, and that the deceased made no response; thereupon the defendant asked the witness if at other times when he spoke to the deceased, if he always paid attention and showed that he heard what the witness said. The court properly refused to allow the witness to answer the question, as the answer could not have thrown any light upon the issues of the case.

While the court erred in allowing the witness, Withrow, to state why he went away from the house of the accused, it was not prejudicial, as the court finally excluded the answer; besides, the witness had testified to facts as to the approach of the officers and the accused's threatened resistance which necessarily made the impression on the jury that the witness, like any one else, would have been glad to have gotten away, so as not to have witnessed the tragedy which was threatened and actually took place.

The judgment is affirmed.

FLETCHER v. COMMONWEALTH.

(Filed May 27, 1904.)

Indictment—Taking lumber from church—Felonious intent—The taking by defendant of one or two planks of loose lumber from a church in the day time, without any attempt at concealment, the defendant saying at the time that he wanted them because they were well seasoned, and would replace other plank in their place which he afterwards did, was not a felonious taking in the meaning of section 1162, Kentuky Statutes, for "feloniously taking property from a church, meeting house, school house," etc., and under the evidence showing these facts, the defendant was entitled to a peremptory instruction by the court to the jury to find him not guilty.

B. B. Golden for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, John J. Fletcher, was accused by the grand jury of Clay county of violating section 1162 of the Kentucky Statutes, by a felonious taking from the Pleasant Run Meeting house of plank, lumber and other things of value, with the intention of converting same to his own use. Being put upon his trial before a petit jury, he was convicted. It was shown by the testimony for the Commonwealth that he was engaged in the business of blacksmithing and repairing vehicles of all kinds a short distance from the Pleasant Run Church on Raider's Creek, in Clay county, Kentucky; and that during the month of October, 1902, he went to the church and took therefrom a board about ten or twelve feet in length and twelve or fourteen inches wide, carried it to his shop and used it in the construction of a wagon bed for one of his customers; and that on another occasion, near the same time, he took another piece of plank from the church while in company with one Jule Hacker. Both of these boards were taken in the day time without the slightest attempt at concealment, the defendant remarking at the time that he wanted a piece of seasoned lumber and would return other boards in the place of those taken by him. It is also shown that he did return boards of approximately the same size as those taken. It appears that several years before, a lot of lumber had been taken into the church for the purpose of manufacturing seats for the congregation, and that after finishing the number required, several hundred feet of lumber was left over, which was left in the meeting house; and that the boards taken by defendant were a part of this surplus lumber, which had become well seasoned in the meantime. The section of the statute under which appellant is proceeded against reads as follows: "If any person shall feloniously take out of or from a church, chapel, or meeting house, school house, court house, or other public building, any goods or chattels or other thing of value belonging thereto * * * he shall be confined in the penitentiary not less than two nor more than ten years."

Buildings of the kind described in this section of the statute are usually unoccupied, and consequently easily and safely despoiled by trespassers. The purpose of the statute was to prevent the removal from public buildings of appendages and appurtenances belonging to the building itself, and

used in connection with the building; for instance, chandeliers, doors, windows, tables, benches, chairs and such like. In our opinion the statute has no application to a pile of loose lumber which did not belong to and was not to be used in any way in connection with the building itself. Besides, in our opinion it is conclusively shown by the testimony in this case, that the appellant did not remove the planks from the building with a felonious intent. There was not the slightest attempt at concealment on his part, and the voluntary restoration by him to the church of other planks of substantially the same kind and value, is wholly inconsistent with any purpose on his part to commit a crime. The inconsiderable value of the plank removed is also material evidence in our opinion of a lack of criminal intent. While the defendant was perhaps technically guilty of illegally appropriating personal property, the evidence wholly fails to make out a criminal intent on his part in so doing. We think the trial court erred in overruling the motion, at the close of the evidence for the Commonwealth, for a peremptory instruction to the jury to find him not guilty.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

VOLLMAN BUGGY BODY CO. v. SPRY, BY, &c.

(Filed May 27, 1904—Not to be reported.)

1. Damages—Evidence—In an action by appellee, a servant of appellant, against it for damages for injuries sustained while operating a joiner in its manufacturing plant, it was not competent to ask the plaintiff's witness upon the trial, the general question as to whether a boy sixteen years old would have appreciated the increased danger resulting from the absence of the safety board, and it was error for the court to overrule exceptions to this testimony.

2. Instructions—Upon the trial of an action for damages for injuries sustained by operating a joiner at a buggy manufacturing plant, an instruction of the court which assumed the machine to be dangerous, was erroneous. Such question being in issue by the proof, it was the province of the jury to determine from it whether the machine was or was not dangerous.

Miller & Todd for appellant.

James B. Clark for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Burnam

The appellee, John Jackson Spry, a boy sixteen years of age, brought this action in the court below against the appellant, the Vollman Buggy Body Co., to recover damages for an injury sustained by him while operating a joiner in their plant. He alleges, in substance, that he was employed by the defendant to off-bear light strips of lumber and do such other light work as was proper for a boy of his age and experience, under the control and direction of defendant's foreman; that having completed the task assigned to him by the foreman, he was directed to plane some small pieces of wood on a machine called a joiner; that he had had no previous experience with this machine, and that its operation was outside of the line of his employment; that the joiner appeared to be safe, but was in reality a very dangerous ma-

chine and could only be safely operated by an experienced person; that among the pieces of wood which he was directed to plane there was a defective piece, hard to plane, and that while attempting to do so his right hand came in contact with the knives of the machine, and his thumb and first finger were cut off; that defendant's foreman failed to warn him of the danger attendant upon the operation of the machine, or to give him any instructions concerning it; that at the time he was directed to do the work, the safety board, an attachment belonging to the machine for the protection of persons operating it, had been taken off, thereby greatly increasing the risk of its operation; that he did not know or appreciate the increased danger of attempting to operate the machine in the absence of this board, but that appellant's foreman knew, or by the exercise of ordinary care could have known, of the absence of the board from the machine at the time he directed plaintiff to do the work and the increased risk occasioned thereby. The defendant answered in three paragraphs. In the first it traversed all the material averments of the petition. In the second it plead that the plaintiff, on the day and at the time he was injured, was operating the joiner in violation of positive instructions from the foreman not to do so. Third, it relied on a plea of contributory negligence. Issue was joined by reply and the case tried out before a jury, who returned a verdict against the appellant for $700. Motion for a new trial having been overruled, the defendant appeals.

Upon the trial, appellee testified that Mr. Vollman, the superintendent, had directed him to operate the joiner at the time of the accident; and that he was standing only five or six feet from the machine at the time he gave him these orders; that he noticed that the safety board had been taken off of the machine, but that owing to his youth and inexperience, he did not appreciate that its absence rendered the machine extremely dangerous; that in attempting to plane a defective piece of wood, it split, and his hand came in contact with the knives of the joiner, resulting in the injury sued for. He is supported in his statements, as to the direction given him by the superintendent, by his younger brother, Jimmy Spry, who was also in the employ of the company. On the other hand, Mr. Vollman emphatically denies that he told appellee to operate the machine at the time of the accident, but says that plaintiff requested that he should be permitted to plane some small pieces of boards, and that he expressly forbade him from doing so. He also testified that the joiner was perfectly equipped and in good condition, and was not a dangerous machine for any one to operate with the safety board on it; that plaintiff was familiar with the mode in which it was operated, having been in the employ of the company for some time. Mr. Vollman is supported in his statements by the witness Foster, an employe of the defendant, and also by John Martin, who testified that ordinarily he operated this machine, and that he had been engaged in so doing about twenty or thirty minutes before the accident; that when he left the machine the safety board was in its proper place; that just before the accident he asked the plaintiff, who told him to work on the machine, and that appellee replied that no one told him; that he then warned him that he might get hurt, and that appellee responded that he would do as he pleased about it. The testimony of Martin tends to show that the safety board was removed by appellee himself, although this is emphatically denied by the boy.

A number of errors are complained of in the admission and rejection of testimony upon the trial. First, over the objection of the defendant, plaintiff was permitted to prove by Wm. Jorleman, an expert machinist, that a boy of sixteen years of age, without experience in machinery, would not appreciate the hazard and risk of operating such a machine in the absence of a safety board. We think it was competent to prove by this witness the construction of the machine and the effect of attempting to operate it in the absence of the safety board, but we do not think it was competent to have asked him the general question, whether a sixteen-year-old boy would have appreciated the increased danger resulting from the absence of the safety board. There is a great variety in the intelligence, prudence and discretion in boys sixteen years of age, and this was a question upon which expert testimony could throw no light. We think the court erred in overruling the exceptions to this testimony. We think the trial court properly permitted the appellee to read to the jury defendant's answer as testimony, although we are unable to perceive how it could have affected the result of the trial. The first instruction given by the court to the jury is as follows: "The court instructs the jury that if they believe from the evidence that plaintiff, while in the employment of the defendant as an off-bearer of light lumber, was ordered or directed by the foreman of the defendant to operate or run the machine described in the petition of plaintiff, which was a dangerous machine and not properly equipped, and hazardous to the operator, which was known to the foreman, or might, by ordinary care, have been known to him, and plaintiff had no knowledge or experience in the operation of said machine, and was ignorant of the danger in operating same, which was known to the said foreman, or might by ordinary care have been discovered by him, and he failed to warn plaintiff of the dangers of operating such machine, or to instruct him in its use and operation, and plaintiff, while in the observance of such ordinary care as he was capable of, was injured in the manner complained of in the petition, the jury should find for the plaintiff the damages sustained, not exceeding the amount claimed in the petition."

By this instruction the jury were expressly told that the joiner was a dangerous machine and not properly equipped and hazardous to the operator, and which was known to the foreman, or might have been known by the exercise of ordinary care; and that the plaintiff had no knowledge or experience in the operation of the machine and was ignorant of the danger in operating same. In other words, the court assumes in the instruction, as established, the facts on which appellant's liability to appellee must depend, and all of which were put in issue by the proof, and were questions which should have been left to the determination of the jury. It is hardly probable that the trial court intended to take these facts from the jury, but there can be no escape from the conclusion that this is the literal meaning of the instruction and is the interpretation which a jury would most likely place upon it.

For reasons indicated the judgment is reversed and cause remanded for a new trial.

RIDDLE v. RIDDLE, &c.

(Filed May 27, 1904—Not to be reported.)

Decedent's estate—Contracts—Consideration—A contract entered into between the father and his children to rent out the land left by the deceased wife and mother, in order to pay the debts she had incurred, was not without consideration; and while there was perhaps an inequality of consideration, the court will not enter into such inadequacy, the consideration expressed being sufficient to uphold the contract. A part of the land embraced in the rental contract having been owned in fee by the decedent, the father was interested in a speedy settlement of the debts against the estate of his wife, because, when they were fully settled he was to receive his part of the land, and where he had paid a part of the debts he was entitled to be subrogated to the rights of the creditors whose debts he had extinguished.

L. P. Little, Eli H. Brown and Little & Slack for appellant.

J. B. Karn and LaVegas Clements for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barker.

This is a contest between the appellant, who is the father, and the appellees, who are his children, in regard to an estate left by Elizabeth Riddle, the wife of appellant, and the mother of appellees.

In her lifetime, Elizabeth Riddle was empowered to trade as a feme sole. She owned a life estate in four small tracts of land which lay together, and which made up a farm of one hundred and one and one-third acres, with remainder in fee to her children, the appellees; she also owned, in fee simple, a contiguous tract of twenty one acres. After her death, it seems that the father and his children entered into a contract looking to the payment of her debts, which amounted to $500. By this contract, all of the land constituting the farm, with the exception of the house and the ten acres upon which it stood, was put under the management and control of L. W. Riddle, who was to rent it and apply the proceeds to the payment of the debts of his mother.

After the expiration of a number of years, the father married again, and, as a result, an estrangement has crept in between him and his children. This action was instituted for a division of the above-mentioned land between the children; Louis W. Riddle was plaintiff, his father and his brothers and sisters were defendants. The father filed an answer, counterclaim and cross petition, setting up the contract existing between him and his children in reference to the debts of their mother, alleging that, under it, they had taken charge of the farm, with the exception of the house and ten acres of ground occupied by himself, and used it for their own interest; that it was reasonably worth the sum of $200 per year, and that they, therefore, had received in value a sum sufficient to have paid off all the debts of Elizabeth Riddle; that he, himself, in order to avoid being sued, had paid off some of the debts, amounting in the aggregate to $147; and he prayed for a judgment requiring the children to pay all their mother's debts, including the sum of $147 due to himself.

The learned trial judge was of opinion that, inasmuch as the appellees at their mother's death became the owners of the four tracts of land in which

she had a life estate, and they, as her children, were not bound for her debts, that, therefore, the contract entered into between appellant and appellees looking to the payment of her debts out of the rents and profits of the land in question, was without consideration and void. In this we think he erred by overlooking the fact that, as part of the consideration of the contract in question, appellant had placed in charge of L. W. Riddle his interest in the tract of twenty-one acres, which constituted a part of his wife's estate; and, while it may be true that there was an inequality in the consideration of the contract moving from the father and children, respectively, the court will not enter into its adequacy, if there was a consideration at all. The trust fund created by the contract for the payment of the debts of Elizabeth Riddle was made up in part of appellant's interest in the twenty-one acres, of which his wife died seized in fee simple, and this was sufficient to uphold the contract. This being true, appellant was interested in the speedy payment of the indebtedness of his wife's estate, because, whenever that was fully discharged, he was to receive back his land; consequently, he was deeply interested in preventing the accumulation of costs of actions instituted by the creditors, and, therefore, had the right to protect himself from this loss by paying off the debts without suit; and having done so, he was subrogated to the rights of the creditors whose debts he had extinguished, and to that extent had a lien upon whatever estate she had left, subject to the payment of her debts. Certainly, appellees' interest in the remainder of the tract of twenty-one acres was liable for the debts of the decedent, and appellant had a right to subject this interest to the payment of whatever just claim he had against the estate by subrogation.

For the reasons indicated the judgment is reversed for proceedings consistent herewith.

DORSEY'S ADM'X v. LOUISVILLE & NASHVILLE R. R. CO., &c.

(Filed May 27, 1904—Not to be reported.)

1. Railroads—Damages—Where the evidence shows that shortly before the death of appellant's intestate he said to another "I am drunk this morning and I don't care what I do and I would as soon be dead as alive," and then going in the direction of a railroad where a train going twenty-five or thirty miles an hour soon passed, was found soon thereafter lying against a fence near the track, unconscious and badly injured in the head and shoulder, there can be no recovery against the railroad company for damages for his death. There is nothing in the record to show that he was in such position as to be seen by those in charge of the train. He was evidently drunk and perhaps asleep when the train struck him. A peremptory instruction to find for the defendant was proper.

2. Same—Pleading—In an action against a railroad company for damages, the court properly refused to permit the plaintiff to file an amended petition which charged that the company was without title to the right of way. Whether it had title or not it had possession, and one was no less a trespasser upon its track because it had taken possession of the ground wrongfully.

A. D. Cole for appellant.

W. H. Wadsworth and Benjamin D. Warfield for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hobson.

George Dorsey was a laborer on the farm of C. D. Russell, in Mason county. On Sunday morning, August 10, 1902, about half past five o'clock, his wife gave him the milk bucket and he left the house with the bucket to milk the cows. He had been to Maysville the night before and was under the influence of liquor, having been out all night. He did not milk the cows, but went to the house of Charley Brown, another laborer on the farm, and had some conversation with Brown's wife in which he said, "I am drunk this morning and I don't care what I do and I would as soon be dead as alive." Soon after this he left Brown's house, walking down the railroad track, and Brown went with him till they got to a bridge. There Brown turned around and went home. Not long after this a train came along running about twenty-five miles an hour. Forty or forty-five minutes afterward, Dorsey was found at the far end of the bridge from Brown's house, unconscious. He was lying against the fence about six feet from the abutment of the bridge, face downward. There was a jagged larceration in the front of his head about an inch and a half in size. There was also a cut all the way across his head at the back at the base of the skull; there were two bruises on his right arm; across his right shoulder there was a bruise about six inches and in the center of it there was a hole about six inches deep, which the witness at first thought was where somebody had shot him. This hole was ragged. Nothing was seen on the track that indicated what made the wounds. The abutment tapers off gradually to the fence; there was blood on it and blood on down to the bottom where the grass was. There was a road crossing some little distance from the bridge which the train passed as it approached it; and the plaintiff introduced some proof that the usual signals were not given for this crossing. Dorsey died of the injuries without regaining consciousness, and this suit was brought to recover for his death. For a quarter of a mile before the train reached the bridge the track was straight, and as it passed Brown's house, which was within this distance of the bridge, he noticed a man in the cab of the engine apparently looking down the track. The plaintiff charged that the men in charge of the train saw the peril of her intestate and could, by ordinary care after perceiving his danger, have averted the injury to him. At the conclusion of the evidence the court instructed the jury peremptorily to find for the defendant.

The plaintiff alleged that her intestate had sat down on the end of the cross ties and fallen asleep. But the proof entirely fails to show what position he was in as the train approached him. There are circumstances in the case apart from the nature of his wounds which would lead at least to a suspicion that he was not killed by the train, but aside from this there is nothing in the proof showing that he was in a position in which he might have been seen by the trainmen as they approached. He was evidently quite drunk and probably asleep when the train approached him. The noise roused him up and whether this was in time for the engineer to have perceived his danger, there is nothing in the record to show. He was a trespasser. The company had no right to expect his presence on the track. The failure to give signals of the approach to the crossing was not negligence as to him. There can be no recovery because a lookout was not kept. The

fact that a man was seen in the cab apparently looking down the track as it passed Brown's house, was not proof that he saw Dorsey, because it is not shown where Dorsey was then, or in what position he was. It is as reasonable that he was lying down by the side of the track, as it is that he was sitting upon the end of the ties in the sight of the engineer. The case seems to be on all fours with L. & N. R. R. Co. v. Vittitoe's Adm'r, 19 Ky. Law Rep., 618, with the exception that the person injured there, was a boy twelve years old, and was killed right at a crossing.

The court properly refused to allow the amended petition to be filed in which the plaintiff charged that the railroad company was without title to the right of way; for whether it had title or not it was in possession, and Dorsey was no less a trespasser upon its track because it had taken possession of the ground wrongfully. The cases where railroad tracks have been laid in public highways without right, rest upon a different principle. There the traveler on the highway is not a trespasser, for he is where the traveling public have a right to be.

Judgment affirmed.

PLANTERS BANK AND TRUST CO. v. MAJOR.

(Filed May 27, 1904—Not to be reported.)

Landes & Allensworth and Downer & Russell for appellant.

J. W. Hopkins for appellee.

Appeal from Christian Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

We have carefully considered the earnest petition for rehearing filed for appellee, but a reconsideration of the case fails to satisfy us the opinion should be modified, without questioning the sincerety of the testimony of Mrs. Major or her father. In view of the way the Girard notes were taken and assigned and the other facts shown, we conclude that the fund is liable for the debts of the husband.

Petition overruled.

LOVITT v. CREEKMORE.

(Filed May 27, 1904—Not to be reported.)

Pleading—A pleading is defective, which, in an action for damages for injuries resulting from a boiler explosion, does not allege that the master could have discovered defects in the boiler by the exercise of ordinary diligence, or that the lessor had fraudulently represented it to be safe; and the court will not anticipate a probable case and, therefore, does not decide what the effect of these averments would have been had they been made.

Sharp & Siler and Tye & Denham for appellant.

O. H. Waddle and R. D. Perkins for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, Lovitt, was injured by the explosion of the boiler that in-

jured King, who instituted an action against appellee, Creekmore, for damages for the injuries sustained. Both appellant and King were employes of Warren.

This court passed upon King's case in King v. Creekmore, 25 Ky. Law Rep., 1292, and the statement of facts in that opinion and the consideration of the questions of law applicable thereto, obviates the necessity of an elaborate statement of facts and a discussion of the legal questions involved. In the amended petition filed after the decision in the King case, the appellant averred that appellee knew at the time he leased the mill to Warren that the boiler was dangerous and defective and unfit and unsafe for use, until it was inspected, tested and repaired. The appellant did not state a cause of action. If Creekmore had fraudulently represented the boiler to be safe for use and there had been defects in it that Warren could not have discovered by the exercise of ordinary care, and by reason thereof an action could have been maintained against Creekmore by one of Warren's employes who was injured by the explosion of the boiler, the appellant has not shown himself entitled to do so, as no such averments were made. As no such averments are made, the court does not deem it proper to anticipate a possible case and decide it, hence the court does not express any opinion as to what would have been the effect of such averments had they been made.

The judgment is affirmed.

DAVIS, &c. v. J. I. CASE THRESHING MACHINE CO.

HUNDLEY, &c. v. SAME.

(Filed May 27, 1904—Not to be reported.)

1. Mortgage lien—Equitable defense—Motion to transfer to ordinary docket—The first case is an action to enforce a mortgage on property of the defendant to which defendant pleads fraud in the sale of the machine, and asks a cancellation of the contract or its rescission, and placing the parties in statu quo, which is an equitable defense and asks equitable relief, and the defendant's motion to transfer the action to the ordinary docket was properly overruled.

2. Sale of threshing machine—Breach of warranty—Fraud and misrepresentation—Finding of chancellor—In a defense claiming damages for fraud and misrepresentation in the sale of a threshing machine, and for breach of warranty, where the proof is conflicting, and vague and unsatisfactory as to whether the seller was notified of the alleged defects in the machine, and it was kept and used by the defendant until the notes given therefor were sued on, this court is unwilling to disturb the chancellor's finding on the facts.

3. Common law defense—No consideration—Error not affecting substantial rights of parties—In the second case, while there is a prayer in the answer that the note sued on be cancelled, it is in effect only a plea of want of consideration in the note, and for a judgment for the amount they had paid over and above the value of the property obtained, which is a common law defense, the case should have been transferred to the common law docket on motion of the defendants. But it is provided in the Civil Code, that the court must, at every stage of the proceeding, disregard errors which do not affect the substantial rights of the parties complaining and that no judgment shall be reversed for such errors; and the proof failing to show there was any other warranty except the written one, which the proof shows the

defendants themselves did not comply with it, they could not maintain an action on it, and we conclude they were not substantially prejudiced by the form of the trial, for the result must have been the same on either docket.

H. P. Cooper for appellants.

John McChord for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hobson.

By a written contract of date June 29, 1898, Thomas Hundley and M. Davis bought of the J. I. Case Threshing Machine Co. a twelve-horse engine, separator and stacker, for which they agreed to pay $1,395. They paid all the price but the last note for $465, and the company filed suit on January 17, 1901, to recover judgment on the note and to enforce a mortgage given as security on the machinery and a house and lot. In the meantime, on June 29, 1900, M. Davis and his son, Garrett Davis, had bought of the J. I. Case Threshing Machine Co. a fifteen-horse engine, separator and stacker for $1,435, to secure which they gave a mortgage on that machinery and on M. Davis' half of the outfit which he and Hundley had bought, and also on some personal property of Davis. Suit was filed by the company on January 17th to recover the purchase money for this engine and separator, and enforce the mortgage given to secure it. The two suits were consolidated. This order was proper as a lien was sought in both actions on the same property. On final hearing the court entered judgment in favor of the plaintiff in both cases and the two separate appeals before us are prosecuted by the defendants. As the questions made are different, the appeals will be disposed of separately, the appeal of the two Davises being taken up first. When they filed their answer they moved the court to transfer the action to the ordinary docket. The court overruled the motion, and of this they complain. Whether the court ruled correctly depends upon the defense which they set up. The material allegations of their answer are as follows: "These defendants say that on or about June 19, 1900, they contracted with plaintiff for one J. I. Case fifteen-horse power steam traction engine and separator with weigher, bagger, wind stacker and all appurtenances necessary to make a first class threshing machine and free from defects in all its parts. The machine contracted for was to be new or good as new; it was to do first class work and to be worth $1,435. Under this contract and for such machine which was warranted to be as contracted for, the defendants executed to plaintiff the notes and mortgage sued on, said notes aggregating the sum of $1,435. The machine as contracted for, however, was never delivered to defendants. The machine furnished defendants under the aforesaid contract and described in plaintiffs' petition herein, was not a first class machine, nor was it free from defects. The machine furnished defendants, as aforesaid, was not new or as good as new; it would not do first class work nor was it worth $1,435, or any other sum over $700. Defendants did not know of the condition, value, quality or working qualities of the machine furnished them as aforesaid, until they undertook to fill the contracts which they had made for the threshing season of 1900. After learning of the condition, quality and value of the machine furnished as aforesaid, and before the institution to this action, the defendants tendered said machine back to

plaintiff in as good condition as when received, and demanded of plaintiff their notes sued on; and defendants do now and herewith tender plaintiff the said machine in full satisfaction of the several notes herein sued on. Defendants ask the court to cancel each of said notes and mortgage and to require plaintiff to surrender same to defendants and to take back its machine, and ask judgment for their costs herein expended."

Where an equitable defense is pleaded or equitable relief is demanded by the defendant, the court is not required to transfer the action to the ordinary docket.. The cancellation of a contract, or its rescission and the placing of the parties in statu quo, is an undoubted jurisdiction of the chancellor. The common-law court has no power to grant such relief. The answer above quoted plainly sought a rescission of the contract, and when the defendants stood upon their rights to have the contract rescinded they could not, while asking this, also ask a transfer of the case to the ordinary docket, because they were not willing to stand, as shown by their pleadings, and keep the machinery, but desired to have the machinery returned to the seller and the notes and mortgage cancelled. The court, therefore, properly overruled the motion to transfer the action to the ordinary docket, and while the proof is conflicting, in view of the written contract between the parties we are unwilling to disturb the chancellor's conclusion on the facts. The written warranty was as follows: "It is warranted to be of good material, and to do as good work as any made in the United States, of similar style and like amount of use, if properly operated by competent persons, and the printed rules and directions of manufacturers intelligently followed. If purchasers by so doing, after a trial of ten days, are unable to make the same operate well, written notice shall at once be given to J. I. Case T. M. Co.. at Racine, Wis., and also to the agent from whom purchased, stating wherein it fails to satisfy the warranty, and reasonable time shall be given to said company to send a competent person to remedy the difficulty, the purchaser rendering necessary and friendly assistance; said company reserving the right to replace the defective part or parts. and if then the machinery can not be made to fill the warranty, the part that fails is to be returned by the purchaser free of charge to the place where received, and another substituted therefor that shall fill the warranty, or the notes and money for such part immediately returned and no further claim made on the company. Failure to make such trial, or give such notices, in any respect, shall be conclusive evidence of due fulfillment of warranty of the part of said company, and that the machinery is satisfactory to the purchasers; and any assistance rendered by the company, its agents or its servants in operating or in remedying any actual or alleged defect, either before or after the ten days' trial, shall in no case be deemed any waiver of, or excuse for any failure of this warranty."

The written notices referred to were not given. In fact the proof is very vague as to when any notices were given of trouble with the machinery, or of the alleged offer to return the machinery to the Case Co. In cases of this sort, where property is sold under a written warranty, the purchaser must, if he would look to the seller on the warranty, comply with its terms. There is good reason for the rule which requires that the purchaser shall promptly give notice of defects in the machinery and offer to return it if he wishes the contract rescinded. (McCormic Harvesting Machine Co. v. Arnold, 25 Ky. Law Rep., 662.)

The answer of the defendants in the other case is somewhat different. So far as material, it is in these words:

"These defendants say that on or about January 29, 1898, they contracted with plaintiff for one J. I. Case twelve-horse power steam traction engine and separator with trucks, stacker and all appurtenances necessary to make a first class threshing machine of first class make and material. Said machine was to be free from defects in all its parts, and was to be a new machine and worth $1,395. Under this contract for such machine, defendants executed to plaintiff the note and mortgage sued on, together with certain other notes aggregating in all the said sum of $1,395. The machine, as contracted for, however, was never delivered to defendants. The machine that was furnished by plaintiff to defendants and described in the petition and mortgage herein, was not of first class make or material, nor was it free from defects in any of its parts, nor was it a first class machine. The machine furnished, as aforesaid, was not new nor was it worth $1,395, or any sum over $695. The defendants were not machinists and were compelled to and did rely solely upon plaintiff's contract with them, and relying on plaintiff's promises to make good its aforesaid contract, they paid plaintiff on said purchase price the sum of $930, which was $235 more than the machine furnished defendants and described in plaintiff's petition, was worth. Defendants say the machine received from plaintiff, as aforesaid, was not worth more than $695, and these defendants have already paid plaintiff more than the value of the machine furnished them, and defendants now ask that the note herein sued on be cancelled and held for naught. Defendants also ask judgment against plaintiff for the said sum of $235, and for all proper relief.

"Third. Defendants say that a threshing machine as contracted for with plaintiff, as aforesaid, was worth $700 more than the machine furnished defendants as herein stated, and they were damged by plaintiff in the sum of $700 by its failure to furnish them such threshing machine as contracted for and for which the note sued on was executed. And if the court should refuse to cancel the note sued on and give judgment for the defendants as asked for above, then in that event defendants ask judgment against plaintiff for damages in the sum of $700.

"Fourth. These defendants say that they were at all times herein mentioned partners, and as such contracted with plaintiff for a machine and for which the notes and mortgage sued on were executed. Said machine was represented and warranted by plaintiff to be a first class machine in make and material, and free from defects in all its parts, but defendants say the machine furnished them by plaintiff and in controversy was not of first class make or material nor was it free from defects in any of its parts; on the contrary, said machinery was defective in all its parts, particularly in two of its drive wheels and one of its cylinders, and defendants say that as a result of said defects they were deprived of the use of said machinery for threshing and other purposes a great portion of the time during the years 1898 and 1899, and prevented from filling remunerative contracts for the use of said engine and machine during each of said years, and they were thereby damaged in the sum of $700. The defendants say they relied upon plaintiff's aforesaid representations and warranty, and but for which they would not have purchased

said machinery, and by plaintiff's breach of said representations and warranty as aforesaid, these defendants were damaged in the sum of $700; and if the court should refuse these defendants the relief asked in the second or third paragraphs of this their answer, set-off and counterclaim, then in that event defendants ask judgment against the plaintiff for damages in the sum of $700 for breach of contract and warranty aforesaid, and pray for all general, special, equitable and porper relief."

While there is a prayer in this answer that the note sued on be cancelled, it is in effect only a plea of want of consideration in the note and for a judgment for the amount they had paid over and above the value of the property received; which is a common law defense. There is also an allegation of a warranty and of $700 damages by reason of the warranty which is pleaded as a counterclaim. This plea is a common-law defense and should regularly have been transferred to the common-law docket on the motion of the defendants. But it is provided in the Code of Practice that the court must, at every stage of the proceeding, disregard errors which do not affect the substantial rights of the parties complaining, and that no judgment shall be reversed by reason of such errors. The plaintiff replied to the answer of the defendant, showing that the property was sold under the written warranty above quoted, and while the defendants attempted in their pleading to rely on an oral warranty, their proof his not sufficient to show that any other warranty was made than that set out in the writing. They gave their own depositions and failed to establish a parol warranty. They did not comply at all with the written warranty and can maintain no action upon it. In fact, it is very plain from the proof that the things of which they now complain, were troubles that did not arise within ten days after they began the operation of the machine. After they had operated the machine a whole season they wrote the company the following letter:

"Lebanon, Ky , November 1, 1898

"We purchased a J. I. Case threshing machine and have run it this season. It has given perfect satisfaction to every one we work for. The J. I. Case beats the world for threshing orchard grass and timothy seed. We made little over an average run with the other machines in this part of the country. I would advise every one that wanted to buy a machine to buy the J. I. Case threshing.

"I am an engineer myself. I have been running different engines for thirteen years. I find this to be the easiest engine to keep up that I ever saw. The J. I. Case compound engine uses less fuel and less water than any other engine on the market today. This engine speaks for itself; all you have got to do is to try it. Any farmer that ever had a J. I. Case to thresh for them will not let any other touch their grain. We threshed a little over 30,000 bushels of wheat. All that we threshed for, want us to thresh again. T. H. HUNDLEY & CO."

This letter was written by appellant Hundley's daughter, in his presence, his engineer, Welsh, who had run the engine that season, assisting her in getting it up. Hundley, from his own testimony, plainly understood at the time the general tenor of the letter. The only trouble alleged was in the engine. The drive wheels became unwelded, there was a sand hole in the cylinder and the pump did not work. The drive wheels are the wheels that

run on the ground by which the engine is propelled. When they became unwelded they were first patched at a blacksmith shop, and that proving unsatisfactory, they were sent to the factory and fixed. When the hole came in the cylinder a new one was furnished. A piece of wood had worked into the pump, and this was taken out. These were all the troubles, and from all the evidence we are constrained to the conclusion that there never would have been any complaint about this engine if the second rig had not been purchased. The evidence for the defendant utterly fails to make out a defense under the written warranty as to this engine, and if the case had been referred to a jury, the court would have been required to give the jury a peremptory instruction. We, therefore, conclude that the defendants were not substantially prejudiced by the form of the trial, for the result must inevitably have been the same on either docket

There is more merit in the defense in the other case. The engine there was plainly defective. But it was a second hand engine, bought as such at a reduced price, and sold under a written contract. The purchaser failed to comply with the contract so as to entitle him to relief under it. We can not make a contract for the parties. We can only enforce the contract which they made The writing merged the previous oral negotiations between the parties, and proof of what was said thus in the negotiation is not competent to vary or add to the terms of the written contract with which the trade was closed.

The judgment in each case is, therefore, affirmed.

FIELDS' HEIRS v. NAPIER, &c.

(Filed May 27, 1904—Not to be reported.)

1. Lands—Resulting trust—Where land belonging to A. F. was sold under a judgment against him in favor of the State and purchased by the State, and subsequently redeemed by him, and, with his consent, conveyed by the State to his son, R. F. F. no use or trust therein results to H. F. under section 2352, Kentucky Statutes, providing that "when a deed shall be made to one person and the consideration shall be paid by another, no use or trust shall result in favor of the latter."

2. Champerty—Adverse possession—H. F. having continued to occupy the land by the consent of his son, and recognized his son's title thereto under said deed, did not acquire adverse possession thereof.

3. Sale and mortgage by son—Father's consent—Estoppel—The son having sold the mineral rights in the land with his father's consent, and in which the father received part of the consideration and having also with such consent mortgaged the land to the bank to secure a debt which he owed it, for which the land was sold and purchased by appellee Napier, the father was estopped to question such acts of his son or the title thus acquired by Napier.

4. Dower—Homestead—The widow of H. F. having never parted with her dower right in the land owned by her husband, is entitled to dower therein, but is not entitled to homestead therein, as homestead can not be claimed against the State.

E. E. Hogg for appellants.

J. J. C. Bach and W. H. Miller for appellee Napier.

Bailey P. Wooten and Jesse Morgan for appellee Virginia Iron, Coal and Coke Co.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Paynter.

Henry Fields, now deceased, was sheriff of Perry county, and defaulted. He then owned land, a part of which is in controversy in this suit. The State sued him and recovered a judgment, and in 1874 had an execution levied upon the land and sold, at which sale it became the purchaser. Subsequently the State sold the land to Granville Fields and accepted his notes for the purchase money, with the decedent as surety. Afterwards Henry Fields furnished the money and gave it to his son, R. F. Fields, to pay the State the amounts due under the purchase made by Granville Fields. Henry Fields seems to have been present when the purchase money was paid, although he did not apprise the representative of the State that he was furnishing the money. The auditor of public accounts made R. F. Fields a deed for the land. His father remained in possession of the land until his death, which occurred in 1900. In 1887 R. F. Fields conveyed the mineral rights in the land to Trigg, as trustee. Some time after that he executed a mortgage to the Winchester Bank to secure a note which he owed it. That mortgage was enforced by a judgment of the court, and the land here in controversy was sold to satisfy the debt it secured, at which sale the appellee, S. M. Napier, became the purchaser. The widow and heirs of Henry Fields instituted this action to have the land adjudged to them. Henry Fields died intestate.

They claim, first, that the conveyance of the land to R. F. Fields was procured by fraud; second, that the deed to him and the purchase by Napier were champertous; third, that Henry Fields acquired title to the property by adverse possession. It is denied by the appellees that the deed to R. F. Fields was obtained by fraud or that the conveyances referred to were champertous. They claim further, first, that as Henry Fields paid the money and had the deed made to his son, no trust resulted; second, that he was estopped to question appellees' right to the land. It is evident from this record that Henry Fields was aware that the land had been conveyed to his son, R F. Fields, and that with his knowledge and consent a deed was made to the Olinger negro for part of the tract, and also one to his son in-law for a part of it.

The court also reaches the conclusion that he was aware of the fact that his son had conveyed the mineral rights in the land to Trigg, as trustee, and that he had mortgaged the property to the Winchester Bank. The father had some purpose in furnishing the money to his son to pay for the land. He kept concealed the fact that he had furnished the money. The same reason which induced him to thus conceal the fact that he had furnished the money to his son to pay the State, operated to induce him to have the conveyance made to his son. We reach the conclusion that the conveyance was made by the auditor of public accounts to R. F. Fields with his father's consent.

Section 2352, Kentucky Statutes, provides that: "When a deed shall be made to one person, and the consideration shall be paid by another, no use

or trust shall result in favor of the latter; but this shall not result in any case in which the grantee shall have taken a deed in his own name, without the consent of the person paying the consideration; or when the grantee, in violation of some trust, shall purchase the lands deeded, with the effects of another person."

By reaon of this statute no enforcibie trust resulted; however, the son did not deny to his father the existence of a trust, but for a purpose of their own it was the intention of the father and son that it should be understood by other persons that the land belonged to the son; hence there was in no proper sense an adverse claim or possession by the father as against the title of the son. In addition to that, the evidence shows that Henry Fields received part of the money which the son had obtained for the mineral rights which are now claimed by the Virginia Iron, Coal and Coke Co. primarily by virtue of the deed which he executed therefor. It is also shown that Henry Fields said that if his son did not pay the bank, the land would be good for it. In view of the facts of this case, we think Henry Fields was estopped to question the act of his son in conveying the mineral rights and in the execution of the mortgage to the bank, and consequently was estopped to question the sale to Napier under the judgment enforcing the mortgage. His children and grandchildren can have no greater right in the property than he possessed. If he lost his right to the land by his own acts, his children and grandchildren could derive none by inheritance from him.

In view of the conclusion we have reached, that there was no adverse possession by Henry Fields, it is unnecessary to discuss the question of champerty that is raised. Of course if the deed was made to the son with the father's consent, it was not champertous. If he is estopped to question the act of his son in making the conveyance of the mineral rights and the execution of the mortgage, the doctrine of champerty can have no application to the transactions.

The rights of his widow, Louisa Fields, stand upon a different ground from those of his children and grandchildren. She does not seem to have signed any of the deeds to the property, or relinquished her right to dower therein. She is entitled to be assigned dower out of the lands left by her husband, Henry Fields. She never lost her potential right to dower by the sale to the State; hence R. F. Fields never acquired the land as against her right to dower. The homestead act does not apply to the State. (Commonwealth v. Cook, 8 Bush, 220.) She is not entitled to a homestead right in the land, because that right must be derived through her husband. It is a derivative right, and as he could not claim a homestead as against the State, the State acquired title to the property encumbered with the potential right of dower. As the right which the State acquired in the land passed to R. F. Fields, and through him to Napier, the widow is not entitled to a homestead in the land.

The case is affirmed as to all the appellants, except Louisa Fields, and is reversed on her appeal, for proceedings consistent with this opinion.

FARADAY COAL AND COKE CO. v. OWENS, &c.

(Filed May 27, 1904—Not to be reported.)

1. Agreement to sell land—Agency—An agreement by which B. & Co. undertook to sell certain lands at a named price is not an option, but an agency which may be terminated at any time.

2. Option to sell—Fairly made—Exercised within specified time—Specific performance by grantors—One V. W. was given options by a number of grantors on lands which B. & Co. had been previously authorized by them to sell at a named price, which the said V. W. exercised by giving the grantors notice within the time named in the option and making the payments agreed on. Later, the grantors were induced by B. & Co. and F., to convey their lands to F., who had knowledge of V. W.'s option, and gave the grantors bonds to indemnify them against liability to V. W. Held—That F. was not an innocent purchaser; that V. W. having properly obtained and exercised his option, it operated as a revocation of the contract of B. & Co., and that the grantors should be compelled to perform their contracts under their option to V. W.

3. Homestead—The fact that the vendors lived on the lands and occupied them with their families as homesteads will not excuse them from carrying out their contracts.

4. Reimbursement of purchaser—F. having made payments on his purchase from the grantors, is entitled in equity, to be reimbursed out of the sums which may be ascertained that appellant should pay the appellees respectively.

A. C. Vanwinkle, J. W. Alcorn and Tye & Denham for appellant.

R. C. Crawford for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Paynter.

The appellant instituted actions against the appellees for specific performance of contracts for the sale of land. The cases were heard together as all of them involve the same questions (except the case against Greer), and the questions involved will be considered together, as if there was only one case.

Ballou & Co. entered into contracts with the appellees, other than Greer, which are denominated in this record as options. The appellees had it in their power to produce these contracts, but failed to do so. The appellant sufficiently proved the printed form used by Ballou & Co. in making the contracts with the appellees. The contracts entered into by Ballou & Co. and appellees contained, the same terms as the printed blank, except the names of the parties, the description of the land, and the price at which it was to be sold, were inserted. The printed form reads as follows:

"OPTION AGREEMENT.

"Agreement made this ——— of ———, 1901, by and between ————, party of the first part, and W. R. Ballou & Co., party of the second part,

"Witnesseth: That in consideration of ——— dollars in hand paid, the receipt of which is hereby acknowledged, and the agreement hereinafter mentioned, said ———— gives to W. R. Ballou & Co. the exclusive privilege for ——— year from date hereof of selling his tract of land in Whitley county, Kentucky, described as follows:

.....

.....

for the sum of —— dollars per acre.

"Said W. R. Ballou & Co., upon their part, agrees with said ————— that they will, to the best of their ability, endeavor to effect a sale of said lands, without charge or expense to said party of the first part, save and except that party of the first part, or assigns, shall have charge, use his best endeavor to aid the said W. R. Ballou & Co. in the sale of the above described lands, by showing all persons sent to view said lands, the lines, corners and improvements of same. Said party of the first part further agrees to furnish abstract of title and make a deed of general warranty for said lands upon demand of said W. R. Ballou & Co., upon sale being made as aforesaid. And all sales or other transfers whatsoever to be made by and through the said W. R. Ballou & Co.

"It is mutually understood and agreed between said parties, that said party of the first part shall retain possession of said lands, and receive all rents and profits from farming or grazing, arising therefrom until sale of said lands as aforesaid. No timber or mineral to be sold from said lands.

"The owner, however, has the right to use all the timber and minerals for his own use."

The contracts with Ballou & Co. were entered into about the 1st of October, 1891, and were to continue in force for one year. The appellee, Finley, was not a party to these contracts, and his connection with the case will be made to appear herein. The appellees owned contiguous tracts of land in Whitley county, Kentucky, and the contracts with Ballou & Co. were with reference to the sale thereof. In April, 1892, John S. VanWinkle, representing the appellant, took options upon the same land, some of which at $9 and some at $8 per acre. By the terms of the options, if he determined to exercise them, he was to give notice to the grantors before a certain date that he would do so, and make certain payments on the land. Before the expiration of the time he notified the parties that he would take the land under the terms of the options, and he made payments of the several sums to the parties respectively, as required by the terms of the options. Thus the matter stood until about the 8th of July, 1892, when the appellees, who had given the options to VanWinkle, were induced by Ballou & Co. and the appellee, Finley, to convey their lands to Finley. The so-called options to Ballou & Co. provided that the parties were to receive $15 per acre for their lands. The appellees were urged to accept from Finley the amount which VanWinkle had agreed to pay them for the land, (except perhaps in one instance where the party received $1 per acre more,) and they did so. The highest amount paid any one of them was $10 per acre, and the lowest $8. Neither Ballou & Co. nor Finley took the land upon the terms prescribed in the so-called options to Ballou & Co. Before the parties would convey their lands to Finley, they were each given bonds by him to save them harmless against any claim or liability growing out of the contracts entered into with VanWinkle. So Ballou & Co. and Finley were fully apprised of the contracts which the grantors had made with VanWinkle. VanWinkle was likewise aware of the contracts that the grantors had made with Ballou & Co.

The principal grounds urged against the specific performance of the Van-

Winkle contracts are: First, that VanWinkle practiced a fraud in obtaining them; second, that the Ballou &Co. options were exercised by the conveyance to Finley.

The principal effort which was made to show that VanWinkle was guilty of fraud in obtaining the contracts, was to show that he agreed to take his options subject to the options of Ballou & Co., and as the options did not expressly say that they were subject to the Ballou & Co. options, there was a fraudulent omission to state the terms of the agreement. It is recited in some of the options to VanWinkle that "W. R. Ballou & Co. hold an option upon the land until October 4, 1902." In other options it is recited that "W. R. Ballou & Co. have an option upon the land until October 4, 1902." The court is unable to see any difference in admitting in the options the knowledge of the existence of the options in favor of Ballou & Co., and in saying that they are subject to the options of Ballou & Co. If VanWinkle had notice of the contracts with Ballou & Co., his claim would be subject to their rights. The purpose of embodying into the VanWinkle options the admission of knowledge of the Ballou & Co. options, was intended to obviate the necessity of proving it by oral testimony. Had VanWinkle's options read subject to Ballou & Co.'s options, they would simply have stated legal effect. By the admission of knowledge of Ballou & Co.'s options, he gave his own the effect they would have had with the statement therein that they were subject to their options. This record wholly fails to show that VanWinkle did not act with perfect fairness in obtaining the options.

Ballou & Co. and Finley, as we have said, knew of the VanWinkle options and that he had exercised them and had made payments to the grantors, as required by their terms. Finley is not an innocent purchaser. If Ballou & Co. had the right to take the land under the so-called options, it was at $15 per acre. Instead of taking it at that price, the grantors were induced to convey it at the prices at which VanWinkle had agreed to take the land. If VanWinkle bought subject to the rights of Ballou & Co., he had the right to require them, if they did take the land, to do so at the prices stipulated in the so-called options to them. While the parties went through the form of taking the land under the Ballou & Co. options, it was by new and distinct contracts that Finley obtained the conveyances of the land. The grantors evidently preferred to sell to VanWinkle at the prices he proposed to pay, rather than wait until October 4, 1902, to see the outcome of the Ballou & Co. so-called options. By the options to VanWinkle and his acceptance of them, the appellant, through him, was placed into the shoes of the grantors.

We have considered this case as if the Ballou & Co. contracts were options. They were nothing more than contracts of agencies empowering Ballou & Co. to find purchasers for the land. The authority to sell could have been revoked at any time. The options to VanWinkle and the notice that they were to be exercised, operated as revocations of the contracts of Ballou & Co.

It is urged that it is in the sound discretion of courts of equity to decree specific performance. This is true, but there is no reason why specific performance should not be decreed in this case. The contracts of sale were fairly obtained. The price to be paid was reasonable, and they thought so, because they conveyed to Finley at the same price that VanWinkle agreed to

pay for the land. The grantors agreed to furnish abstracts of title and their title papers by which their respective land could be surveyed. This is but a reasonable and fair agreement. The court would not exercise a sound discretion, if it did not require them to carry out their contract with VanWinkle.

Greer had not given Ballou & Co. an option upon his land. He gave one to VanWinkle of the same kind that was given him by the other parties. VanWinkle gave him notice that he would exercise the option and paid him $200 of the purchase money. He insists that he should not be compelled to convey the land, because Van Winkle delayed for an unreasonable time to have the land surveyed. Without going into a discussion of the facts, it is sufficient to say that there was no unreasonable delay upon the part of VanWinkle.

It has been urged that as the vendors lived upon the lands with their families and occupied them as homesteads, they can not be required to carry out their contracts. This court has held that the owner of a homestead can sell and convey it, and that if he sells it and refuses to convey it, the court will compel him to do so. (Brame v. Craig, 12 Bush, 406; Prebble v. Hall, 18 Bush, 67; Gullett v. Arnett, 19 Ky. Law Rep., 1892.)

As Finley has made payments to the appellees on his purchase, in equity he is entitled to be reimbursed out of the sums which may be ascertained the appellant should pay the appellees respectively.

The judgments are reversed for proceedings consistent with this opinion.

UNITED STATES FIDELITY AND GUARANTY CO. v. BOARD OF EDUCATION OF SOMERSET PUBLIC GRADED SCHOOLS.

(Filed May 27, 1904.)

1. Taxation—Graded schools—Repeal of special acts of incorporation—The appellant is surety on the official bond of the tax collector for the years 1899, 1900 and 1901 for the district including the city of Somerset (fourth class) and certain additional boundary embraced in special acts of the Kentucky Legislature of 1888, 1889 and 1890, incorporating the appellee "Board of Education of Somerset Public Graded Schools," who brought this suit on said bond for money not collected and accounted for by said collector. The surety claims, first, that the levy for the year 1899 is void, because the order does not state for what purpose it was made; second, that the levies are all invalid because the special acts under which the appellee was organized, were repealed by the present charter of said city. Held—

First. Order should recite purpose of levy—That the order for the levy of the tax for the year 1899, which is as follows: "On motion, the levy for 1899 was fixed at $1 on every $100 worth of property and $2 for each poll," failing to recite for what purpose the levy was made, not even that it was made for school purposes, is void, and the surety is not liable for any of the taxes for the year 1899.

Second. Special acts in force—Under numerous similar cases cited, the court holds that the special acts under which the appellee, board, was organized are still in force, and the levy for the years 1900 and 1901, made in pursuance of said acts, are valid, and appellant, as surety on the tax collector's bond for said years is liable, not only for the taxes collected, but for that which could have been collected for the years 1900 and 1901.

Bodley, Baskin & Flexner for appellant.

Virgil P. Smith and O. H. Waddle for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Board of Education of Somerset Public Graded Schools, was created by a special act of the legislature in 1888 (Vol 3, Acts 1888, page 500), which act was amended (Vol. 1, page 446, Acts of 1889-1890). By virtue of these acts of the legislature it levied an advalorem tax of $1 upon each $100 of property in the school district and a poll tax of $2. The district is comprised of the territory within, some outside of the corporate limits of the city of Somerset. The levies were made for the years 1899, 1900 and 1901. Hiram H. Gragg was appointed tax collector and was required to give a bond each year as such, which he did, with the appellant as surety. He failed to account to the appellee for all the taxes for the years in question, and made settlements showing the amount due for each year. On his failing to pay over these sums this action was instituted on the several bonds to recover the balances shown to be due from him. The appellant admits the execution of the bonds, but seeks to avoid liability thereon for several reasons, some of which will be made to appear in this opinion.

It is urged that the levy for the year of 1899 is invalid, because it does not state the purpose for which it was made, and that under the doctrine of Greenwell v. Commonwealth, 78, Ky. 322; Whalley v. Commonwealth, 23 Ky. Law Rep., 1292, and Commonwealth v. Stone, 24 Ky. Law Rep., 1297, it is not liable for the taxes collected and such as were not collected. There is no serious objection to the levies except for the year of 1899. The order making the levy for the year of 1899 is as follows: "On motion, the levy for 1899 was fixed at $1 on every $100 worth of property, and $2 for each poll." The order does not state the purpose for which the levy is made, not even that it is for school purposes. Section 108 of the Constitution provides: * * * "Every act enacted by the general assembly, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied." * * *

The appellee was a local legislative body authorized to levy the tax. The court in the City of Somerset v. Somerset Banking Co., 22 Ky. Law Rep., 1132, had under consideration orders making levies substantially the same as the one here under consideration, and held them void. The order in question is void, because it is in disregard of section 180 of the Constitution. In the case of Pulaski County v. Watson, 21 Ky. Law Rep., 61, the order stated the purpose for which the tax was levied, hence that case does not support the position of counsel for appellee. If the order is void, then the collector had no authority to collect the tax, neither had the board the right to accept the bond in question, and for that reason no recovery can be had thereon (bond for 1899.) This conclusion is supported by Greenwell v. Commonwealth; Commonwealth v. Stone, and Whalley v. Commonwealth.

By section 3, volume 1, page 446 of the Acts of 1889-1890, the board has the power to adopt the assessment of the assessor of the city of Somerset as to the property in the city limits belonging to all white persons, and it is made

the duty of the assessor of the district to assess the property in the district outside of the city of Somerset. There is a board of equalization of the city to supervise the work of its assessor. By section 14, volume 3, Acts of 1887-1888, page 509, the board of education is authorized to sit as a board of supervisors for the purpose of supervising the tax list. No tax payer is here complaining that the property was not properly assessed, or that the assessment was not properly supervised or equalized. The record fails to show that the law was not fully complied with.

Section 14 of the acts of 1888 provides that "the collector shall be under the same responsibility as sheriffs in the collection of the State revenue," and that his surety shall be liable on his bond "for all money so collected." These two clauses must be construed together to determine the liability of the collector and his surety. The bond which he gave and which the appellant signed as surety does not impose any greater liability upon the surety than is contemplated, by law. It is not only the duty of the sheriff to pay over the money which he collects, but to collect all valid tax receipts placed in his hands for collection. We, therefore, are of the opinion that the bonds executed by the appellant did not purport to impose any greater burden upon the appellant than is authorized by the statute. The appellant is liable not only for the taxes collected, but those which could have been.

It is insisted that the special acts under which the graded school was organized were repealed by the charters of cities of the fourth class. In this view, we do not concur. We have examined the cases of Mayor of Eminence v. Wilson, 20 Ky. Law Rep., 29; Roberts v. Clay City, 19 Ky. Law Rep., 1047; Hickman College v. Trustees, 23 Ky. Law Rep., 1272; Trustees v. Vanceburg, 20 Ky. Law Rep., 869; Board of Education of Elizabethtown v. Morris, 24 Ky. Law Rep., 1422, and Board of Education of Somerset v. Trustees, 18 Ky. Law Rep., 103, and find they do not support a different conclusion. In some of the cases the court held that the charters of cities of the fifth class did not repeal the provisions of the special acts giving the graded schools the money collected for liquor licenses, because the charter provided that such sums should go into the general fund of the municipalities; hence there was a conflict. The court recognized that special acts establishing graded schools in cities of the fifth class were still in force. The other cases referred to hold that the special acts are still in force. Somerset is a city of the fourth class. Under the charters of cities of the fourth class, it is optional with the cities of that class to maintain a system of public schools. The city of Somerset does not seem to have attempted to establish a system of public schools.

The appellee is entitled to recover on the bonds for the years of 1900 and 1901, and if there is no order except the one in question making the levy for 1899, it is not entitled to recover on the bond executed for that year.

The judgment is reversed for proceedings consistent with this opinion.

REUSCH, &c. v. LICKING ROLLING MILL CO.

(Filed May 31, 1904.)

Coasting—Public street—Contact with wagon—Liability of owner—Coasting on a heavy sled on a down grade street in a city is per se, a nuisance, and one who is injured while so engaged by contact with a wagon left standing in the street on a dark night, can not recover damages from the owner of the wagon, on a charge in the petition that such owner, by ordinary care, might have known that the street was used for coasting.

M. L. Harbeson and Pence & Williams for appellants.

S. D. Rouse for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

Eleventh street in Covington, Ky., from Girard street eastward to the Licking river is a down grade and is sometimes used for coasting when there is enough snow or ice to permit. On January 5, 1904, the plaintiff was upon a large sled with several other persons coasting down the street about half past eight o'clock, it being then dark. The defendant had left a large four-horse wagon upon the street a short distance east of the crossing, to which no team was hitched, and which was left there to stand over night. The sled ran under the wagon and plaintiff was struck by it, her teeth were knocked out, her chin was shattered, her nose, brow and upper lip were cut, her back was sprained and she received large and ugly scars upon her face, permanently disfiguring her. The street had been used for coasting for many evenings immediately preceding that upon which she was hurt and was so used by a large number of persons that night. The plaintiff alleged in her petition the foregoing facts and sought to recover of the defendant for her injuries.

She also alleged that the defendant well knew and could, by the exercise of ordinary care, have known of the use of the street for coasting on the previous evenings, and on that evening, and that it negligently left the wagon in the street thereby causing her injuries. The court sustained a demurrer to her petition, and she appeals. A city street is constructed for public travel. Any use of the street which renders it unsafe to the traveling public is a nuisance, for the traveling public have a right to pass back and forth upon it and have a right to presume thlat it wil be reasonably safe for this purpose. The large sled loaded with several persons, rushing rapidly over the ice down the declivity in the dark, endangered the safety of every traveler upon the highway in its course. The purposes for which the street was made and for which it was used were incocsistent with such use. The sled loaded as it was, and run over the ice down the declivity, gathering momentum as it went, was per se a nuisance. One who creates a nuisance and is himself injured thereby can not recover. But it is insisted that the defendant is liable because of the allegation that it knew, and by the exercise of ordinary care could have known of the use of the street for coasting. A pleading must be taken against the pleader, and taken all together the allegations of the petition amount only to a charge that the defendant, by ordinary care, might have known the facts. In other words the meaning is that defendant

could, by ordinary care, have known the facts and, therefore, knowledge of them is to be imputed to it; for if actual knowledge of the facts was meant to be charged, the allegation that the defendant could by ordinary care have known, was meaningless. Some force must be given all parts of the sentence and it is a fair presumption that a pleading is sworn to in its milder sense; for the pleader selects his own language and will naturally make it as strong as he can, truthfully. The petition as a whole is bottomed on negligence, or the defendants failure to exercise ordinary care to know the facts and remove the wagon from the street. But the defendant was under no obligation to the plaintiff to exercise care for her protection. It is not charged that the wagon was placed at a point at which the defendant knew the street was used by those coasting on it, or that the defendant knew that to leave the wagon where it was, would endanger the safety o those coasting on the street.

The petition is rested on the idea that the defendant negligently placed the obstruction in the street, and while it would be liable for this to those using the street for a proper purpose and in the proper way, it is not liable to one improperly using the street. We are referred to a number of authorities holding that if a man knows that trespassers are using his property, yet if with such knowledge he places a dangerous obstruction in their path, he is liable for an injury to them when they pass along in the dark and are injured without knowledge of the danger. But these cases are not in point, for the reason that it is not averred that the defendant knew that the wagon was standing where it would endanger those coasting on the street, nor is it sufficiently averred that the defendant knew in fact of the use of the street for coasting, at the time the plaintiff was injured. No opinion is, therefore, intimated as to whether the line of authorities referred to would apply to a case like this.

Judgment affirmed.

MONROE, &c. v. PRICE.

(Filed May 31, 1904.)

Homestead—Sale subject to right of homestead—Title thereby acquired—Death of occupant—B. executed a mortgage on 115 acres of land on which he resided with his wife, and in which she did not join. Suit was brought to enforce the mortgage lien, in which B. claimed his homestead exemption, which was conceded, and 64 acres of the land was laid off to him as exempt. The land was all sold for the mortgage debt, but the 64 acres was sold subject to B.'s homestead right therein, and purchased by P., and deed made to P. subject to B.'s homestead in the 64 acres. Upon the death of B. in 1902, leaving no widow or children, the purchaser, P., brought suit for the 64 acres. Held—That under the mortgage in which the wife did not join, no lien was created on the homestead. The judgment in the action to enforce the lien was an adjudication that the mortgage creditor had no lien upon it or right to have it sold, and as B. owned the fee in the 64 acres allotted to him as a homestead, there was no estate in it which could be sold or vested in a purchaser, and no title or interest was acquired therein by the purchaser.

Pendleton & Bush for appellants.

J. Smith Hays for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Paynter.

Eli Bruce owned 115 acres of land in Clark county. In September, 1873, to secure the payment of a debt to James Winn he executed a mortgage on the land. Thereafter he executed a mortgage to Butler Robinson on the same land to secure a debt. Bruce's wife did not join in either mortgage. The appellee, Price, was the owner of the Robinson debt. In 1876 an action was instituted to enforce the mortgage liens. Bruce filed an answer, claiming that he was entitled to land of the value of $1,000 as a homestead. Winn and Price conceded that he was entitled to it. In that action the court adjudged that Bruce was entitled to a homestead in the land and appointed commissioners to allot and set it apart to him. They made the allotment and particularly described it by metes and bounds. The court confirmed their report. After adjudging that Bruce was entitled to the homestead the court ordered the 115-acre tract sold "subject to the homestead right of the defendant, Bruce," to pay the mortgage debt. The commissioner sold it subject to Bruce's homestead right, and the appellee, Price, became the purchaser, and it was conveyed to him subject to Bruce's homestead right. Bruce died in 1902 and did not leave a widow or infant children. The appellee, Price, instituted this action in ejectment to recover the 64 acres which had been allotted to Bruce as a homestead, claiming that he had title to it by virtue of the judgment and sale to which we have referred.

If a debtor executes a mortgage on his homestead in which his wife does not join, no lien is created on it. The creditor acquires no right in it by virtue of the mortgage. (Lear, &c. v. Totten, &c., 14 Bush, 101; Tong, &c. v. Elfort, &c., 80 Ky., 152.) The homestead law does not give the debtor a new estate in the land; it permits him to hold it in fee, that title being protected from coercive sale by his creditors. The owner can sell and convey the land which the law gives him as a homestead. The homestead is not a substantive right that may be granted separate from the fee. No such right exists. These observations are not applicable to the homestead right which the widow and children take, because that is derivative, and the statute authorizes the land to be sold subject to their right of occupancy. Their homestead right does not partake of the nature of a fee simple estate.

The pleadings show that Bruce's wife did not join in the mortgages. Bruce made averments in his answer which shows that he was entitled to a homestead, and the mortgagees conceded his right to it. There was no issue on the question of his right to hold land of the value of $1,000 as a homestead. The court in express terms adjudged that he was entitled to do so. When the court adjudged him the homestead he was not vested with a new estate in it, but it was an adjudication that he was entitled to enjoy that which he possessed. The judgment that he was entitled to the homestead right was an adjudication that the mortgage creditors had no lien upon it, or a right to have it sold. When the court ordered that the 115 acres should be sold subject to the debtor's homestead rights, it did not thereby intend to take from him that which the law allowed him to retain and which the court had adjudged him. When the court ordered that the land should be

sold, subject to the homestead right, it did not thereby intend to diminish any right which the debtor had in the property. It was a recognition of whatever right the law allowed him to retain in the land allotted to him as a homestead. It would be a perversion of the meaning of terms to say that, when the court ordered the 115 acres of land sold subject to the debtor's homestead right, that it intended to qualify or limit that right. While the expression was not necessary to preserve the right of the debtor to his homestead, that fact can not justify the court in ascribing a meaning to it which it does not import. There was no claim in the pleadings that the debtor was only entitled to occupy the land during life, as a homestead, as against the right of the mortgagees. Hence if the language employed in the judgment created a doubt as to what the court intended by the expression, we should hold that, as no claim was made in the pleadings that the debtor's homestead right should be qualified by only allowing him the right of occupancy, that the court did not intend to so limit it. However, we have no doubt upon the question. When the court adjudged that he was entitled to a homestead exemption, it adjudged that he was entitled to retain all the rights which, by law, he was vested in the land allotted to him as a homestead. When the court ordered a sale of the land subject to that right, it was a recognition of it, and in effect a declaration that the purchaser of the land could not acquire any interest therein, except one subordinate to that of the debtor. As he owned the fee to that part which was allotted to him as a homestead, there was no estate or interest in it which could be sold or vested in a purchaser; therefore, appellee acquired no title or interest in the land by his purchase. The court has held that where a debtor executed a mortgage in which his wife did not join, that after the enforcement of the mortgage and a sale of the property, the debtor could recover his homestead, the question of his right thereto never having been adjudged.

In Wing, &c. v. Hayden, &c., 10 Bush, 276, the court said: "As to all persons entitled to the benefit of the act its effect is to take away from all courts the power to sell the homestead under a judgment for the sale of land in which the owner has a right to a homestead exemption; and a sale under it can not divest the homestead unless the right to exemption has been waived in the mode pointed out by the statute. The sale simply invests the purchaser with the title, subject to the exemption; and as this is all he buys, the fact that the debtor may subsequently cease to be a housekeeper, or to be entitled to the exemption, will not inure to the benefit of the prior purchaser; he must be presumed to have purchased subject to the exemption; and whether he did or not, he can not enlarge his purchase by subsequent events. He gets what he purchased; but if he be allowed to hold the whole land because the facts which at the time of his purchase exempted the homestead have ceased to exist then he will get what he never purchased, what never was sold, and what was not at the time subject to sale."

The judgment is reversed for proceedings consistent with this opinion.

NALL v. WRIGHT'S EX'ORS.

(Filed May 31, 1904—Not to be reported.)

1. Wills—Advancements—Equalization—Riley Wright having three daughters, by his will, made August 17, 1900, directed that the proceeds of his estate, real and personal, should be equally divided between them; and thereafter, on December 25, 1900, delivered to one of them notes of the value of $4,000, for which said daughter gave him a receipt as follows: '$4,000. Received of Riley Wright four thousand dollars, being part of my interest in his estate. This December 25, 1900. (Signed) Mrs. M. D. Nall. Witness, W. L. Nall." Held—That in the distribution of the testator's estate, the executors should first pay to each of the other two daughters $4,000 out of the estate, and then if there was any balance left, after payment of costs, such balance should be equally divided between the three daughters.

2. Variance—Waiver—The allegation in the petition that $4,000 in money was paid to the appellant which was denied in the answer, and the proof showed that it was not money, but notes, while it may be a variance, which, whether applicable to a case like this or not, we are sure comes within the provisions of section 129 of the Civil Code, that "no variance between pleading and proof is material, which does not mislead a party to his prejudice, in maintaining his action or defense upon its merits."

Lane & Harrison for appellant.

J. W. Lewis and J. Morgan Richardson for appellees.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Barker.

Riley Wright died domiciled in Meade county, Kentucky, leaving a last will and testament, which was admitted to probate, and by which he appointed S. T. Howey and C. A. Montgomery, executors. The decedent left three daughters, Eliza Jane Brown, Margaret Delilah Nall and Adeline Melinda French, who were his only heirs at law. By the second section of his will, he provided as follows:

"I hereby devise and bequeath to my executors, C. A. Montgomery and S. T. Howey, all of my property, real, personal and mixed, and of every kind and description, to be held and disposed of by them as herein provided, and the surplus proceeds of all my property to be equally divided between my three daughters, Eliza Jane Brown, Margaret Delilah Nall and Adeline Melinda French. My executors shall have, and are hereby given, the power to sell and convey any or all of the land I may own at my death, or they may partition and divide the land between my three daughters, setting apart and conveying to each daughter a fair equal one-third thereof. It shall be left to the discretion of my executors whether they sell the land or partition and divide it, my three daughters to share equally in the land, or the proceeds thereof, if the land be sold. * * * During Christmas week of each year after the qualification of my executors, they shall divide equally between and pay over to my three daughters, any surplus money they may have in their hands from my estate. * * *

"I have heretofore given to each of my three daughters a ten dollar gold piece, and I request each of them to keep said gold piece as long as they may live. My three daughters are to share equally in the division of my

estate, and none of them is to be charged with, or required to account for, anything received from me."

This will was dated on the 17th day of August, 1900. Afterwards, on December 25, 1900, the testator delivered over to his daughter, Mrs. M. D. Nall, notes due to him aggregating $4,000, and took from her the following receipt:

"$4,000. Received of Riley Wright four thousand dollars, being part of my interest in his estate. This December 25, 1900.

(Signed) "MRS. M. D. NALL.

"Witnessed: W. L. NALL."

After the death of Riley Wright, his executors converted all of his estate into cash, or lien notes equal to cash, and found that it amounted to about $9,000; but before dividing it between the daughters, they ascertained that Mrs. Nall was denying their right to equalize her sisters with her out of the estate of her father before she was allowed to participate in the division; whereupon they instituted this action, setting up the foregoing facts with regard to the advancements to Mrs. Nall, and asking the advice of the chancellor on the subject of their duty in the premises; and this is the sole question involved upon this appeal.

The chancellor decreed that the executors should first make Mrs. French and Mrs. Brown equal to their sister, considering the sum received by her from her father during his lifetime, before she was allowed to participate in the estate, and, after this equality was reached, the balance of the estate, if any, should be divided equally between the three sisters. The material part of the judgment is as follows: * * * "It is ordered and adjudged that in the division and distribution of the estate of Riley Wright, deceased, by the plaintiffs as his executors, the defendant, Margaret D. Nall, shall be charged with the $4,000 advanced to her by Wiley Wright on the 25th of December, 1900, and for which she executed and gave the receipt set out in and filed with plaintiffs' petition, and that it was the intention of said Riley Wright that said Margaret D. Nall should be charged with said $4,000 in the distribution of his property and estate by his executors; and it further appearing to the court that said advancement of $4,000 to Margaret D. Nall was made and paid in notes, and that one of the notes she received was against J. M. Williams and P. T. Noell, who were insolvent at the time she received said note, and are both still insolvent, and that she was unable to collect said note or any part thereof, which note on December 25, 1900, the day she received it, amounted to $494.87 It is now adjudged that the executors pay to Mrs. Margaret D. Nall said sum of $494.87, the amount of said note, upon condition that she return and deliver back said note to the executors as an asset of the estate of Riley Wright, deceased; then the executors are ordered and directed to pay to Eliza Jane Brown and Adeline Melinda French each the sum of $4,000, and then if there is any balance left after payment of costs, etc., they will distribute such balance or surplus equally between all three of the defendants."

From this judgment appellant, Margaret D. Nall, has appealed, executing a supersedeas bond.

The first question by appellant is one of parctice. Appellees, in their petition for the advice of the chancellor, described the advancement made to ap-

pellant as the sum of $4,000 in the language of the receipt which she executed and delivered to her father. The allegation of the advancement of $4,000 in money was denied by appellant, and the proof showed that it was not money, but notes instead, which was advanced by the testator to his daughter, and it is claimed that this is a fatal variance for which this court should reverse. Waiving the question as to whether or not the doctrine of variance is applicable to a case like this, we are quite sure that it comes within the provisions of section 129 of the Code, which is as follows: "No variance between pleading and proof is material, which does not mislead a party to his prejudice, in maintaining his action or defense upon the merits. A party who claims to have been so mislead, must show that fact to the satisfaction of the court, and thereupon the court may order the pleadings to be amended, upon such terms as may be just." (Gaines v. Deposit Bank of Frankfort, 19 Ky. Law Rep., 171; Woodcock v. Farrell, 1 Met., 437.)

Section 4840 of the Kentucky Statutes is as follows: "A provision for or advancement to any person shall be deemed a satisfaction in whole or in part of a devise or bequest to such person, contained in a previous will, if it would be so deemed in case the devisee or legatee were the child of the testator; and whether he is a child or not, it shall be so deemed in all cases in which it shall appear from parol or other evidence to have been so intended."

We do not see how it could have been made more clearly to appear that it was the intention of the testator that the notes turned over to his daughter should be deemed an advancement in satisfaction of the devise to her contained in his will, than by taking her receipt declaring such to have been the fact, was as done in this instance; but, if such other evidence was necessary, it sufficiently appears from the provisions of his will with reference to the equality of his daughters in the division of his estate. A perusal of this instrument shows that this equality is its dominant idea. In a short instrument covering two pages of typewritten matter, the testator provided for equality of division of his estate between his three daughters, five separate and distinct times; in no instance does he allude to a division of his estate without setting forth in unmistakable terms, that this division shall be equal. If appellant's contention be correct, she will receive of her father's estate a little more than double the portion allotted each of her sisters. It is true, that the testator provided in his will that none of his children are to be charged with or required to account for anything received from him, but this is in a sentence which recites that he had theretofore given to each of his three daughters a ten dollar gold piece, which he requested they should keep as long as they lived, and in the same sentence he reiterates again "my three daughters are to share equally in the division of my estate." The provisions of the will itself, and the terms of the receipt, conclusively refute the claim of appellant, that her father did not intend the notes given her as an ademption pro tanto of the estate devised to her; in addition, however, the record contains overwhelming evidence of the intention of the testator that his daughter should be charged, in the division of his estate, with the notes received.

It is true, that by the terms of section 4859, "a will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the

testator, unless a contrary intention shall appear by the will;" but this section must be construed in connection with section 4840, and made to harmonize with the dominant idea of equality, which was the manifest intention of the testator; and, moreover, we think it plain that the equality between the devisees so clearly set forth in the language of the testator, shows that the advancements with which his children were not to be chargeable, were such as he had made prior to the execution of his will.

The record shows that after the advancements to Mrs. Nall of the $4,000 in notes, the testator executed a deed for certain lands belonging to each of his other daughters, at the recited valuation of $4,000, thus making his intention of equality keep even pace with his gifts to his daughters. These deeds Mrs. French and Mrs. Brown declined to accept, on the ground that the land was not worth the sum of $4,000, as recited; whereupon the testator declared his intention to sell the land, and deliver to them the proceeds, but died before carrying out his intention. This fact, alone, shows that the testator did not intend that Mrs. Nall should receive double the portion of his estate received by her sisters.

Upon the whole case, it is manifest that the chancellor correctly adjudged appellant to be chargeable with the advancement received by her from her father, less the value of the worthless note of Williams and Noell.

Whereupon, the judgment is affirmed.

PARSONS v. PARSONS.

(Filed May 31, 1904—Not to be reported.)

Divorce and alimony—Where, in an action for divorce, a judgment was rendered on an agreement entered into between the parties by which the husband was to pay two-thirds of his annual income for the support of his wife and their four children, upon the husband's failure to pay and in response to a rule against him requiring him to do so, where it appeared that he had lost his position; had been unable to obtain any regular employment; that he had suffered a broken leg; had been in an infirmary and that he had no property or means; that one daughter was married, another of age having a government position paying her $40 a month, the third of age and making her living and the fourth a son over fifteen years of age, able to work, it was error for the chancellor to require him to pay two-thirds of his net income. The children are better off than he, and, moreover, a contract on his part to provide for his adult children out of his future earnings will be without consideration. In such case the ends of justice require a reasonable allowance for the wife, taking into consideration the present and probable future earning capacity of the husband.

W. W. Thum and Robt. L. Greene for appellant.

Percy N. Booth for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Hobson.

On June 2, 1902, appellee, Mary Isabella Parsons, filed suit against appellant, Clarence W. Parsons, on the ground of abandonment.. Proof was taken sustaining the allegations of the petition and on the 12th of June a

written contract was made between them, by which he agreed to apply two-thirds of his annual income, not exceeding $2,400 per annum, for the support of his wife and their four children, and to pay the amount to the Louisville Trust Co., as trustee for them. On July 5, a judgment was entered divorcing the parties, to which this is added: "It appearing to the court that an agreement as to future support of plaintiff and the children of plaintiff and defendant has been entered into between the parties to this action and a trustee, which agreement is to be filed herein, this cause is retained for that purpose, and for all such orders as may be necessary and proper in reference thereto."

On October 28, 1902, the plaintiff filed her affidavit and asked a rule against the defendant for not complying with his agreement. He responded to the rule, and on hearing, the court discharged the rule at plaintiff's cost. Again, on November 10, 1903, she filed a like affidavit and obtained another rule against him. To this rule the defendant responded that before the time of the making of the contract referred to, he was in the employment of the city of Louisville as its chief engineer, but had lost his position, and had been unable to obtain any other regular employment; that in January, 1903, he accidentally slipped on the ice and fell, breaking his left leg, and was taken to an infirmary where he remained for a month, and for three months afterwards he was confined to his room; that after he left his room he was on crutches for a month, and was unable to work until the middle of June; that thereafter he had taken two small jobs for which he received gross $580, and had also received $70 for witness fees, making a total of $650 in all; that he had no property or means, and was in debt for his doctor's bills and other things; that out of the $650 received he had paid something over $300 for assistance, tools, and other expenses; that one of his daughters was married and living with her husband; that another was of age and had a government position which paid her $40 a month; that the third was over twenty years of age and earning about $20 a month, and the son, the fourth child, was over fifteen years of age, and had been working with him in the jobs referred to. The third daughter was married pending this proceeding. In view of the changed circumstances of the parties he asked to be relieved from the written contract, and that the court make a reasonable allowance to his wife for alimony. The three unmarried children filed a statement that they did not wish a rule taken against their father; were interested in no way in the case, and desired no action taken on their account, as they expected to support themselves. Notwithstanding this, the court, on final hearing, entered a judgment requiring C. W. Parsons to pay to the trustee $307.32 to be distributed by the trustee in accordance with the agreement of June 12, 1902, this sum being two-thirds of his net income as shown by the record.

The agreement of June 12, 1902, is not by its terms, limited as to time; but it is hard to conceive that the parties contemplated that the husband was to continue to pay two-thirds of his income for the purposes indicated as long as he lived, without regard to the changes of circumstances which might come to the parties in the meantime. It is perfectly apparent that the children are better off than their father, and as able to take care of themselves as he is. He turned over to his wife all the visible property he

had. A contract on his part to provide for his adult children out of his future earnings, would be without consideration, and we do not think this is the fair meaning of the contract. So far as the children are concerned, he should not be required now, under his changed circumstances, to make any further provision for them. The proof shows that the wife at the time was keeping a boarding house and the children were boarding with her.

The contract seems to have been made in view of this condition of the family, and not as a permanent arrangement; for the mother's one-fifth of two-thirds of the income might be a very inadequate allowance for her, without the benefit which the contract evidently contemplated she was to receive from the allowance to the children. In view of all the facts, and considering the changed circumstances of the parties, the end of justice requires that a reasonable allowance should be made the wife in lieu of the provision made for her by the contract. In making such an allowance the court will take into consideration the present and probable future earning capacity of the husband, what the wife has received from him, and his financial circumstances.

Judgment reversed and cause remanded for further proceedings as herein indicated. The husband will pay the costs in this court, as it appears that the wife is without means.

The judgment on the cross appeal is affirmed.

SCHNABEL, &c. v. WAGGENER.

(Filed May 31, 1904.)

1. Practice—Where money is received under a judgment which was subsequently reversed, it is a well settled rule that restitution can be compelled only from parties to the record, their assignees or personal representatives, and only to the extent that such parties have actually profited by the erroneous judgment.

2. Same—This court not having seen fit heretofore sua sponte to enforce rule three, no motion by appellant in this case having been made either before or after its submission to impose payment of costs upon appellee for failure to file brief, it does not feel warranted in imposing costs upon appellee.

C. B. Seymour and Fred Forcht for appellants.

Gordon & Gordon for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Chief Justice Burnam.

This is an appeal from a judgment discharging a rule which sought restitution of money received under a judgment of the Jefferson Circuit Court which was subsequently reversed by this court. The facts of the case are fully recited in the opinion of the court, upon the former appeal, by Judge DuRelle, and in the separate opinion of Judge Guffy, reported in 23 Ky. Law Rep., 234. Upon the return of the case to the lower court it was decided that the infant defendants were entitled to $534, with interest from the 9th of July, 1898, as the value of the homestead adjudged them upon the former appeal. It was also shown that there had been paid to the appellee,

R. C. Waggener, $514.60 from the funds on hand at the date of the former judgment, and upon motion of the infant defendants a rule was awarded against him to show cause why he should not repay into court the full amount of the money which he had withdrawn under the reversed judgment. In his response to this rule, he claimed that he had only received as his pro rata of the fund finally adjudged the infants in lieu of homestead, $158, and that he ought not to be held liable for any greater amount, and paid the sum which he admitted to be due into court. The action having been submitted on the response of Waggener to the rule against him, it was discharged, and a judgment awarding appellants $158 was entered. The defendants excepted to the judgment, and have again appealed, and insist that they should not be driven to collect the full amount allowed to them as a homestead exemption, from the insolvent creditors, but are entitled to have restitution to the full extent of the pro rata received by appellee from the estate of their father upon his debt, upon the ground that their claim for the homestead was a preferred one.

The rule is well settled that restitution on reversal of a judgment can be compelled from only parties to the record, their assignees or personal representatives, and only to the extent that such parties have actually profited by the erroneous judgment. (Gregory v. Litzy, 48 Ky., 489; Morgan v. Hart, 48 Ky., 79; Ball v. Lively, 84 Ky., 371; Outter v. Palmetter, 80 Ky., 241.) We think the trial court properly limited the amount to be paid by appellee to the amount actually received by him as his pro rata of the fund finally adjudged appellants.

It is insisted in the brief of counsel representing appellants, that as appellees delayed from the date of the submission of this case on the 13th of November, 1903, until the 26th of May, 1904, to file their brief, that they should be required to pay the cost up to the latter date. Rule 8 provides that: "In all cases or appeals hereafter filed, or now filed and not submitted, it shall be the duty of the appellant to file his brief twenty days prior to the day the case is set for hearing, and the appellee to file his brief ten days prior to that time; and a failure to do so by the appellant shall cause a dismissal of the appeal without prejudice, and upon the part of the appellee, he will, if in default, be required to pay the costs up to the date of filing his brief."

This court has not seen fit heretofore sua sponte to enforce rule three, and has uniformly refused to dismiss an appeal for failure of appellant to file brief when the motion came for the first time after the submission of the case, and they have also for the same reason refused to impose the payment of cost upon appellee for the failure to file brief, unless motion to this effect was made by the appellant prior to the submission of the cause. As no motion was made by appellant in this case, either before or after the submission of the case, the court does not feel warranted in following the suggestion of counsel for appellant as to cost.

For reasons indicated the judgment is affirmed.

HARRISON, JR. v. WILKERSON, &c.

(Filed May 31, 1904—Not to be reported.)

1. Taxes—Collection of—Delinquent taxpayer—Where a sheriff, pursuant to section 4241, Kentucky Statutes, seeks to collect by suit delinquent taxes, he is entitled to prosecute such suit without any intervention on the part of the auditor's agent; and where the latter also institutes a proceeding to collect the taxes such action should be dismissed.

2. Same—Where a sheriff had instituted a proceeding for the collection of delinquent taxes, the fact that the clerk failed to issue the summons upon the statement within five days after it was filed, was not material where the delinquent taxpayer had substantially agreed to enter its appearance to the proceeding.

L. J. Moore for appellant.

J. D. & G. R. Hunt for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Paynter.

Section 4241, Kentucky Statutes, reads as follows: "It shall be the duty of the sheriff or auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment, or railroad commission, for any year or years. The officer proposing to have such property assessed, shall file in the clerk's office of the county in which the property may be liable to assessment, a statement containing a description and value of the property proposed to be assessed, and the value of the corporate franchise, if any, and the name and place of residence of the owner, his agent or attorney, or person in possession of the property, and the year or years for which the property is proposed to be assessed. Within five days after the filing of such statement, the clerk of the court shall issue a summons against the owner to show cause, before the next regular term of the county court, which does not commence within five days after service of such summons, why such property or corporate franchise, if any, shall not be assessed at the value named in the statement filed. The summons shall be executed by the sheriff of the county by delivering a copy thereof to the owner, if in the county, if not, then to his agent, attorney or person in possession of the property. * * * As compensation for his services in causing such property to be assessed, the officer filing the statement shall be entitled to the penalty, which shall be paid to him after the full amount of the taxes shall have been collected." * * *

On November 18, 1902, the appellee, Wilkerson, sheriff of Fayette county, through an attorney, filed in the clerk's office of the Fayette County Court a statement, in which it is in substance alleged that the Lexington Cemetery Co. was the owner of personal property of the value of $43,000, which had not been listed for taxation by the county and State for the year of 1899 and subsequent years. On December 24, 1902, the appellant, J. H. Harrison, Jr., auditor's agent, examined the statement filed by the sheriff, and with knowledge of its contents and purpose, filed in the clerk's office of the Fayette County Court a statement for back taxes against the same company for the years covered by the statement of appellee on the same property, but he

stated that the omitted property was of the value of $60,000. Both cases were passed, by an arrangement with the company, until March 20, 1903, when they were consolidated, and a judgment was rendered by the Fayette County Court and the property was assessed at $43,000 for the years mentioned. The taxes and penalty were paid to the sheriff. The appellee refused to pay the penalty to the appellant and this action was instituted to recover it. The question to be determined is, which of the parties is entitled to the penalty?

This question arises from the fact that the auditors' agent sought to supersede the sheriff in his effort to compel the cemetery company to pay the taxes and obtain the penalty which would be his duty, if he succeeded in compelling the cemetery company to list its property for taxation. When the statement was filed by the sheriff, an interview was had with the attorney and president of the cemetery company, and an arrangement was made to allow the proceeding to be postponed until this court disposed of a petition for rehearing in an action in which it had delivered an opinion holding the personal property of the cemetery liable for taxes. The statement filed by the sheriff was a substantial compliance with the statute. The cemetery company entered its appearance thereto and made no question as to its sufficiency. There can be no doubt that the appellee would have been entitled to the penalty, if the appellant had not instituted a proceeding. The statute does not contemplate that both the sheriff and the auditor's agent shall institute proceedings against a delinquent taxpayer. To allow it to be done unnecessarily would harass a delinquent taxpayer and cause unseemly conflict in efforts to collect penalties. If the auditor's agent or sheriff files a statement, he is entitled to prosecute it, and he can not be deprived of his right to collect the penalty by the interference of the officer who might have taken the initiative, but did not do so. The conclusion which we have reached is supported by the reasoning of the court in Butler, Sheriff v Watkins' Ex'ors, 16 Ky. Law Rep., 302.

It is urged that the appellant had the right to institute the proceeding, because the clerk had failed to issue the summons upon the statement filed by the sheriff. The statute made it the duty of the clerk to issue a summons within five days after it was filed, but this he failed to do. This was immaterial, because the cemetery company had substantially agreed to enter its appearance to the proceeding, if the Court of Appeals adhered to its opinion, and as the court did adhere to its opinion, the cemetery company entered its appearance to the proceeding. Because the sheriff was not prosecuting the proceeding with as much vigor as appellant believed he should, did not give him the right to supersede the sheriff by instituting another and similar proceeding.

It is urged that the sheriff had no right to execute the summons, because he filed the statement and was to have the penalty under the law. It is difficult to see what bearing this has on the issue between the appellant and appellee. The proceeding instituted by the sheriff was sustained and the value of the property was fixed at the amount alleged in the statement filed by him. Independent of all this, the statute expressly provides that a summons issued upon such a statement shall be executed by the sheriff.

In argument it was stated that the sheriff could not file this statement

through an attorney. It was done by appellee's direction, and was prosecuted to a successful determination. If he chose to employ an attorney to assist him, and pay the fee himself, he had the right to do so. The principle of law invoked by the appellant, that an officer can not delegate to another the performance of a duty requiring the exercise of a discretion, has no application to the facts of this case.

The conclusion we have reached obviates the necessity of determining whether the summons which was issued December 24, 1902, was upon the statement filed by the sheriff, or that filed by the auditor's agent. The mere fact that the two proceedings were consolidated, did not deprive the sheriff of the right which he had acquired to prosecute the proceeding. Instead of consolidating them, the court should have dismissed the one instituted by the appellant.

The judgment is affirmed.

BURKHART v. VINE GROVE COMMON SCHOOL DISTRICT TRUSTEES.

(Filed May 31, 1904.)

Schools — Furnishing fuel for school — Enforcing payment therefor — Where one has furnished coal for use of a common school district for several years, under section 4444, Kentucky Statutes, part of common school law, providing that the "trustees shall assess, and the treasurer collect, a capitation tax of $1.50, or less, on all persons having children attending the school, to pay for fuel, etc.," he is entitled to have a sufficient sum to pay for the coal furnished by him to the school for each year, levied and collected from the patrons of the school for that year, provided the levy for that year did not reach a maximum tax of $1.50. If the full tax has been levied, and there are still debts in excess of it, there is no statutory authority for the payment thereof.

R. L. Stith for appellant.

L. A. Faurest for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Wm. A. Burkhart, recovered a judgment against the trustee of common school district No. 63 of Hardin county for $68.40, with interest and cost, for coal furnished and used in the school house of the district, on which execution was issued and returned no property found. After notice to the trustee, he brought this action for a mandamus to compel the trustees of the common school district to levy and collect a capitation tax under section 4444 of the Kentucky Statutes, on all persons having children attending the common school of the district, which would be sufficient to realize a sum sufficient to pay off his judgment. The defendants, in their answer, allege that the account upon which plaintiff's judgment was rendered was for coal furnished to the district in separate amounts for each of the years from 1892 to 1902, inclusive, and should have been paid as incidental expenses by a levy of a capitation tax upon the patrons of the school, for the amount furnished during each successive year; that there was a poll

tax levied and collected by the trustees from the patrons of the school for each of these years, for incidental expenses; and that no funds arising from such levy and collection for this purpose came into the hands of the present trustees of school district No. 63; that the patrons of the school were not the same as they were for the years in which the coal was actually furnished; and that they had no right or power to levy a tax upon the present patrons of the school to discharge indebtedness incurred in former years. They allege that plaintiff was a trustee for several of the years in which the coal was furnished by him; and that it was his duty to have seen that a sufficient tax was levied to pay the incidental expenses of the school during such years; and that no indebtedness was incurred in excess of the levy for such purpose; and that by his failure and negligence to do so he was estopped from calling upon them as his successors to do so. A general demurrer was filed to the answer by the plaintiff, which was overruled. He thereupon filed a reply, denying the alleged estoppel. A demurrer was sustained to the reply, and declining to plead further, his petition was dismissed.

Trustees of a school district have no power to levy or collect taxes unless expressly authorized to do so by statute. Section 4440 of the Statutes, authorizes them to levy and collect a tax for the erection and equipment of a schoolhouse and for repairs thereto. Section 4441 to pay indebtedness previously incurred in the erection and furnishing of a schoolhouse. But neither of these sections authorize the levy of a tax to pay incidental expenses. The only other section of the school law, which authorizes the levy of a tax, is section 4444, which reads: "Unless there are sufficient funds on hand which may be used to pay the contingent expenses, incident to conducting the school comfortably, the trustees shall assess, and the treasurer of the district shall collect, a capitation tax of $1.50, or less, on all persons having children attending the school of the district, the same to be collected as provided in section 4443, and used to pay for fuel and other things needful to keep warm, clean and comfortable the house where the school is conducted."

Under this section, the cost of keeping the schoolhouse warm, clean and comfortable must be paid by persons having children attending the school at the time. The answer filed in this case does not allege that the capitation tax of $1. 50 was levied and collected for each of the years in which the plaintiff furnished the coal to the district, but only that a capitation tax was levied for that purpose. It was plainly the duty of the trustees to have levied and collected a sufficient tax upon persons having children attending the schools for each year, sufficient to have defrayed the necessary expenses, and if as a matter of fact, they failed to do this, then plaintiff is entitled to have a sum sufficient to pay for the coal furnished by him each year to the school, levied and collected from the patrons of the school for that year, provided the levy for that year did not reach a maximum tax of $1.50. Of course, if the full tax was levied, and there was still debts in excess of it, there is no statutory authority for its payment. But appellant is entitled to be paid for his coal by the patrons of the school at the time it was furnished, if it is practicable to do so under the statute.

For reasons indicated the judgment is reversed and cause remanded, with instructions to allow plaintiff to amend his petition, setting out definitely

the amount of coal furnished each year, and the persons having children attending the school for such year, and for other proceedings consistent with this opinion.

BURCH v. NICHOLAS, &c.

(Filed May 31, 1904—Not to be reported.)

1. In this action seeking to have a deed declared a mortgage, the judgment of the chancellor decreeing the relief sought will not be disturbed, where the proof shows the parties executing the paper were ignorant negroes who thought the relation of attorney and client existed between them and the person who drew the paper; and it appearing from the proof that the property was worth considerably in excess of the consideration named in the paper.

2. Same—It is the policy of the law to relieve against contracts made by a person with an attorney, where the confidence induced by the relation of attorney and client, probably threw such person off his guard.

W. T. Burch for appellant.

Gardner & Moxley for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Hobson.

On August 25, 1900, Emma Nicholas and her husband conveyed to Virginia Burch, in consideration, as recited in the deed, of $110, cash in hand paid, and $850 to be thereafter paid to Rosa Ostreicher, a house and lot in Louisville conveyed to Emma Nicholas by Rosa Ostreicher on December 2, 1899. Nicholas and wife on November 8, 1901, filed this suit against Virginia Burch to have the deed declared a mortgage, and the court having so adjudged, she appeals.

The proof shows that W. T. Burch, the husband of appellant, is an attorney-at-law, and as such had represented the husband of Emma Nicholas in some legal proceedings previous to her purchase of the property in contest from Rosa Ostreicher, and he was the attorney of Emma Nicholas in the purchase of the property and in the making of a payment on it after the purchase. She contends that he continued her attorney throughout. He contends that the relation of attorney and client had ceased before the deed to his wife was made, and that the transaction with her was deliberately had and fully understood. While we do not doubt the sincerity of the testimony of Burch or his wife, we think the chancellor properly, under all the facts and circumstances, adjudged the deed to be a mortgage. Emma Nicholas and her husband are negroes; neither of them can read nor write; neither of them appears really to have understood in fact, the transaction. They had bought the property for $650, and it was worth something more than that; they evidently regarded Mr. Burch as their attorney, although he thought the relationship had ended, and in view of all the circumstances and the ignorance of Nicholas and his wife, the chancellor properly refused to hold the deed an absolute conveyance of the property. It is the policy of the court to relieve against contracts made by a person with an attorney, where the confidence induced by the relation of attorney and client probably

threw a party off his guard, and thus induced him to make a contract which he did not really understand, and would not otherwise have made. The law justly holds the attorney to a strict standard in his dealings with his client, and this rule must be applied where the person dealing with the attorney acts under the impression that the relation of attorney and client exists between them, although the attorney may not so understand, and may intend no wrong. The judgment protects appellant in the money she paid out, and under all the evidence, the chancellor's conclusions on the facts will not be disturbed.

Judgment affirmed.

SMITH, &c. v. CORNETT, &c.

(Filed June 1, 1904—Not to be reported.)

Conveyances—Construction of deed—Where the heirs of one dying intestate, conveyed their interests in the land left by him, designated as that "being in Harlan county on the Poor fork of Cumberland river," such conveyance does not include their interests in decedent's land on Clover fork, which was owned by decedent, but which fact was unknown at the time to them and the grantee. The general rule of construction being that the general description in a deed must be controlled and limited by the specific description, and where a deed is limited to a specific description, land not embraced therein can not be included, although those conveying own land in another boundary belonging to their decedent's estate.

Clay & Hardin and J. G. & J. S. Forrester for Leonard Smith, &c.

W. F. Hall and R. L. Greene for Jonathan Cornett.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Nunn.

In 1862, John H. Smith, then a resident of Harlan county, Kentucky, died intestate, the owner of two tracts of land in that county; one tract of about 800 acres lying on the waters of Poor fork, which was improved land, and known as the home farm; the other track of about 1,000 acres, lying on the waters of Clover fork, and was then wild and unimproved land. These tracts were divided by the crest of what is known as Big Black Mountain, and also separated by a survey of 2,800 acres, known as the John Lewis survey. All this land lies within a patent of 17,200 acres, patented to Boyd Dickerson, but the deceased held a patent to himself for 500 acres which was also inside of the boundary of the tract on Poor fork. The title to the 500 acres was superior to the Dickerson patent. He purchased from Dickerson land on Poor fork to square up his farm, which made up the 800 acres, Dickerson at the time executing to him a bond for the title. It was afterwards ascertained that this title bond covered and included the 1,000 acres of land on Clover fork. Smith left surviving him eight heirs—seven children and one grandchild. Jonathan Cornett married one of the daughters, and Ambrose Powell married another. Cornett and Powell administered on his estate, Cornett taking charge of the papers belonging to the decedent, and transacted most of the business in the settlement of the estate. Soon after they administered, Cornett began to purchase the interests of the children in the real and personal estate of the decedent, taking from them writings

showing that fact. In the year 1885, the appellants, Leonard Smith, Clarinda McDaniel and her husband, Wm. McDaniel, James B. Smith and Jonathan L. Smith, conveyed their interest by deed to appellee, Jonathan Cornett. The appellee on cross appeal, Leonard Smith, conveyed his interest to Jonathan Cornett on the 27th day of December, 1867. Appellee in the cross appeal, Emily Hoskins, who was Emily Short, an only child of a daughter of the decedent, never did convey her interest to Cornett, but Cornett claimed her interest by an alleged purchase from her father when she was an infant.

The appellants on the original appeal and appellees on the cross appeal, brought this action against Jonathan Cornett for the recovery of their interests in the 1,000 acres survey of land lying on the waters of Clover fork, alleging that the deeds made by them to Cornett only covered and included their interests in the 800-acre survey on the waters of Poor fork.

Cornett answered, traversing the allegations of their petition, claiming that the conveyances to him covered and included all their interests in both surveys, and also pleaded adverse possession and the statute of limitation.

The deed of Leonard Smith of date 1867, describes the land in which he conveys his interest, as follows: "All of the interest in the land owned by John Smith, deceased, with all the appurtenances to the same belonging, situated in Kentucky in said county, on the Poor fork of Cumberland river adjoining the land of John Lewis."

The deed of appellants on the original appeal describes the interest which they conveyed as follows: "All their interests in the real estate of John H. Smith, deceased, for and in consideration of the sums respectively named, etc., it lying and being in Harlan county on the Poor fork of Cumberland river, and bounded with the line of said tract of land."

The general rule of construction is, that the general description given in a deed must be controlled and limited by the specific description. This deed specifically describes the survey of Poor fork and shows of itself that the intention was to convey all their interest in this particular survey to Cornett. If they had intended to convey more, the words "on Poor fork of Cumberland river" would have been omitted, or the words "on Clover fork" would have been added.

It appears from the record, without consideration, that the agent or attorney in fact of Dickerson, had conveyed to the decedent, John H. Smith the land described in the title bond of Dickerson to Smith, but this fact was not known to any of the children or heirs of decedent until long after Cornett had bought their interests in what they all understood to be their interest in the home or Poor fork farm. The land on Clover fork was separated from the Poor fork farm by the crest of the Big Black mountain and the John Lewis 2,800 acre survey, and was in the woods and wild land. Appellee Jonathan Cornett did not know that the children and heirs of John H. Smith owned an interest in any land on Clover fork, as shown by his own testimony, until after he had purchased all their interests.

We are of the opinion that the language contained in the deeds only conveys to Cornett their interest in the Poor fork survey, and it was certainly not their intention to sell and convey their interests in lands they knew nothing of; and Cornett surely did not intend to buy or think he was pur-

chasing interests in lands which he did not know his vendors owned. These facts make our construction of the deeds certain, if it needed any evidence other than the language used.

After Cornett obtained these conveyances, he found among the papers of the deceased the title bond of Dickerson which covered the Clover fork 1,000 acres, and he instituted an action in the Harlan Circuit Court against the heirs of Dickerson for the purpose of getting title to himself. The court granted his prayer and caused the commissioner to convey to him the title to the Dickerson survey. He now claims that this having occurred more than ten years prior to the bringing of this action that it is a bar to their claim. We can not agree with him in this. The children and heirs of deceased Smith were not parties in any way to that action, and they are not bound thereby. His obtaining the title from Dickerson to himself must be regarded as his holding it in trust for the heirs of Smith. His claim of adverse possession and the plea of limitation is without any foundation, as this survey of 1,000 acres has never been in the adverse possession of any one, it being wild and unenclosed land.

Wherefore, the judgment of the lower court is affirmed on the cross appeal and reversed on the original appeal, and the cause remanded for further proceedings consistent with this opinion.

GILL v. LANE.

(Filed June 1, 1904—Not to be reported.)

Partition of land—Joint owners—Indivisible without impairing value of the whole tract—It appearing from the pleadings and proof that the tract of land jointly owned by appellant and appellee, containing 578 acres, on which is located a popular summer resort known as Olympian Springs, with the buildings attached thereto; that the land is unproductive for agricultural purposes and can not be divided into two equal parts without injury to the whole tract, the chancellor properly adjudged a sale of the entire tract upon the petition and prayer of the appellee, and an equal division of the proceeds of the sale.

Reuben Gudgell & Son and Hazelrigg & Chenault for appellant.

C. W. Goodpastor for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Settle.

The appellant, George C. Gill, and the appellee, James W. Lane, are the joint and equal owners and in possession of a tract of land lying in Bath county containing 578 acres. Upon one side of this tract is situated the celebrated "Olympian Springs," a popular watering place and summer resort.

The most celebrated of the mineral waters on this land is the well-known salt sulphur well, which is said to contain an inexhaustible supply of water, possessed of great medicinal properties. Upon the grounds contiguous to the salt sulphur well is a hotel building, also cottages, and other improvements suitable for a summer resort. The well is the most valuable thing belonging to the land; in fact, the soil itself is sterile and unproductive,

Since appellant and appellee have been the owners of this property, they have been renting it to parties engaged in keeping hotels, and such places of public resort for health and recreation. But having come to the conclusion that the property was not yielding sufficient profits on the amount invested therein, and failing to agree upon a satisfactory division thereof, this action was instituted by appellee in the Bath Circuit Court to obtain a decree for the sale of the property, and an equal division of the proceeds.

It is alleged in the petition "that said tracts of land are very valuable and worth a large sum of money; that the chief sources of their value are the numerous mineral springs distributed over them; that without said mineral springs said tracts of land would be of little value; that the land is not productive, and, therefore, not well qualified for agricultural purposes; that said property has been used as a summer resort because of the healthful mineral springs aforesaid, for more than fifty years, and is now so used, and can not be divided without materially impairing its value; that the plaintiff desires a sale of the whole thereof because a division thereof would render the interest of each joint owner of little value."

In his answer the appellant, Gill, admits that the property is very valuable, chiefly because of the numerous mineral springs distributed over the same, but denies that without the mineral springs the land would be of little value. It is also denied in the answer that the land is indivisible, or that such division can not be made without materially impairing its value; for which alleged reason appellant resisted any sale of his one half interest, and asked that the land be partitioned between him and appellee by commissioners of the court. A number of depositions were taken by each of the parties as to the value of the property, and whether or not it could be divided between the owners into two equal parts in value.

The lower court appointed three commissioners to make the partition, and by its order gave them directions as follows: "They will proceed to make partition and allotment of the real estate mentioned and described in the petition and exhibits of this case, if the same can be made into two lots or parcels of equal value, and allot one to the plaintiff, J. W. Lane, and the other to the defendant, George C. Gill; that in making such partition and allotment, the commissioners shall take into consideration the facts as to whether the said property can be partitioned without materially impairing its value as a whole, or whether or not the interest of one of the joint owners will thereby be rendered of less value than the interest of such joint owner in the whole tract; that if such partition can not be made, they will so report, with their reasons therefor."

Thereafter the commissioners filed their report, which, omitting the formal parts as to having been sworn, the time of their meeting, etc., is as follows: "That they had carefully examined the property described in the petition and find that it is impossible to divide same between its joint owners without materially impairing its value, and hence we did not divide it. The chief value of the property is due to the salt sulphur well, or spring, near which all the buildings are located. Were it not for the salt sulphur well, the buildings would add but little value to said property. The land is unfertile and unproductive. If a portion of said land which could be sold for one-half as much as the whole tract could be sold for, were allotted to one

of the joint owners, the other portion could not be sold for a sum anything near as much as one-half of what the whole tract could be sold for. Or, if we had allotted to one of the joint owners a portion of said land equal in value to one-half the value of the whole thereof, the remainder would be of far less value than the value of one-half of the whole."

To this report a number of exceptions were filed by appellant, all of which were overruled by the court, and the report confirmed. Thereupon, a decree was entered directing a sale of the whole property, and a division of its proceeds equally between the owners, the court being of opinion that the property could not be divided without materially impairing its value. The appellant insists that the property could have been divided without materially impairing its value, and that it was error for the lower court to adjudge its sale. It appears from the evidence that the property in controversy is worth not less than $16,000, but independently of the salt sulphur well it is worth from $5 to $7 per acre. The land is of little value for agricultural purposes; in fact, nearly all of the witnesses testified that it is unproductive. R. E. Hazelrigg, one of the witnesses introduced in the case, and who now lives upon the property in question, testified that he had lived there and kept the springs as a watering place since 1897, and that outside of thirty acres, including the springs with improvements, the value of the land would not exceed $6 an acre; that the land is very unproductive; that he had cultivated it for the last five years and had been unable to get an average of three barrels of corn per acre therefrom; that it would not produce wheat, tobacco, or oats, but he had known it to produce a fair crop of millet. Of the eleven witnesses introduced by appellee, all testified that the property in question could not be divided without materially impairing its value.

The appellant took the depositions of four witnesses as to the value of the property, but none of them were asked, or testified, as to whether the property could or could not be divided without materially impairing its value. They merely testified that the property could be divided into two parcels of equal value. If the whole property is worth $16,000, of which there can be no doubt from the evidence, and its chief value is due to the salt sulphur well and the improvements near it, and the outlying portion if sold alone is worth from $5 to $7 an acre, it would seem impossible to so divide it between its joint owners that the portion of each would be worth $8,000, or could be sold for that sum.

Section 490, Civil Code, provides that "a vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity, in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant, first, if the share of each owner be worth less than $100; second, if the estate be in possession and the property can not be divided without materially impairing its value, or the value of the plaintiff's interest therein."

We are of opinion that the appellee has brought his case up to the requirement of the section of the Code supra, in that he has alleged and proved that the property in controversy can not be divided without materially impairing its value. It follows, therefore, that the court below did not err in adjudging that it be sold as a whole.

In the case of Tolbert v. Campbell, 23 Ky. Law Rep., 2199, this court,

speaking through Judge O'Rear, said: "We hold, that unless it is made to affirmatively appear that the property is indivisible without materially impairing its value, it would be error to adjudge its sale as an entirety. The owner of each share is entitled to hold his property subject only to the rights of his co-tenants. If indivisible, it would be unjust to the other tenants to compel them to suffer sacrifices to gratify one joint owner's whim or claim to personal use of the identical property."

In Kean v. Tilford, 81 Ky., 606, it was also said by this court: "Under this provision of the Code (section 490), it is insisted by counsel that an objection by any one of the joint owners will prevent the sale of his share, regardless of the rights of the other parties in interest. The objection can only prevail, as we construe this provision of the Code, when a division can be had without materially impairing the value of the property, or of the plaintiff's interest in it."

We see no reason why the chancellor has not full power to adjudge a sale when the proof, as in this case, brings it within the provision of the Code.

Wherefore, the judgment is affirmed.

STEINWENDER-STOFFREGEN COFFEE CO. v. F. T. GUENTHER GROCERY CO.

(Filed June 1, 1904—Not to be reported.)

Contracts—In a contract entered into between appellant and appellee by which the former was to ship its coffees to the latter and canvass the latter's territory with a resident salesman so long as it is to the mutual interest of the parties to do so, such contract was not binding, because by its terms the appellee could have given up the sale of the coffees, nor was the appellant compelled to furnish any specified amount of coffees; and in an action by the appellant for coffee which the appellee had sold on commission, it was error to award damages upon a counterclaim on the ground that appellant had refused to ship appellee a certain brand of coffee.

Powers & Anderson for appellant.

J. D. Atchison for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Nunn.

The appellant instituted this action against appellee for $160, the price of coffee furnished appellee for sale on commission and which it had sold. Appellee answered, admitting this indebtedness, but made its answer a counterclaim and asked for $850 damages for the breach of an alleged written contract which it claimed had been made and entered into between it and appellant for the sale and delivery of coffee to it from time to time by appellant. The alleged written contract is as follows:

"Owensboro, Ky., July 16, 1902.

"We have arranged with the F. T. Guenther Grocery Co. to handle our line of coffees over the territory traveled by them from Owensboro, Ky.

"We will fully canvass their territory on arrival of shipment, and will continue a resident salesman in said territory so long as it is to our mutual

interest that special work should be done in order to keep the goods in the hands of our customers, and said salesman is to work exclusively on our roasted coffees, through the F. T. Guenther Grocery Co. It is understood that the F. T. Guenther Grocery Co. are to co-operate with our salesman to the best of their ability. We will ship a line of our coffees of our selection, and it is further understood that should any of this, or after shipment of several grades, prove unsalable, we will transfer them to other territory for our account, same to be placed to the credit of the F. T. Guenther Grocery Co., or should any become unmerchantable through age, or any cause, we will replace the same with similar perfect goods, or goods suited to their market, or credit the same to their account at the net cost to them, and should the F. T. Guenther Grocery Co. desire giving up our line, we will relieve them of the same at the net cost of all coffees they may have in stock and order disposal.

"Terms, 10 per cent. trade discount and 2 per cent. ten days."

This was signed by the agents of the parties.

A trial was had and the jury returned a verdict for $200, deducting appellant's claim, and the court gave the appellee a judgment for the difference, and appellant has appealed. Appellee alleged that appellant had violated this contract in this: That about fifteen months after the date of it, appellant, without any cause, refused to ship it any more coffee of a brand known as "Old Glory;" that it had spent considerable time and means in advertising and introducing this brand to the trade, and had established a good trade for it, and introduced evidence to the effect that, in the opinion of the witnesses, they could have sold enough of this brand of coffee within the next twelve months after the alleged violation of the contract, the profit on which would have netted them the sum sued for.

Appellant controverted the claim of appellee, and contends that the paper or writing referred to was not a contract and not binding upon either of the parties, that it was simply an agreement between the parties for the conduct of business, to be terminated at the will of either party. And even if it amounted to a contract and had been binding upon the parties, that the evidence produced by the appellee did not authorize a recovery; that the mere opinion of witnesses that what they believed they could have made in the way of profits for a succeeding or ensuing twelve months from the sale of coffee, if the same had been furnished, was too uncertain and indefinite to authorize a recovery.

Contracts which are valid must be mutual and binding upon both parties. We have examined this paper with care, and have been unable to find anything binding upon the appellee. It was not compelled to perform any stipulation, and by the writing, the appellee could at any time have given up, without hurt or injury to itself, the sale of these coffees, and it was not compelled to make the first or any subsequent orders for coffee. Nor was the appellant compelled to furnish any specified amount of coffee, nor was there any specified length of time during which it offered or proposed to furnish appellee coffee. As we have said, it is a fundamental principle of law that there must be mutuality in every contract. If one of the parties is not bound, then the other is not. It is true that prior to the withdrawal by appellant of its offer to furnish coffee to appellee, every time appellee sent

to appellant an order for coffee, appellant was bound to fill that order; because by sending in an order the appellee accepted the standing proposition of appellant and the proposition or offer was turned into a contract to ship and deliver the specific amount of coffee thus ordered.

On the 19th of October, 1903, appellant notified appellee that it would not furnish it any more coffee, and thereafter did not; and though appellee did, after that time, request appellant to furnish it coffee, and was ready, able and willing to pay therefor, yet, as appellant had never agreed to furnish appellee any definite amount of coffee, in any definite time, nor at any definite price, and as the appellee on its part had never agreed to accept any definite amount of coffee in any definite time at any definite price, but had expressly reserved the right to refuse to take coffee, or order it whenever it pleased to do so, it was clearly the right of appellant to refuse to furnish any more coffee to appellee, after notice of its withdrawal of the proposition to further furnish appellee. To hold that appellant was liable on such an arrangement as the appellee calls a contract, would be to hold that there can be such a thing as a contract although it is lacking in mutuality. (Bishop on Contracts, Enlarged Edition, sections 78, 80; 24 L. R. A., 857; 105 Fed. Rep., 869; 114 Same, 77; and 57 L. R. A., 696; Cyc. Law and Proc., volume 9, 248 and 327.) On page 327 of the reference last named, it is said: "There are many cases in which the offer is definite enough, yet the accepter, by merely accepting, has really himself promised nothing in return, has not made himself liable for anything, so, that, although one is bound, the other is not, and the engagement lacks what is called mutuality; in such a case there is not an enforceable agreement. The most frequent example of this principle is when one offers to supply another with such goods of a certain kind as he may choose to order or may wish during a certain time, and the other accepts the offer. Here there is no consideration for the promise or offer, for the promisee has not bound himself to anything, and has incurred no legal liability at all."

We are of the opinion that the principles as stated herein are peculiarly applicable to the case at bar, and the appellant was not liable for failing to furnish coffees, at least after it had notified the appellee that it declined to furnish other coffee under this proposition. If the appellant's profits on the coffees furnished him for the fourteen or fifteen months in which he sold it, did not remunerate him for the trouble and expense he was put to in advertising and introducing it to the trade, and he sustained a loss, it was occasioned by his own neglect in his failure to obtain a valid contract. Entertaining these views, we deem it unnecessary to discuss the other questions presented on this appeal.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

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COURT OF APPEALS OF KENTUCKY.

GEDGE v. CITY OF COVINGTON.

(Filed June 1, 1904—Not to be reported.)

Street improvements—In an action by a city of the second class to enforce a lien for street improvement which was made at the instance of more than two-thirds of the abutting property owners, the ordinance directing the work, letting the contracts, accepting the work, having been regularly passed, the fact that the city exceeded its authority in attempting to guarantee the payment of the bonds by pledging its faith and credit, can not operate to relieve the lot owner of the cost of the improvement. The city acts as a sort of trustee for the collection of the assessments and can not apply this money to any other purpose than the payment of the debt.

Myers & Howard for appellant.

M. H. McLean and Wm. McD. Shaw for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge O'Rear.

This suit was brought by appellee, a city of the second class, to enforce a lien for a street improvement, which was made at the instance and upon the petition of more than two thirds of the abutting property owners. The ordinance directing the improvement and letting the contracts and accepting and approving the work are conceded to have been regularly passed.

Upon the petition of the property owners the city adopted, under section 3101 of Kentucky Statutes, what is known as the ten-year plan of paying for the improvement, that is, one-tenth of the cost of the improvement was to be paid each year by such of the property holders as did not pay in cash. The installments were to continue for ten years, with interest until the total cost was paid. The city issued its bonds and sold them for a sum sufficient to pay the total cost of the improvement, pledging the faith and credit of the city as well as the sums raised by the special assessments provided for in the ordinance under the section of the statute above named, to pay the bonds at their maturity. The money so raised was used in paying the contractors who did the work. It is admitted that the improvement was not.

ordered as the result of a vote at an election at which the proposition was submitted, and it is claimed that the liability, being one in excess of the revenues of the year in which it was contracted, was, under section 157 of the Constitution, the city's undertaking, and was invalid and void; that the property holder is not liable to the city because the city is not liable to its bondholders; that the contractor has been paid by funds realized by the sale of void bonds, and that thereby his lien has been discharged; that, as the holders of the bonds can not enforce the obligations against the city, the city has no lien upon the lots, for the improvement has not cost the city anything. It is also claimed that the city does not intend to pay the bondholders the liability incurred for this improvement, and that it will use the money collected from these assessments for general purposes, and that this would be and is an unauthorized collection of taxes against the lot owners.

In City of Covington v. McKenna, 99 Ky., 508, relied on by appellant, it was decided that such an obligation is void so far as it purports to impose a personal liability upon the city; that was the only point before the court for decision, or that was decided in that case. In the later case of City of Covington v. Nadaud, 103 Ky., 455, 20 Ky. Law Rep., 151, it was held that after such an improvement had been made, although the city was not personally liable for it, the lot owner was. To the same effect is the more recent case of City of Catlettsburg v. Self, 25 Ky. Law Rep., 164.

The attitude of the parties may be summed up thus: The city has regularly, and in pursuance of the power conferred by statute, authorized the improvement of the street at the proper cost of the abutting lots. The owners of the lots have asked that under a favorable provision of the statute they be permitted to pay this cost in ten annual installments instead of one, and that the city issue such an obligation representing this cost, as would procure the extended time of payments. The city has done what it was requested to do by the persons most directly concerned, and what by statute it was authorized to do. In addition the city undertook by guaranteeing the payment of the bonds and pledging its faith and credit, a personal liability, which, under the Constitution, it was prohibited from doing in the manner in which it was done. This last undertaking is admittedly void, but how that can operate so as to relieve the lot owner or his property of its charge for the cost of the improvement, we are unable to see. The city, in collecting these assessments, acts as a sort of trustee for the person to whom they are ultimately payable. The fund so collected is in reality, by the terms of the statute, a trust fund, set apart solely to the discharge of the debt made for that improvement. The city can not legally apply this money to any other purpose than the payment of that debt. The city's creditors can not be affected in their legal rights by any contrary purpose or intention of the city administrators.

The judgment is affirmed.

RUBY CARRIAGE CO. v. KREMER.

(Filed June 3, 1904—Not to be reported.)

1. Sales of personal property—Damages—In an action by the purchaser of a vehicle against the seller for damages, it being alleged in the petition that the seller represented the vehicle to be of high grade and excellent work-

manship, the answer failing to traverse that allegation and the evidence showing the vehicle to be so defective in material and workmanship as to be totally unfit for the purposes for which it was purchased, a judgment for the purchase price of the article will be upheld.

2. Pleading—It was not error to overrule a motion for a judgment non obstante veridicto on the ground that no reply was filed controverting an amended answer which only sets out matters of defense with greater particularity than was done in the original answer, all of which were denied by the reply.

John Barret and Chas. L. Taylor for appellant.

Chatterson & Blitz for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Settle.

This is an appeal from a judgment for $215 recovered by appellee of appellant in the court below for the purchase price of a buggy which the latter had sold him, but which was alleged to have been worthless.

It was in substance alleged in the petition that appellee is a physician, and that appellant at the time of the sale to him of the buggy represented it to be of high grade, first class as to material and workmanship, and especially adapted and desirable for the use of a practicing physician of the city of Louisville; that appellee, being ignorant as to the material and workmanship of the buggy, relied upon and was induced by the representatives of appellant to purchase it, but that it was in fact defective and worthless at the time of its sale, in material and workmanship, and unsuitable for his use as a physician, which was then known to appellant, but unknown to him; that in a short time the buggy got out of repair, and later, one, and then the other, of its axles broke, and it otherwise gave down, and became useless, and was by appellee returned to appellant, who yet has it, but it refused to return to appellee the purchase price thereof, for which reason this action was instituted to recover the sum paid by him for the buggy.

The answer of appellant does not deny that it represented the buggy to be of the character alleged in the petition, but avers that it only undertook to keep it in repair for a year free of cost to appellee, and denies a return of the buggy "complete," or that it was returned at all except for repairs. Also avers that the injuries resulting to it were caused by the negligence of appellee, his servants and agents in the handling and use of the buggy. The affirmative matter in the answer was denied by the reply, and upon the issues thus made there followed two trials of the case, each resulting in no verdict. Upon the third trial, however, the jury returned a verdict in appellee's favor for the sum above indicated, upon which judgment was duly entered. Thereupon appellant entered motion for a judgment non obstante veridicto, and also for a new trial, both of which motions were overruled.

As according to the weight of evidence the buggy was so defective in material and workmanship as to be totally unfit for the purposes for which it was purchased by appellee, he had the right upon returning it, or offering to do so, to sue for and recover the purchase price, instead of suing to recover damages for the breach of the warranty as he might have done. In Cook v. Gray, 2 Bush, 121, it is said: "There is a material distinction be-

tween a warranty of a chattel on an executed sale and a warranty that the article to be manufactured and delivered in the future shall be of a particular quality. In the former case the purchaser has the right to rely upon the warranty without examination or explanation of the article, and, therefore, may return the article, or sue for the breach of warranty, or use it as a defense by way of recoupment." (Dana v. Boyd, 2 J. J. Marshall, 593-4; Leas Manufacturing Co. v. Waller, 18 Ky. Law Rep., 846.)

In Am. & Eng. Ency. of Law, 1st edition, 28th volume, 19, under the head of "Warranty," it is said: "Another exception to the general rule has been made in cases where the breach of warranty is such as to amount to a total failure, as where the article delivered proves to be absolutely worthless, or entirely different from what the contract calls for; in such cases the vendee may return the article and recover the purchase money paid."

The instructions given by the trial judge properly presented this view of the law, which we think applicable to the facts of this case, as well as the law covering other aspects thereof, and there was no error in the refusal of the court to disturb the verdict of the jury, or set it aside. We are also of opinion that the court did not err in overruling the appellants' motion for a judgment notwithstanding the verdict. The motion was based upon the ground that as no reply was filed controverting the amended answer, appellant was entitled to a judgment upon the face of the pleadings. We do not think so. The amended answer was filed just before the last trial. It appears to contain no new matter, but only sets out with greater particularity matters of defense relied on in the original answer, all of which was denied substantially by the reply. The issues were not materially changed by the amended answer, and the proof upon the last trial seems to have been practically the same adduced upon the two former trials, and we are not prepared to say that the verdict and judgment are not supported by the evidence.

For the reasons indicated the judgment is affirmed.

McFARLAND, &c. v. HATCHETT, &c.

(Filed June 1, 1904.)

Deeds—Construction—Conveyance to married woman and her children—Interest of husband—A deed to Sarah Hatchett for a house and lot contained the following: "The party of the first part sells and hereby conveys to Sarah Hatchett and her children a certain lot of ground (describing it). To have and to hold to her the said Sarah Hatchett and her children, with covenant of general warranty." Held—That Sarah Hatchett, under said deed, took a life estate in the property, with remainder to her children, the words "to her children," being used in the deed as words of purchase rather than as word of inheritance, and her husband, Roland Hatchett, to whom she was married before the husband and wife act of 1894, had no curtesy in said land.

W. P. McClain for appellants.

Lockett & Lockett for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Nunn.

The appellants sued Roland Hatchett, alleging that Sarah Hatchett, who was the mother of appellant, Julia McFarland, and appellee, Madison Hatchett, owned a house and lot in Henderson, Ky., for life, and that her children owned the fee in remainder; that Sarah Hatchett died some two years before the institution of this action, and that appellee, Roland Hatchett, had been in possession of this property and owed her and her brother rent from the date of her mother's death to the institution of this action; that the property was not susceptible of division, and prayed judgment for rent against Roland Hatchett and for a sale of the property and for a division of the proceeds.

Appellee, Roland Hatchett, demurred to the petition; his demurrer was sustained; appellant declined to amend, and the petition was dismissed, with costs. The circuit court decided that Sarah Hatchett had a fee simple in the property, and that appellee, her husband, Roland Hatchett, had an estate by the curtesy in it for life. The deed to Sarah Hatchett was made prior to the passage of the married woman's act in 1894, and their marriage occurred long prior to the passage of this act, and if, under the deed, Sarah Hatchett took a fee-simple title, then the court was right in adjudging Roland Hatchett an estate by the curtesy. (Rose v. Rose, 104 Ky., 48, Mitchell v. Violett, 104 Ky., 77.)

The question to be determined is, whether under the deed to Sarah Hatchett for this land she took a fee-simple title or only a life estate. If she took the fee, the judgment must be affirmed; if only a life estate, a reversal must follow. The deed to Sarah Hatchett for this lot was filed with and made a part of appellants' petition, and such parts of it as are necessary to elucidate the question involved are as follows: "This indenture made and entered into this 20th day of October, 1883, by and between W. P. Robinson and Jennie Robinson, his wife, of the first part, and Sarah Hatchett (colored), wife of Roland Hatchett (colored) of the second part, and all of Henderson county, Ky., witnesseth: That for and in consideration of the sum of $60 in hand paid, the receipt of which is hereby acknowledged, and the note of the party of the second part executed and delivered to the party of the first part for the sum of $65, due six months after date and bearing 6 per cent. interest, the party of the first part sells and hereby conveys to said Sarah Hatchett and her children, a certain lot of ground situated in the city of Henderson (here describing the property). To have and to hold to her, the said Sarah Hatchett and her children, with covenant of general warranty."

The word "children," is a word of purchase, and not of limitation, and, therefore, where property is devised or conveyed to a woman and her children, the children take as joint tenants with the mother, where there is nothing to show a contrary intention. (Turner v. Patterson, 5 Dana, 295; Cessna v. Cessna, 4 Bush, 516; Powell v. Powell, 5 Bush, 620, Bell v. Kenneer, 101 Ky., 271.) But where there are other words in the will or deed showing that the word children was used in the sense of heirs, as where they are followed by the word forever, and in other parts of the instrument the words children and heirs are used interchangeably, the term children will be read as meaning heirs, and construed as a word of limitation and

not of purchase. This construction is adopted only to effecutate the intention of the maker when there is enough on the face of the instrument to show that he used the word children in the sense of heirs. (Moran v. Dillehay, 8 Bush, 434; Hood v. Dawson, 98 Ky., 285; Lackland v. Downing, 11 B. M., 32; Williams v. Duncan, 92 Ky., 125.)

On the other hand, the word heirs will be read as synonymous with children and construed as a word of purchase, when necessary to effectuate the intention of the grantor in the deed. (Tucker v. Tucker, 78 Ky., 503; Harper v. Wilson, 2 A. K. M., 256.) An exception to the above rule has been made in the case of a deed or will from the husband to his wife and children. These cases are held to constitute a peculiar class, and in such cases it is held that the wife takes the property for life, with remainder to the children. (Fletcher v. Tyler, 92 Ky., 145; Smith v. Upton, 12 Ky. Law Rep., 28; Davis v. Hardin, 80 Ky., 672.)

Where the woman has no children when the deed or will is made, and it is made to her and her children, she takes the life estate, with remainder to her afterborn children. (Parr v. Estill, 16 B. M., 245; Bodine's Adm'r v. Arthur, 91 Ky., 55.)

This court, in the case of Webb & Harris v. Holmes, 3 B. M., 404, construed a deed similar to the one before us. The children in that case were not named as parties to the deed, but were named in the granting and habendum clauses. The court said: "This is a deed inter parties in which Crist and wife are named parties on the one side, and Sarah Thomas and her husband on the other; the children are not parties, nor are they named as such in the caption of the deed, which, by the designation of the parties, is intended to confine the deed to those who are named, in exclusion of all others as contracting parties. And as a stranger who is not a party to a deed, can derive no legal interest under it, or maintain covenant on it, so it is well established that those who are not parties to a deed can take no present interest under it; * * * but those who are not parties may take, by way of remainder. So to give to the deed operation at all, as to the children, they must be construed to take in remainder only, as they can not take a present joint interest with their mother. And surely such a construction should be given to the deed as to give some beneficial interest to the children, as they were clearly intended to be provided for. By giving to them an estate in remainder in fee to take effect after the life of their mother, they all may be provided for, not only those who are born before, but those who are born after the date of the deed, * * * and it may be fairly presumed that it was as much the object of the donor to provide for afterborn children as those that were born before the date of the deed." To the same effect are the cases of Foster v. Shreve, 6 Bush, 521, and Basket v. Sellars, 93 Ky., 8.

In the case of Viley, &c. v. Frankfort & Cincinnati Ry. Co., 21 Ky. Law Rep., 255, it was held that a deed in form like the one under consideration in this case, passed the fee-simple title to the grantee named in the caption. We have the original record in that case before us. Samuel Viley was the father of J. M. Viley, and the caption of the deed was as follows: "This indenture made and entered into this, the —— day of ——, 18—, between Samuel Viley of the first part, and John Viley of the second part." The consideration was love and affection which the father bore to the son. Both

in the granting and habendum clauses the language was to "John Viley and his children." The court in that case, in construing the fee to John Viley, was in conflict with the foregoing authorities, and we are inclined to adhere to the construction given to the deed in the former opinions.

In the case under consideration, Sarah Hatchett, the grantee in the deed, named in the caption, paid for the land, and she had the right to control the form of it and especially the parties who should take under it, and it is presumed that she intended that her children should take the remainder in fee, reserving to herself the life estate, and we are constrained to hold that the words "and her children," as used in the granting and habendum clauses, were used as words of purchase rather than as words of inheritance.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

SOHAN v. GIBSON, &c.

(Filed June 1, 1904.)

1. Sale of land—Inadequacy of price—Rescission of contract—Province of chancellor—Inadequacy of price alone, or the payment of a greater price by the purchaser than the thing is worth, will not authorize the rescission of the contract. It must appear that the vendor in making the sale was guilty of actual fraud, or of such unfair conduct as to put the vendee at a disadvantage. It is not the province of the chancellor to modify a contract between parties merely because in his opinion it was to the undue advantage of one or to the disadvantage of the other.

2. False representations—Opportunity for inspection of property—If the purchaser had time and opportunity to examine the land, or have it examined, and did so, she was not entitled to relief, although the vendor may have made false representations as to its quantity or value.

Barker & Wood for appellant.

C. H. Moorman and O'Meara & James for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Settle.

The appellant, George W. Sohan, sold and conveyed to appellee, Annie M. Gibson 31¼ acres of land in Hardin county, and a lot of personal property consisting of two horses, one surrey and harness, sixteen head of hogs and shoats, two cows and calves, all the fowls on hand, one range, child bed, and a set of dining chairs. The consideration for the sale of the land and personal property mentioned was $2,000, $1,400 of which appellee paid in cash upon receiving the deed, and for the remaining $600 she executed to the appellant her three several notes of $200 each, with interest from date, payable in one, two and three years, respectively, secured by lien upon the land.

The deed contained a provision to the effect that if appellee failed to pay the first note when due, the remaining two notes were to become due and payable. After the maturity of the first note and the failure of appellee to pay it, this action was instituted by appellant upon all three of the notes, and to enforce the lien retained in the deed to secure their payment. Ap-

pellee, Annie M. Gibson, resisted the payment of the notes, and by answer and counterclaim, asked a rescission of the contract upon the ground that at and before the purchase of the land, and for the purpose of inducing her to make the same, the appellant falsely and knowingly represented to her that the land was fertile and very productive; that it would produce, during an ordinary season, 50 bushels of corn per acre; that there were 35 acres in the survey; that the land did not wash, and that the cellar under the house on the premises was healthy, all of which representations were alleged to be false and known by appellant at the time to be false, but were then unknown to appellee to be false.

The answer further avers that the appellee, Annie M. Gibson, and her husband, were not familiar with farming lands, and were unable to judge of the quality of the land sold them by appellant, and for that reason that she relied upon, and was induced by his alleged false representations, to purchase the land of him. The affirmative averment of the answer and counterclaim were denied by reply, and upon the submission of the case the chancellor rendered judgment cancelling the notes sued on, and dismissing the action at appellant's cost. Of that judgment he complains, hence this appeal. Appellee does not seriously rely upon the alleged shortness in acreage. Indeed, it is apparent that there is no merit in this part of her defense, for it is not likely that appellant represented that the farm contained 35 acres when the deed from his vendor stated that it contained only 31¼ acres, and moreover appellee offered no objection to the deed made her by appellant which also gives the number of acres of the land conveyed as 31¼, and thereby informed her of that fact.

Appellee's proof seems to have been directed more particularly to the other alleged misrepresentations set forth in her answer. We think the evidence tends to prove the following state of facts: First, That appellant advertised his land through his Louisville agent, W. H. Pipes, whose deposition appears in the record, in which it is denied that any misrepresentations were made by him as to the land, or through the advertisement; upon the contrary, it appears from his deposition that after appellee and her husband looked at the land, they told him they thought it exactly as represented by him, and that it was the only place they had seen advertised that came up to the advertisement. Second, It also appears from the evidence that before appellee, who lived in Louisville, purchased the land of appellant, she went with her brother-in-law, Britt, to look at it, and did in fact with him inspect it, or have ample opportunity to do so, and that Britt later and before her purchase of the farm, went with appellee's husband to see it. Britt testified that the place, in his opinion, came up to the representations contained in the advertisement; that being a contractor and builder, he at appellee's request, estimated the value of the buildings on the land, which he found to be worth $1,000. This witness further testified that before the consummation of the trade between appellee and appellant, he talked with and drew the check of the former for the $1,400, which she paid for the land when the deed was received by her from appellant, and he then advised her, that if she was not thoroughly satisfied with the farm, the time to make her objections was before and not after the trade was made, but she was then satisfied, and the witness also testified that appellant made; no such repre-

sentations as claimed by appellee. The appellant himself states with great positiveness, in his deposition, that no such misrepresentations were made by him. Third. It further appears that appellant himself had paid $1,785 for the land when he purchased it, and that the personal property which he sold appellee with the land was worth $300.

As against these facts, we find the testimony of the appellee to the effect that appellant did represent the land to be productive, and that it would produce fifty bushels of corn per acre, that it did not wash, and that the cellar of the house was dry.

Three or four other witnesses introduced by appellee, testified that the land was poor and unproductive, and not worth, buildings included, exceeding $600. Taking the evidence all together, however, we are of opinion it conduces to prove that whatever representations were made to appellee by appellant with reference to the quality and value of the land, were mere expressions of opinion, not intended to defraud or deceive, nor calculated to do so, and that appellee had every opportunity and means at hand to discover their truth or falsity. Moreover, the circumspection manifested by her in looking at the land herself, having her husband and brother-in-law, Britt, to inspect it, the latter the second time, demonstrates that she was not misled by any misrepresentations of appellant, and that she did not rely thereon.

Inadequacy of price alone, or the payment by the purchaser of a greater price than the thing purchased is worth, will not authorize a rescission of the contract, and did not justify the cancellation of the notes sued on. It must further and satisfactorily appear that appellant, in making the sale, was guilty of actual fraud, or at least of such unfair conduct as put appellee at a disadvantage. It is manifest that the chancellor in deciding this case proceeded upon the sole theory that appellant had, exclusive of the notes sued on, received as much as, in the chancellor's opinion, the farm was worth. This in our opinion was not a proper ground upon which to base the judgment. It was not the province of the chancellor to modify or change the contract between the parties merely because it was to the undue advantage of one, or the disadvantage of the other.

In Livermore v. Middlesboro Town and Land Co., 20 Ky. Law Rep., 1704, in discussing this subject, this court said: "To establish actionable fraud, or fraud against which equity will relieve * * * it must appear that the misrepresentation was of a matter of material fact (as distinguished from opinion) at the time or previously existing (and not a mere promise for the future); must be relied on by the person whose action is intended to be influenced, and must be made with knowledge of its falsity, or under circumstances which did not justify a belief in its truth. This is the doctrine deducible from the Kentucky decisions. There are some modifications of this doctrine, but they are chiefly by way of substitution of an equivalent, for some one of the essentials necessary to constitute fraudulent misrepresentations, as in the cases where it is held that a fraudulent concealment of a material matter of fact, is the equivalent of an actual misrepresentation, and in cases in which a statement made as of personal knowledge, but without knowledge, was held to be equivalent to a statement whose falsity was proven."

If, as appears from the evidence to be the case, the land sold by appellant to appellee cost him $1,735, and he put with it in the sale to appellee personal property of the value of $300, it made the total cost of it to him $2,035, or $35 more than he received from appellee for it. It would seem, therefore, that he had some reason for declaring to appellee that the land was worth $2,000, and for putting forth such claims as would make it appear to be worth that sum. At any rate, it has not been shown by the evidence that he made any statement as to the value of the land which he knew at the time to be false. If the appellee had time and opportunity to examine the land, or cause it to be examined by another in her behalf, and such examination was made, she was not entitled to a rescission, or to the relief granted, although appellant may have made false representations as to its quality or value.

The case of Peak v. Gore, 94 Ky., 533, seems to us to be decisive of this case. The circumstances of that case worked a much greater hardship upon the purchaser than will result in this case. In that case, as in this, the purchaser was a woman. In that case the woman was a widow, in this case she has a husband who made for her an examination of the property, and otherwise assisted in its purchase. In Peak v. Gore the price paid for the property was more than twice its value, and the vendor, according to the evidence, admitted that he made statements which he knew to be false. In the case at bar the evidence is conflicting as to the value of the property, but no such discrepancy exists between the price for which the property was sold and that appellant claims it is worth, and appellant positively denies making any false representations. In Peak v. Gore, it is said: "The evidence makes it too plain for controversy that the hotel property for which appellants agreed to pay $10,000 was not at the time, nor is now, worth half that sum. Indeed, only one of nine witnesses who, having knowledge on the subject, testify as to its value, say it was or is worth as much as $5,000; the value fixed by the others being from $2,000 to $4,000, so that in view of the fact her son-in-law and co-purchaser, E. C. Montgomery, is insolvent and unable to pay any part of the purchase price, the bargain is a very hard one for Mrs. Peak, who is a widow. But the relief prayed for could not be granted for that reason alone. It is stated in the petition, and also sworn to by Mrs. Peak and Montgomery as witnesses, that pending negotiation about the trade and also at the time the contract was reduced to writing, Gore, as an inducement for them to purchase the property, stated it was worth, and he had been offered for it, $10,000, and that its earning capacity was from $25 to $50 per day. He practically admits making the statement as to its value, and though not as distinctly confessing he made the other alleged statement, it is evident to us from the manner in which his testimony is given, that he did do so. And as Mrs. Peak had at the time no experience or knowledge in regard to the value or earning capacity of hotel property, and Montgomery very little, if any, more, it is manifest the representations of Gore unduly influenced them to make the purchase, which they both testify neither had previously any intention to do. This, therefore, seems to us from all the circumstances, to be the case of persons without practical knowledge or experience of the value or management of particular property, being allowed to buy and pay an exorbitant price for it

by representations of the owner, known by him to be untrue. But as they purchased after having time and opportunity to ascertain for themselves the value of the property, and did in fact examine it, commendation or even false representations of its value by Gore, can not, according to a settled rule, afford ground for a rescission."

We think it is reasonably plain from the evidence that appellee, in the matter of the land trade, relied in part upon her own judgment and that of her husband, but more especially upon that of her brother-in-law, and that at least one visit to and inspection of the land by the latter occurred after she had talked with appellant about the land. Manifestly she purchased the land after having time and opportunity to ascertain herself, and through others, the quality and value of the land and buildings, and did in fact examine it. If, therefore, appellant made any false or fraudulent representations in regard thereto, such representations can not, according to a settled rule, afford ground for a rescission, or abatement in the purchase price.

What is here said in reference to the trade as to the land applies with equal force to appellee's complaint about the corn, her contention on that score being that appellant represented that there were a hundred bushels of corn on the land, that would go to her in the trade, when in fact there were only twelve bushels. The corn is not mentioned in the deed, and does not appear to have been a part of the personal property intended to pass to appellee with the land, and there is no allegation in the answer, of fraud or mistake in the drafting of the deed, whereby it was omitted to be mentioned therein. In any event, the corn was standing on the land at the time of the trade, and was as much subject to the inspection of appellee, her husband and brother-in-law as was the land, and in view of the opportunity afforded them to examine it and ascertain its quality, it is but fair to presume that such examination was duly made, and that in accepting the corn, the appellee relied upon her own judgment and that of her husband and brother-in-law, as in the matter of the land.

The view of the case herein expressed makes it unnecessary for us to consider the question as to whether it was necessary for appellee to offer to return the personal property received by her of appellant under the deed, to entitle her to a rescission of the contract.

For the reasons herein indicated the judgment is reversed and cause remanded, with directions to the lower court to set aside the judgment appealed from, and in lieu thereof enter judgment in appellant's behalf for the amount of the notes sued on, and the enforcement of the lien retained in the deed to secure their payment, and for such further proceedings as may be consistent with the opinion herein.

KENTUCKY LAND AND IMMIGRATION CO. v. CRABTREE.

(Filed June 1, 1904.)

1. Delivery bond—Action thereon—Extent of recovery—Attorney's fees and other expenses—Legal costs—Where a plaintiff in an action for the immediate delivery of personal property executed bond under section 180, Civil Code, and obtained possession thereof, and then dismissed his action and

effect to the words, 'such other costs and damages as he may show himself entitled to,' unless they are construed to mean, all such costs over and above the legal costs of the present suit, as he was necessarily subject to by reason of the suing forth and executing the writ of replevin. Neither is there any kind of cost which the defendant would be thereby made to incur, that would fall more naturally within such a description, than that extra compensation which he would necessarily have to pay attorneys for defending the suit, over and above the taxed fee. It is a cost or damage to which he was subjected exclusively by reason of the institution of the replevin suit, and would seem, therefore, to present the strongest claim for being embraced by the legislative description of such other costs and damages as he might show himself entitled to, over and above the legal cost of that suit."

The allowance of the attorneys' fee in this case was, by the peculiar language of the statute as it then existed, and the wording of the bond, permitted. It is clearly shown that if the bond had only contained the words "all legal costs," the attorneys' fee would not have been allowed. But by reason of the fact that, in addition of these words, the bond contained "and such other costs," he was entitled to recover the attorneys' fee. This was unlike the bond in this action. It only provided for the recovery for the costs in that action in which it was executed; that is to say, only the legal and ordinary costs. To the same effect was the case of Kenley, &c. v. Commonwealth for Henderson, 6 B. M., 588.

We are of the opinion that the lower court erred in submitting these items of damage to the jury.

If appellee was entitled to recover in this action for anything, he was entitled to recover for the value of the logs at the time taken from him and the interest on that amount from that date, and on this question the court erred to the prejudice of appellee, by not submitting the question of interest to the jury. The appellee in his petition does not allege any breach of the bond, except a failure to return to him the logs or pay him the value thereof, and it is shown by the order of the court in that action that the court did not adjudge that the appellant should do either of these things, and under the pleadings, as they exist, he is not entitled to recover in this action. From the record in this case it appears that there was a condition of the bond broken and violated by appellant. The appellants obligated themselves that they would duly prosecute that action, and, after getting possession of the logs by virtue of the bond, they then dismissed the action without prejudice, and failed to prosecute, as they had bound themselves to do. If appellee had alleged this stipulation in the bond and the breach thereof, he could have recovered the value of the logs with the interest thereon. In volume 24, 2d edition, Am. and Eng. Cyc., 540, it is said: "For breach of the condition duly to prosecute the action or prosecute the action to effect, the defendant has been held entitled to recover, in an action on the bond, all the damages he had sustained by reason of the institution of the replevin action and the taking of the property from his possession, such as the costs awarded to the defendant in the replevin action, and damages for the detention of the property. And on breach of such a condition, a recovery for the value of the property in the case of its non-return, has been per-

mitted, though in some cases the courts have denied the right to recover the value of the property."

And again, on the same page: "The condition to prosecute the action to effect or with effect requires a successful prosecution of the action, and extends to one continued prosecution from the commencement to the termination of the action; thus, if on appeal by the defendant from a judgment in the lower court for the plaintiff, the judgment is reversed and no venire de novo is awarded, the condition is broken. The condition is likewise broken when judgment passes against the plaintiff, or when the plaintiff suffers a voluntary or involuntary nonsuit, dismissal, or discontinuance of the action."

Again on page 539, it is said: "The condition that the plaintiff shall duly prosecute has been held not to require that the plaintiff should be successful, but merely to require that the action be prosecuted to final judgment. Such condition, however, would be broken by the plaintiff suffering a dismissal of the action, or by unnecessary delay to prosecute with good cause, although no judgment was entered."

The author refers to authorities in many States and to two in Kentucky to support this doctrine. The Kentucky cases are 2 Bibb., 199, Roman, &c. v. Stratton, and 2 Dana, 256, Yantiss v. Burditt.

This condition in the bond is as valuable to the defendant as any other. It would be unjust to allow a party to obtain possession of property by the execution of such a bond, and then fail to duly prosecute his action, and then upon his own motion to dismiss it without prejudice and hold the property from the defendant. This appears to be the situation of the case before us.

For these reasons the judgment of the lower court is reversed and the cause remanded, with directions that the plaintiff be allowed to amend his pleadings, if desired, and for further proceedings consistent with this opinion.

MOSELEY v. STROUD.

(Filed June 1, 1904.)

Execution—Transcript from the quarterly court—Duty of circuit clerk—Failure to perform—Validity—The requirements of Civil Code, section 723, that the clerk of the circuit court, when a certified copy of an execution from the quarterly court is filed in his office, indorsed in whole or in part no property found, to record same in a book kept in his office for that purpose, are mandatory; and such clerk has no authority in law to issue an execution thereon, until he has recorded the judgment, execution and return of the quarterly court in such transcript book; and such execution is void and a sale of land thereunder invalid.

Hays & Wells for appellant.

Powers & Anderson for appellee.

Appeal form Daviess Circuit Court.

Opinion of the court by Chief Justice Burnam.

Appellant brought this action under section 499 of the Civil Code to have

allotted to him an undivided one-sixth interest in a tract of 100 acres of land. He alleges in his petition that the other five-sixths interest in the land was owned and held by defendants as heirs at law of one Charles Wilhite; that he had acquired title to the one-sixth interest claimed by him, by purchase thereof on the 16th of March, 1896, at an execution sale made by the sheriff of Daviess county, under an execution which issued from the clerk's office of the Daviess Circuit Court on the 25th of February, 1896, in favor of Martin Yewell against the defendant, Mary Stroud, who was a daughter and heir at law of Charles Wilhite; that he had paid the full amount of the purchase money, and in consideration thereof the sheriff had, by deed dated March 18, 1897, conveyed to him the interest of the defendant, Mary Stroud, and prayed that this interest might be allotted to him in fee. The deed to him from the sheriff was filed as an exhibit with his petition. The appellee, Mary Stroud, who was made a party defendant to appellant's suit, answered, and denied that appellant was the owner of her one undivided one-sixth interest in the land by virtue of his purchase at the execution sale; and alleged that the judgment on which the execution purports to have been issued was not recovered in the Daviess Circuit Court, but in the Daviess Quarterly Court; and that plaintiff had not filed a certified copy of the judgment obtained by him in the quarterly court, or the execution and return thereon, in the office of the clerk of the Daviess Circuit Court, and that no such judgment, execution or return had ever been recorded by the clerk of the Daviess Circuit Court in a book kept for that purpose, prior to the issual and sale of her land thereunder; and that the execution was issued without authority of law by the clerk of the Daviess Circuit Court, and conferred no right or authority on the sheriff of Daviess county to levy the execution upon her interest in the property mentioned and described in plaintiff's petition; that the attempted sale was illegal and void, and passed no interest or title to the purchaser, and prayed that the sale and purchase by plaintiff be held void and the deed to him by the sheriff cancelled. Plaintiff, in his reply, admitted that the judgment in favor of Yewell against defendant was recovered in the Daviess Quarterly Court, but alleged that execution issued thereon from the Daviess Quarterly Court, which was directed to the sheriff of Daviess county, and returned by him no property found; that subsequently there was filed in the office of the clerk of the Daviess Circuit Court a copy of the judgment, execution and return, but that they were not recorded by the clerk of the Daviess Circuit Court in the book kept for that purpose, and that the certified copy of the execution and return had been misplaced or lost, and could not be found among the records of the circuit court clerk's office; but denied that the omission by the clerk of the circuit court to record the judgment, execution and return as required by section 728 of the Civil Code, rendered the execution which issued thereon or the sale thereunder, void. The deposition of Martin Yewell was taken by the plaintiff, and he testified that he had recovered a judgment against Mary Stroud for $25, with interest and cost, in the Daviess Quarterly Court, on which execution was issued and which was returned by the sheriff no property found; that subsequently he filed a transcript of the judgment, execution and return in the Daviess Circuit Court upon which an execution issued, which was levied by the sheriff upon

the one undivided one-sixth interest of defendant in the land in controversy; that this interest was appraised at $400 and was bought by the appellant, Moseley, for $38.22, the amount of the execution, sheriff's commission and cost; and that he had subsequently been paid the full amount of his judgment by the sheriff. S. W. Bedford, the clerk of the Daviess Circuit Court, testified that he had made a careful examination of the records of his office for a copy of the judgment, execution and sheriff's return taken from the quarterly court, in the case of Yewell against appellee, and had found a copy of the judgment, but no copy of the execution or sheriff's return which issued from the quarterly court, and no evidence that any execution ever issued from the office of the circuit court thereon; that a transcript judgment book was kept in his office, as required by section 723 of the Civil Code, but no copy of the alleged judgment, execution and return in favor of Yewell against defendant was ever copied therein.

Sections 722 and 723 of the Civil Code provide:

"Section 722. Land shall not be sold, nor levied on under execution from the quarterly court, or justices court, or in any court of similar jurisdiction.

"Section 723. When an execution upon a judgment of a court mentioned in section 722 is returned by a proper officer, in whole or in part, in substance no property found to satisfy it, the judge of the justices court shall, upon the application of the plaintiff or his attorney, furnish a certified copy of the judgment, execution and return, which on being filed in the office of the clerk of the circuit court of the county in which the judgment was rendered, shall be recorded by him in a book kept in the office of the circuit court clerk for that purpose, and thereupon the plaintiff shall be entitled to the same remedies for the amount of his judgment and cost, including the cost of said copy and recording it, as if the judgment had been rendered in the circuit court."

It is conceded by appellant that section 729 of the Civil Code and so much of section 723 as requires the filing in the office of the clerk of the circuit court of a certified copy of the judgment, execution and sheriff's return thereon from the quarterly court, are mandatory provisions, but that so much of section 723 as requires the clerk of the circuit court to record the transcript filed in his office from the inferior court in a book kept for that purpose, is purely directory; and that a failure to do so does not deprive him of any remedies for the enforcement of the quarterly court judgment, which he would have enjoyed if the judgment had been rendered in the circuit court. It seems to us that this contention is illogical and in conflict with the plain language of the statute. It requires that plaintiff shall file a copy of the judgment, execution and return thereon from the lower court, in the office of the circuit court clerk of the county in which the judgment was rendered; and that when so filed, they shall be recorded by the circuit court clerk in a book kept in his office for that purpose. There is no suggestion in the statute that the recording in the book kept for that purpose is of less consequence than the filing in the office of the transcript of the lower court. They stand upon identically the same footing. After both of these requirements have been complied with, the statute provides that the plaintiff shall be entitled to the same remedies for the collection of his judgment, as if it had been rendered in the circuit court. Both, in our judgment, are con-

ditions precedent to giving to the judgment of the lower court the effectiveness of a judgment of the circuit court.

Statutory prescriptions in regard to the time, form and mode of proceeding by public functionaries, are usually directory, as they usually are not of the essence of the thing to be done, but are given only to secure system, uniformity and dispatch in the conduct of public business.

"But where authority to proceed in courts is conferred by statute, and where the manner of obtaining jurisdiction is prescribed by the statute, the mode of proceeding is mandatory and must be strictly conformed to, otherwise the proceeding will be void." (26 A. & E. En. of Law, 692, and authorities there cited.)

In Freeman on Executions, 2d edition, section 14, the law is stated in these words: "It is not unusual for statutes to be enacted authorizing the filing with the county clerk of transcripts of judgments rendered and entered by justices of the peace, and providing that executions may issue on such transcripts in the same manner and by the same person or officer as though the judgment were rendered in the court where the transcript is filed. This does not transform the original judgment into a judgment of the higher court, except for the purpose of issuing execution. * * * When the county clerk issues execution to enforce a judgment of a justice of the peace, his authority to do so rests upon the filing of the transcript and upon the existence of such other facts as the statute has prescribed, and unless it can be shown that the law was substantially complied with, the act of the clerk is regarded as without authority, and, therefore, void. So there are statutes authorizing transcripts of judgments to be sent to other counties, some times for the purpose of making such judgments liens in the counties to which the transcripts are sent, and sometimes to authorize the issuing of execution in such counties. Where the latter is the object, the authority to issue execution depends on compliance with the provisions of the statute, and if issued in the absence of such statutes, the execution is void."

In Kelber's Void Judicial and Execution Sales, 260, where the author is discussing the necessity for the rendering of the judgment before execution can issue, he says: "When the only evidence of judgment is embodied in the minutes or memoranda entered upon books not intended for preservation of the record of judgment, these do not constitute a judgment, and the issue and levy of an execution before the rendition of a judgment is wholly void, and the subsequent rendition of the judgment, and its entry in due form of law, will not validate the writ and the proceedings had thereunder."

In Freeman on Void Judicial Sales, section 24, the author says: "In some States execution may issue by the clerk of a superior court upon transcripts of judgments of justices of the peace. The substantial performance of the various acts described by the statute with respect to the transcript and the filing thereof, appear to be essential to the issuing of the writ and the maintenance of titles founded upon it."

Without reference to further authorities, we have reached the conclusion that the clerk of the Daviess Circuit Court had no authority in law to issue the execution until he had recorded the judgment, execution and return of the quarterly court in the transcript book kept by him for that purpose; and

that the execution issued by him conferred no authority upon the sheriff to levy and sell the property of appellee.

Judgment affirmed.

BEAVERS, &c. v. BOWEN.

(Filed June 1, 1904—Not to be reported.)

1. Stenographer's report of examining trial—Agreement that it may be read to impeach witnesses—On the trial of an action in the circuit court to recover damages for assault and battery, the report of the evidence on the examining trial, taken in shorthand by a stenographer, is not competent evidence to impeach a witness who testified on such examining trial, although the parties to the action may have agreed that such report should be read to the jury as the testimony of the stenographer if he were present.

2. Instructions—Wrongful assault—In an action to recover damages for assault and battery where several are jointly sued, it is error in the court to instruct the jury that if they believe from the evidence that the defendants, or either of them, "wrongfully assaulted and beat the plaintiff with fists or rocks, they should find for the plaintiff against all or such of them as in the opinion of the jury are guilty if either is guilty," as nowhere was the jury told what would have been a "wrongful" assault.

O'Meara & James for appellants.

Weed S. Chelf, J. S. Sprigg and L. A. Faurest for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge O'Rear.

This is an action by appellee against appellants for assault and battery. The affray was first engaged in between appellee and B. G. Beavers. At a time when the former had thrown the latter to the gorund and was striking him, the other appellants, sons of B. G. Beavers, appeared on the scene, and took part in behalf of their father. At least, one of them did (Wilber Beavers,) and it is claimed that the other did also. After Wilbur Beavers got there, he soon had overcome appellee, and had him down on the ground. His theory of the case is, that at the instance of some bystanders he desisted from the fight and let appellee up, when appellee resumed the fight and recommenced attacks upon B. G. Beavers and Wilber. Appellee's version is that Wilber attacked him violently and took him unawares, throwing him to the ground and beating him into insensibility, while B. G. Beavers stood by aiding and encouraging the assault. The origin of the trouble seems to have been because appellant, B. G. Beavers, refused to move a hitching rack for horses that was on his ground and near his store, because it was near appellees' house and offensive to him. An altercation of words over the subject of the hitching rack brought on this fight.

The verdict of the jury in this case was an assessment of substantial damages against all the appellants.

Appellants were arraigned, charged with a felonious assault. An examining trial was had before a magistrate. On that trial in the examining court, notes of the evidence were taken in shorthand by one Eskridge. On this trial these notes were used as evidence of what appellants then testified to. It was used to contradict or impeach appellants' testimony on certain

points in this trial. Eskridge was not introduced as a witness. His notes were introduced as evidence under this agreement: "It is agreed by the parties that R. H. Eskridge, the stenographer who reported the evidence on the examining trial, would state if here, that the transcript of his notes is incomplete and does not contain all that was testified to by the witnesses, but that all contained in it was said by the witnesses and is correct as far as the testimony is written."

We do not construe this agreement to waive the relevancy of the contents of Eskridge's notes taken at the examining trial, but only to waive their production and proof by Eskridge. They had, under this agreement, just such value as evidence as if Eskridge had been present and testified concerning them as the agreement recites. There are at least two grounds why, in our opinion, the stenographer's notes are not relevant in this trial.

First, they are admittedly incomplete. For aught that is shown the statements omitted would, if presented, have reconciled the other statements with the witness' present testimony. A witness can not be contradicted by proof of a mere fragment of a statement which may, standing alone, appear to be inconsistent with a full statement; second, by section 64, Criminal Code of Practice, the minutes of an examining trial are, by express provision, made incompetent as evidence for any purpose. But if they were not part of the minutes of the examining trial and were only the stenographer's work, they are likewise incompetent as evidence. The act providing for official stenographic reporters applies only to the circuit courts (sections 4637-4645, Kentucky Statutes,) and proceedings therein. But even there the stenographer's notes are made evidence only in case the witness whose testimony they represent is not present at the trial, and his testimony can not be procured. But when the purpose is to impeach a witness by proving that on another occasion he has made a different statement from his testimony at the trial, the mere introduction of the notes by the shorthand reporter who took down the evidence of the witness on the other trial, is not enough for that purpose. The extended notes of the reporter are evidence in one event only, and that is the one alluded to. The main purpose of such notes, in circuit courts, is to supply a part of what would otherwise be in the bill of exceptions, made up for use solely of the appellate court. If they be taken and used in examining courts, and made a part of the minutes of the proceeding, their only purpose is to furnish the grand jury a clue to the witnesses and to what they will probably testify as an aid in the investigation before that body. But, where they are proposed in subsequent trials as impeaching evidence, they can be used only as memoranda to refresh the recollection of the witness testifying to such statements. (Wilson v. Commonwealth, 21 Ky. Law Rep., 1888.) And he must be able, after having his memory so refreshed, to testify to the matter as of his own recollection. The extended notes, even then, are not themselves evidence.

Considerable stress is laid in argument upon the incorrectness of the instructions given to the jury by the trial court. Some question is made that the instructions are not properly incorporated in the bill of exceptions, and are not made part of the record. If the instructions brought up were the ones given to the jury, they are all erroneous. But whether they are or not the ones given, we deem it not improper to lay down the law that should

govern on the retrial of this case, particularly as there appears to have been already three mistrials.

The instructions told the jury that if they believe that the defendants or either of them "wrongfully assaulted and beat the plaintiff with fists or rocks, they should find for the plaintiff against all or such of them as in the opinion of the jury are guilty, if either is guilty."

All the instructions were moulded upon that same form, namely, that if the defendants, or either of them, "wrongfully" assaulted the plaintiff, but nowhere were the jury told what would have been a "wrongful" assault. The matter was left entirely to them without a guidance by the law, so far as the instructions went, as to what would be right or wrong in making the assault. We are of the opinion that the court should have instructed the jury so as to cover the following points:

1st. If the defendants, or any of them, assaulted, beat and bruised the plaintiff, the jury ought to find against the guilty ones, unless they were justifiable under these instructions.

2d. The measure of damages, if the jury find for the plaintiff, is such sum as will, under the proof, compensate him for loss of time sustained by reason of his injuries, not exceeding $1,500, the sum claimed, and such further sum as will, under the proof, compensate plaintiff for injuries to his person by defendant or any of them, and his physician, and mental pain suffered therefrom, not exceeding $20,000, the sum sued for.

3d. If the jury believe from the evidence that at the time B. G. Beavers assaulted the plaintiff, he in good faith believed and had reasonable grounds to believe that he was then in danger of an assault about to be inflicted on him by plaintiff, he had the right to use such force as was necessary, or as appeared to him in the exercise of a reasonable judgment to be necessary, to repel the assault and save himself. Nor is it necessary that the jury should believe that such danger to B. G. Beavers was actual or real. It was enough if it appeared to him, in the exercise of good faith, to be real.

4th. The other defendants had the right to do for their father what he had the right to do for his own self-defense.

5th. Wilber Beavers' right of self-defense was dependent upon B. G. Beavers having the same right, under the instructions, except, that if Wilber, after having begun the assault on plaintiff, in good faith quit it, and thereupon plaintiff assaulted him, then Wilber had the same right to defend himself from the attack that he would have had had he not first assaulted plaintiff.

6th. If plaintiff was first assaulted by B. G. Beavers, and in his own self-defense knocked his assailant down, yet if thereafter he used more force than was necessary, or more force than to him, in the exercise of a reasonable judgment, appeared to be necessary against the said B. G. Beavers to avert the assault then and there about to be inflicted on him by B. G. Beavers, plaintiff thereby became the aggressor, and the right of B. G. Beavers and of his sons, the other appellants, to use apparently necessary force in defending him, attached.

7th. If defendants, or any of them, used more force than was necessary, or than reasonably appeared to them to be necessary under the circumstances and surroundings to save themselves, or any of them, from an assault then

about to be inflicted on them by plaintiff and others aiding him, the defendants are liable to plaintiff therefor, although they were acting in their self-defense or under apparent necessity as defined in the instructions.

The evidence should have been restricted within closer bounds. It should have been confined to what occurred at the time, and between the parties to the fight; that certain people had complained of the presence of the horse rack; and as to why certain persons did or did not interfere and endeavor to separate the combatants; as to what one of them said afterwards as to not being sorry that the other, coupled with certain oaths, got what he deserved, do not appear to illustrate anything at issue in this trial. They were better calculated to mislead than to aid the jury in reaching a proper verdict.

Another ground of complaint is that one of the attorneys for appellee in the closing argument to the jury went outside of the record, and indulged in personal abuse of opposing counsel, and otherwise sought to inflame the prejudices of the jury. It was shown in opposition to this contention that counsel upon the other side had previously committed a similar breach in his argument to the jury. Such discursions are discourteous to the court, wasteful of its time, and not calculated to do any good. The court ought, even without objection, have interfered and stopped it, when it was begun by either side.

For the reasons indicated the judgment is reversed and cause remanded for a new trial consistent herewith.

CRUTCHER v. RODMAN, TRUSTEE, &c.

(Filed June 3, 1904.)

Infant's real estate—Sales for reinvestment—Control of funds—Bonds—In an action under Civil Code, section 491, for the sale of unproductive real estate and a reinvestment of the proceeds, in which infants own a contingent remainder dependent upon their surviving the life tenants, it was error in the court to make the purchase-money bonds payable to the testamentary trustee who is a nonresident of the State; but under the provisions of subsection 5 of section 493 of the Code, the sale bonds should have been made payable to the court's commissioner, and the control of the fund reserved by the court until it was paid out in the purchase of other property.

Frank Chinn for appellant.

T. L. Edelen for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge O'Rear.

This suit was brought originally for a construction of the will of Thomas Rodman, deceased, and to confirm the sale by the executors of the will and the testamentary trustee thereunder, of a certain house and lot in Frankfort, devised by the testator to his three daughters. The nature of the estate created in this property was the fee to an undivided one-third to Elizabeth; life estates in the remaining two-thirds to Johanna and Sue, one-third to each, with remainder to their surviving children. Their children now living are infants. (Murray v. Rodman, 25 Ky. Law Rep., 978.)

The lot is unproductive, owing to the expense of maintaining repairs, and

taxes and other charges. It was, therefore, adjudged under the proof that it be sold for reinvestment of the proceeds of each parcener in other property. Appellant became the purchaser at the decretal sale at $4,250, more than two-thirds of its appraised value. She appeals from the judgment of the court overruling her exceptions and confirming the sale. The exceptions are that the judgment of sale is erroneous, if not void, because the suit was not brought by the person authorized by statute to bring it; also, because the judgment permitted and directed the purchase-money bonds to be payable to the testamentary trustee, instead of to the court's commissioner; and because the bond required by section 498, Civil Code, was not executed.

It was intimated on the former appeal, though the question was not then presented, and its decision appears to have been dictum, that the proceedings to sell the lot must be under subsection 5 of section 489, Civil Code; that this expression was regarded by the parties as not binding on them is shown from the fact that they do not appear to have attempted to conform to the practice necessary in proceedings under that section. Before the former appeal it was the contention of appellees that the three daughters named, took the fee-simple title to the lot; or, if that was not so, then Elizabeth, as testamentary trustee for the others, took the fee, with power to sell and convey, and to reinvest the proceeds. Both of these positions having been denied, appellees have proceeded for a decretal sale of the property for purposes of reinvestment as above stated. The question is now presented whether they have pursued the proper course. To decide this, it is first necessary to determine the exact nature of the estate owned by the devisees, measured by the provisions of the Code governing sales for reinvestment of such estates of persons under disability.

Section 489, Civil Code, relates to sales of vested estates of infants and persons of unsound mind. These infants have not a vested estate in this lot. On the contrary, it is a contingent remainder, dependent upon the event of their surviving the life tenants. Nor can the proceeding be under section 490, Civil Code, because it relates to the sale of a "vested estate in real property owned jointly by two or more persons." The term "vested estate," as used in these sections "includes all estates which are not contingent." (Ward v. Edge, 100 Ky., 771.) Section 491, Civil Code, is the only statutory provision authorizing a proceeding in court to sell a contingent remainder interest in lands of persons under disability. It provides: "In an equitable action by the owner of a particular estate or freehold in possession, or by his guardian or committee if he be an infant or of unsound mind, against the owner of the reversion or remainder, though he be an infant or of unsound mind, and against the owner of the particular estate if he be an infant or of unsound mind or, if the remainder be contingent, against the person, if in being, in whom it would have vested if the contingency had happened before commencement of the action, though he be an infant or of unsound mind, and against the owner of the particular estate if he be an infant or of unsound mind, real property may be sold for investment of the proceeds in other real property."

In certain sales, under sections 489 and 490, particularly where the purpose is for re-investment, and "subject to the provisions of section 491" and

other sections (not applicable to this case), before a sale of the land can be ordered, the guardian of the infant must execute bond, with approved sureties worth double the value of the estate to be sold, that the guardian will faithfully discharge all his duties, and will comply with the judgments and orders of the court in the action, and will account for and pay to the infant all money or property due or belonging to him when required.

The third subsection reads: "If the bond be not given, any order of sale, and any sale or conveyance made under such order, shall be absolutely void and of no effect."

But susbection 5 of section 498, reads as follows: "In the case mentioned in section 491, the court ordering the sale shall, by its commissioner, retain the custody and control of the fund realized by the sale, until the same is reinvested in real estate, or in such other property as the funds of persons under disability may be invested by authority of law, and the court shall order the money to be paid, by its commissioner, directly to the person from whom the purchase for reinvestment is made, and to no other person, and in which case no bond shall be required."

This subsection was an amendment to the section passed in 1892. Its purpose was to obviate the necessity of the execution of the bond. The procedure required by it was to be in lieu of the bond. The necessity for a strict conformity with the requirements of this subsection are as important to the persons intended to be protected by it, as is the execution of the bond mentioned in the other subsection. It is a jurisdictional prerequisite, the strict observance of which can not be too punctilliously enforced. (Elliott v. Fowler's Gd'n, 23 Ky. Law Rep., 676.)

As indicated, the judgment of the circuit court made the purchase-money bonds payable to the testamentary trustee, who is a nonresident of this State. This was error. The purchase-money bonds should have been made payable to the court's commissioner, and control of the fund should have been reserved by the court until it was paid out in purchase of other property, title to which is to be taken and held in the same manner as that sold. The circuit court must not only retain the custody and control of the fund, but must approve its reinvestment before it is parted with. The argument that the will gives to the testamentary trustee the control of the trust estate, including the interests in the lot in litigation, as well as the control of its investment, is unavailing; that she did not have the power of selling the lot under the terms of the will, was the point decided in the former appeal. Therefore, its sale, if sold at all during the infancy of the contingent remaindermen, must be under and by virtue of section 491, supra. The court can not exercise the jurisdiction conferred by that section, except it be done in the manner directed by the section. Consent of parties can not confer, nor can it dispense with conditions of jurisdiction of the subject matter. Rodman's will did not provide that the testamentary trustee could sell the lot, nor did it give her the right to reinvest its proceeds if sold by the court. So far as the trust over that property applied, it did not go beyond the control of it, and the custody of the title. Her authority in investing trust funds given by the will was over the other trust property devised. The testator does not appear to have contemplated its sale for reinvestment of the proceeds in more profitable property. While the testator might have given

his executors or the trustee authority to sell the lot and reinvest its proceeds without resort to any court, leaving the whole matter to the wisdom and discretion of the persons so selected, yet he did not do it. Upon that point the will is silent. The statutory authority is, therefore, the only authority for the sale.

This suit is brought by one of the owners of the particular estate, and all the other owners are parties. It is not necessary under section 491 that the guardian of the infant owner should be the party plaintiff, as is required under other conditions.

But for the reasons indicated the judgment is reversed and the cause remanded for proceedings consistent herewith.

FULWILER, &c. v. ROBERTS.

(Filed June 8, 1904—Not to be reported.)

Contract—Construction—Conditional sale or mortgage—Appellants owned a house and lot in Henderson worth $2,000, which was sold for a lien debt thereon and purchased by one of the appellants, Mrs. Graves, for $500, the amount of the debt, and being unable to execute a bond for the price, made the following contract with appellee Roberts: "Whereas a certain lot (describing it) was sold in May, 1903, and purchased by Mrs. Belle E. Graves at the price of $500, who, in consideration of the premises hereinafter stated and of $20 in hand paid, has this day transferred and assigned her bid to A. G. Roberts, who receives the same and assumes to pay said bid and all taxes for 1902 and 1903, water rent for 1902 and half of 1903, and keep the property insured for $800, and to have $50 worth of repairs done on the house and to reconvey same (to appellants) upon the payment to him of $800 at any time prior to —— day of May, 1903." Under this contract Roberts advanced, in all, $637.34. He claims the writing is a conditional sale and the appellants failing to comply with the conditions within the time named, he thereby became the owner of the property. Appellants claim the writing to be a mortgage, and offer to pay the amount advanced by Roberts, which he declines to accept. Held—That the contract is a mortgage, and appellee Roberts is entitled to a lien on the property for $637.34, and no more.

M. C. & G. D. Givens for appellants

Yeaman & Yeaman for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Burnam.

W. F. Fulwiler, a bachelor, was the owner during his life of a house and lot in the city of Henderson, fronting ninety-one feet and eight inches on the south side of Seventh street between Elm and Green, and running back in parallel lines two hundred and ten feet to the "Clore" line, on which he resided with his mother, the appellant, Elizabeth Fulwiler, and his two sisters, Kate Fulwiler and Mrs. Belle E. Graves, which, at his death in 1901, was incumbered by a mortgage lien in favor of the estate of Mrs. S. W. Lambert for about $500. He devised all of his estate to his mother, and shortly after his death, a suit was brought by his executors to settle his estate. The executor of Mrs. Lambert was made a party defendant to this suit, and by cross petition asked an enforcement of the mortgage lien to

secure the debt due his testatrix. He alleged that the whole lot would have to be sold, as it was indivisible, and judgment was entered in conformity with the prayer of his petition. The house and lot was apprised at $2,000, and at the sale made by the commissioner, on the 28th of April, 1902, it was knocked off to the appellant, Mrs. Belle E. Graves, at $500, the amount of the mortgage debt. Mrs. Graves was unable to execute a bond for the purchase money, and on the 24th of May, 1902, assigned her bid to the appellee, A. G. Roberts, who paid the amount thereof, and a commissioner's deed was made to him for the property. Contemporaneously with the assignment of Mrs. Graves of her bid to the appellee, the following written contract was entered into between the parties: "This contract this day made and entered into between Mrs. Belle E. Graves, Mrs. Elizabeth Fulwiler, Miss Kate Fulwiler and A. G. Roberts, Witnesseth: That, whereas, a certain piece of property fronting ninety-one feet, eight inches, on the south side of Seventh street, between Elm and Green streets, and running back that width two hundred and ten feet to Clore's line, and belonging to the estate of W. F. Fulwiler, deceased, was, on the 5th day of May, 1902, sold under a judgment rendered in the suit of W. F. Fulwiler's Ex'or v. W. F. Fulwiler's heirs and creditors, and purchased by Mrs. Belle E. Graves, at the price of $500; who, in consideration of the premises hereinafter stated, and of $20 to her in hand paid, has this day transferred and assigned her bid to A. G. Roberts, who receives the same and assumes to pay said bid, and to pay all taxes for 1902 and 1903; water rents for the year 1903 and first half of 1903; and to keep the house on said property insured for at least $800; also to have $50 worth of repairs done on the house, and to reconvey the same as hereinafter directed, upon the payment to him of $800 at any time on or before the —— day of May, 1903.

"It is further agreed that upon the redemption of said property it shall be conveyed as follows: One-half interest therein to Miss Kate Fulwiler, who is to have the right and authority to rent, lease, sell and convey the same; but if she shall die without exercising this right, then said one-half interest is to descend to the children of Mrs. Belle E. Graves, jointly, as in the case of the other half. The other half interest is to be conveyed to Mrs. Belle E. Graves and her children jointly, to have and to hold during their lives, with remainder to the survivors of them in fee simple.

"But it is expressly agreed and understood that Mrs. Elizabeth Fulwiler shall have the custody and absolute control of said premises during her life, and to be the head of the family just as she has always been.

"It is agreed that the transfer be completed at once. Signed this 24th day of May, 1902.

"KATE FULWILER,
"ELIZABETH FULWILER,
"BELLE E. GRAVES,
"A. G. ROBERTS."

Under this contract, Roberts advanced in all $637.34. On the 21st of July, 1903, the appellee served the following notice upon the appellants:

"Mrs. Belle E. Graves, Mrs. E. Fulwiler, Miss Kate Fulwiler: You are hereby notified to vacate and deliver to me the possession of the land and

lot you now occupy, located at 824 Seventh street, Henderson, Ky., on or before the 31st of January, 1903.

"Very respectfully,

"A. G. ROBERTS."

Thereupon appellants brought this action against the appellee, setting out the facts recited, supra, and alleged that the arrangement entered into with the defendant, Roberts, was for the purpose of borrowing the money advanced to them by him, and which they had offered to repay to him after the 24th of May, 1903, but he refused to accept it, claiming to be the owner of the property under the contract. Defendant, in his answer, averred a willingness to reconvey the property to the defendants upon the payment to him of the $800 stipulated for in the contract and $4 paid for insurance, which he asked should be adjudged a lien upon the property, and that it should be sold to pay the same. The circuit court held the contract of May 24, 1902, a conditional sale by the defendant to the plaintiff of the property, and gave them until the 3d of May, 1904, to pay the defendant $804, with interest and cost of this action, and in default of payment directed a sale of the property to pay these various sums. Plaintiffs have appealed, insisting that appellee only held the property in mortgage to secure the repayment to him of the $637.34, the amount actually admitted by him to have been advanced under the contract.

The question for decision is, whether the arrangement between the parties is to be regarded as a mortgage or conditional sale. Story's Equity Jurisprudence, section 1018, says: "The particular form and words of the conveyance are unimportant, and it may be laid down as a general rule subject to few exceptions, that whenever a conveyance, assignment, or other instrument transferring an estate, is originally intended between the parties as a security for money or for any other incumbrance, whether the intention appear from the same instrument or from any other, it is always considered in equity a mortgage."

And the rule is well settled that where the nature of the conveyance is doubtful, it will be considered a mortgage, and not a conditional sale, because this construction is most favorable to the debtor. (Tigert v. Potter, 97 Ky., 54.) We think it clear from all the facts and circumstances developed in this record, that the object of the arrangement entered into between the parties on the 24th of May, 1902, was to secure the payment to the appellee of the various sums of money which he assumed to advance for plaintiff, to enable them to pay off the mortgage to Lambert's executor. The property was appraised at $2,000, and we can not for a moment believe that it was ever contemplated that plaintiff should become the owner thereof for $637.34, less than one-third of its real value. Appellee was entitled to a judgment for the several sums of money advanced by him to appellants under the contract, with interest from the date of such advancement, and a lien on the property conveyed to him to secure their payment, and no more.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

LOCKETT v. LOCKETT.

(Filed June 8, 1904—Not to be reported.)

1. Life insurance—Beneficiary—Where one, while a bachelor, obtained an insurance upon his life, naming his father as the beneficiary, thereafter marrying and living three months, but before his death he declared to his wife and others in her presence that the insurance was for her benefit that he gave it to her, was such a change in the beneficiary and an assignment of the policy, as to vest the title of it in the wife. The fact that the father of the insured, who was made the beneficiary in the policy, got possession of the policy and collected the money, did not affect her rights to it because he took the policy under promise to collect the proceeds and pay them over to her, and moreover, during the lifetime of the son and after his marriage, the father suggested to him the change in the beneficiary.

2. Same—By provision of section 670, Kentucky Statutes, the insured has the right to change the beneficiary in the policy, and where the insured clearly indicates his purpose to do so, and does such acts as in law amount to a transfer or an assignment of a chose, and where the person named as beneficiary has an insurable interest in the life of the insured, if the insured intends in what he says or does to change the beneficiary of a policy, the law will recognize such change without the application of the insured and the consent of the company to such change.

J. P. O'Meara, J. R. Layman and J. F. Reid for appellant.

Duff & Hutcherson for appellee.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge O'Rear.

William Lockett, while a bachelor, effected an insurance upon his life in a benevolent life insurance company, known as "The Woodmen of the World," in the sum of $2,000. His father was named in the policy of insurance as the beneficiary. Thereafter the insured married appellant. He died about three months after his marriage. His father (appellee) got possession of the policy of insurance from appellant, promising her that he would collect the money and pay it over to her. He did collect, but paid her only one-half of it, after defraying the expenses of the funeral and the last illness of his son.

Appellant sues to recover the balance of the money collected by appellee on the policy, alleging that the insured, in his lifetime, and after his marriage with her, had assigned the policy to her: that is, had changed the beneficiary by substituting his wife for his father. It is conceded that there was no transfer, as required by the rules of the order, nor was it attempted, so far as bringing it to the notice of the order. As to what did occur, the proof clearly shows this: After William Lockett had married appellant, his father suggested to him that he then ought to change the beneficiary of his insurance policy. What response William made to his father is not proven. But shortly afterward he declared to his wife, and to others in her presence, that the insurance was for her benefit, that he gave it to her. He did deliver the policy to her, and she retained it until after his death. He, in his last sickness, which lasted only nine days, mentioned that he wanted to write the secretary of the order and enclose him the fee for making the transfer on their books, and he did attempt to write the letter, but

was too weak, and said that he would be better in a day or so, and would then attend to it. Instead, he grew rapidly worse, and died. The principal question is, whether there was a transfer or assignment of this policy by the insured to his wife, so as to defeat the claim of the beneficiary named in the policy.

By statute in this State (section 670, Kentucky Statutes), as well as by the terms of the policy, the insured had the right to change the beneficiary. The beneficiary named originally had no right to prevent the change, nor could the company do so, if the person sought to be substituted by the insured was one of the class permitted by its charter and the terms of the policy. There were but two things necessary to effect a valid assignment or transfer of the policy: First, that the insured should clearly indicate his purpose to do so, and do such acts as would in law amount to a transfer or assignment of a chose; second, the person named as beneficiary or assignee, must have had an insurable interest in the life of the insured under the charter of the company, and in law; that his wife stood in that relation there is no manner of doubt. So, the only question left for determination is, did the insured intend, by what he said and did, to change the beneficiary of the policy and to give it to his wife?

The insured had no other estate whatever, save a few dollars worth of mechanic's tools. He was about twenty-seven years old. His wife was about twenty-two. They were living with her father and mother. It does not appear that she had any estate either. It is clearly proven that the insured recognized his duty to his wife, and her superior claim to his support, by declaring on numerous occasions that this insurance of $2,000 would be a protection for "the little woman" if he should die. He had delivered her the policy with that declaration; that he intended her to have it is quite evident. Nothing in the record shows that he knew how, or what to do, to change the beneficiary in the policy until a few days after his last illness had begun. Then he had a note from the secretary of the lodge to which he paid his dues, suggesting to him that he should make the change by making a written application for it, and sending 50 cents to pay for the transfer on the books of the order. It was then the insured declared his purpose of doing so, but was too sick to attend to it that day.

A life policy is a chose in action. It may be assigned or otherwise disposed of as other choses, subject to the condition that the assignee must have an insurable interest in the life of the insured; must be related by blood or marriage, and be so situated that the assignee or beneficiary has a pecuniary interest in the prolongation of the life of the insured, rather than in its early termination. Conditions annexed to life policies requiring that notice of assignment be given to the insurer, are for the latter's protection. They are not meant to lessen the estate of the insured, or to curtail his right to change the beneficiary of the policy, or to assign it to a person having a legal right to take it. The right to change the beneficiary in, and the right to assign, such life policy are privileges that belong to the insured. They are of equal value to him, and are quite similar, if not substantially the same, in their nature. It is generally conceded and held that the insured may, by parol, assign his life policy to any one having an insurable interest in his life. (Chapman v. McIlwrath, 77 Mo., 88, 46 Am. Rep., 1; May on

Insurance, section 889; New York Life Ins. Co. v. Flock, 8 Md., 341, 56 Am. Dec., 742; Maderia Appeal (Pa.), 4 Atl. Rep., 908; Guenther v. Cary, &c., 17 Ky. Law Rep., 1262; Lord v. New York Life Ins. Co., 56 L. R. A., 597.) We are of opinion that the facts show there was a valid and sufficient transfer of the policy to his wife to operate as a change of beneficiary by him.

Appellee not only advised the assignment, and, therefore, consented to it, but after his son's death he ratified it. His change of position after having gotten possession of the policy by his assurances to his daughter-in-law, and having collected the money upon it, takes nothing from the strength of her claim.

The judgment of the circuit court dismissing appellant's petition is reversed and the cause is remanded, with directions to render judgment in her favor for the sum sued for, with interest from the filing of her suit.

YOKLEY, BY, &c. v. SUPERIOR DRILL CO., &c.

(Filed June 8, 1904—Not to be reported).

Lands—Conveyances—Where the wife, who owned one-half interest in a tract of land, caused her interest to be conveyed to herself and her husband, a mortgage upon the land by the husband after the wife's death, can not be defeated on the idea that the wife's mother owned the land and that it descended to her children. By the wife's own act she placed the title to one-half interest in the land in her husband, upon the faith of which he obtained credit and afterwards executed the mortgage; and if she were alive she would be estopped to defeat this mortgage lien, and her children stand in no better attitude than she would stand in were she alive. They took the land by descent from her and they can make no defense to a mortgage that she could not make if living.

G. M. Miller and Spear & Miller for appellants.

Baird & Richardson and V. H. Baird for appellees.

Appeal from Monroe Circuit Court.

Opinion of the court by Judge Nunn.

On the 5th of November, 1868, L. A. Smithwick and his wife conveyed by deed 237 acres of land to John Emberton and Ceretha E. Emberton, their daughter. By this deed they conveyed to these parties the life estate, and it was expressly stated that at their death the land was to descend to the bodily heirs of C. E. Emberton. Construing this, it is evident that the grantors, in the use of the words "bodily heirs," meant the children of C. E. Emberton. She died, leaving only two children; a daughter, Lemon, and a son, L. A. Emberton. Their father, John, and these children, after arriving at age, agreed among themselves as to a division of this land, the father taking eighty-seven acres, and the children 150 between them. Conveyances were executed in accordance with this division. At the time of the division, Lemon had married Elmore Yokley, and at her request the conveyance of seventy-five acres, her part, was made jointly to herself and her husband. Afterwards she died, leaving the appellants, her children and her husband, surviving her.

On May 5, 1900, Elmore Yokley becoming indebted to the appellee, Su-

perior Drill Co., in near the sum of $300, executed a mortgage to it to secure the payment of this indebtedness, on his interest in this land. This mortgage lien was enforced, the land sold, and the appellants, his and Lemon Yokley's children, by their guardian ad litem seek to have this sale set aside and have the mortgage declared void, claiming that their father, Elmore Yokley, never owned any interest whatever in this land; that it all belonged to their mother, and that they are the owners of it by descent from her. It is true as contended by appellants, that Ceretha Emberton only owned a life estate and at her death it descended in remainder to her children, Lemon and L. A. Emberton, and that the mother of these children, Lemon, owned one-half thereof in her own right. But in the division and partition thereof it is shown without contradiction that their mother, Lemon, directed the conveyance of her interest to be made to her and her husband jointly. By her own act she placed the title in one-half of her interest in this land in the name of her husband, upon the faith of which it is presumed he obtained credit and afterwards executed this mortgage. If Lemon Yokley were alive she would be estopped to defeat this mortgage lien, and the appellants, as her children, stand in no better attitude. They took the land by descent from her, and they can make no defense to this mortgage that she could not make if living.

Wherefore, the judgment is affirmed.

EMMETT v. MITCHELL-TRANTER CO.

(Filed June 3, 1904—Not to be reported.)

Former appeal—Evidence—Upon a second appeal where the same facts were in evidence except that where labor performed by appellant is not shown to have been within the scope of his employment, or that prior to his injury he had performed this labor except by the direction of his superiors and under their supervision, the judgment will not be disturbed.

M. L. Harbeson for appellant.

W. H. Mackoy and Barker & Woods for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

This cause was before this court on a former appeal and the opinion of the court is in 23 Ky. Law Rep., 1788. After a return of the case to the lower court, and at the conclusion of the plaintiff's testimony, upon the retrial of the case, the court gave a peremptory instruction to find for the appellee and dismissed the petition. From that judgment this appeal is prosecuted. We deem it unnecessary to reiterate the facts, as they are stated in the former opinion. On the last trial the appellant introduced evidence in addition to that presented on the first trial, to the effect that he performed labor at this mill other than as a helper to Weatherwax. But this evidence does not show that the labor he performed when injured, was within the scope of his employment, or that he had, prior to his injury, performed labor on the roof of the mill except by the direction of his superiors and under their supervision. The principles of law as stated in the former

opinion apply to this case on the facts as now presented, and the law as expounded in that opinion, must govern this case.

Wherefore, the judgment of the lower court is affirmed.

MICHAELS, &c. v. CENTRAL KENTUCKY ASYLUM FOR THE INSANE, &c.

(Filed June 7, 1904.)

Inquest—Notice—Compensation—Services of lunatic—Where an inquest of lunacy is held upon a person without notice to him or his presence at the proceeding, it is void, but where he was sent to and kept in the asylum, and was in fact insane, the asylum may receive for necessaries furnished him on a quantum meruit, but in such case where it appears that such inmate was able to labor and was required to and did labor for the asylum, and that his services were worth as much as his keep, there can be no recovery.

Jas. T. Ford for appellants.

Holt & Alexander for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Hobson.

Henry Michaels was found a person of unsound mind by an inquest in the Jefferson Circuit Court without notice to him or his presence at the proceeding. He was committed to the Central Kentucky Asylum for the insane and this suit was filed by it to recover compensation for taking care of him. The proof shows that he was in fact insane and that it was necessary for him to be in an insane asylum. The inquest, being held without notice to him or his presence at the trial, was void. Still, as he was in fact insane, the asylum may recover for necessaries furnished him on a quantum meruit, just as a recovery may be had for necessaries furnished an infant. But it appears in this case that Michaels, while an inmate of the asylum, except for the first few months of his confinement, worked for it, driving a cart, digging a ditch, and doing other such work on the farm run by it, he being a stout man and able to work. When the asylum claims under a quantum meruit for necessaries furnished one who has not legally been found of unsound mind, its claim rests upon the idea that it should be allowed compensation in justice and right for that which it is out on account of the lunatic. If the lunatic's services have been worth to it as much as his keep was worth, it is in fact out nothing. A man who takes care of an infant and seeks compensation on a quantum meruit for necessaries furnished him, would not be allowed anything if it appeared that the infant's services, while being so kept, were of as much value as what he received. The same principle must be applied to the asylum when it comes to claim for keeping one who has not legally been found of unsound mind and committed to it for safe keeping. Where the inquest is legal, then the statute regulates the rights of the asylum. The State in that event requires that the patient be received in the asylum and has regulated by statute on what terms he shall be kept. When the asylum claims in such a case for the keeping of a patient,

its claim rests upon the statute, and no allowance can then be made for the labor of the patient, as the statute provides for none. But when the inquest is illegal and void, a different rule must apply, for then the claim of the asylum against the lunatic must be determined wholly on common law principles, and while it may recover for necessaries furnished the lunatic on a quantum meruit, it must credit him on the claim by what it has received from him in labor or otherwise. On all the evidence in this case, we conclude that the labor of the lunatic was of value as much as his board and keep at the asylum during the time sued for, and that no recovery during this period for his keep can be allowed.

Judgment reversed and cause remanded, with directions to dismiss the petition.

KLENKE v. NOONAN, &c.

(Filed June 7, 1904.)

1. Parties—Judgment—Conclusiveness—A judgment rendered by a court of competent jurisdiction which has never been appealed from, is conclusive between the parties thereto, not only as to all matters determined by it, but also as to all incidental matters which might have been properly litigated and decided therein.

2. Common law marriage—Offspring—Legitimacy—While common law marriages are forbidden by the laws of this State, yet where the parties reside in another State where such marriages are recognized as valid, and where the parties claiming to be husband and wife are shown by the evidence to have lived together and cohabited and recognized each other as husband and wife, and were so recognized in the community where they resided, and had children who bore the reputed husband's name and were recognized as his legitimate children, such children will be recognized by this court as the offspring of a legitimate marriage.

3. Presumptions of law—In the absence of proof to the contrary, this court will presume that the common law is in force in the State of Ohio.

Myers & Howard for appellant.

M. H. McLean for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

This controversy involves the title and ownership of a house and lot in Covington, Ky., which was owned by William Noonan prior to his death in 1871. His wife, Ann Noonan, and three sons, John, William and Charles Noonan, and one daughter, Lizzie Klenke, survived their father. The appellee, Mary Ellen Noonan, and Thomas Dunn, as next friend of her infant children, Helen and John Noonan, Jr., brought this action in the Kenton Circuit Court on the 30th of December, 1897, in which they allege that the appellee, Mary E. Noonan, and John Noonan did, on or about the 1st of January, 1891, both being at that time residents of the State of Ohio, mutually consent and agree to live together as man and wife, and did thereafter cohabit and live together as such in Cincinnati, O., until the death of John Noonan in July, 1897; that Helen Noonan and John Noonan were born of this marriage and were respectively eight and six years of age; that

at the time of his death, John Noonan was seized in fee simple of an undivided one-third interest in the house and lot in controversy; that it could not be divided without materially impairing its value; that Mary Ellen Noonan was entitled to one-third of the interest of John Noonan for life, and her children to the fee simple therein subject to the life estate of their mother, and asked for a sale of the property. The defendant, Lizzie Klenke, for answer to appellees' petition, denied that the plaintiff, Mary Ellen Noonan and John Noonan had agreed with each other to become man and wife, or that they had subsequently cohabited with each other as man and wife, or that as a result of such cohabitation the plaintiffs, Helen and John Noonan, Jr., were born. She alleged that no marriage ceremony had ever been performed between Mary Ellen Noonan and John Noonan, as required by the laws of the place of their residence, or that either of the plaintiffs had any interest in the property in controversy. The defendant, Gus W. Meninger, filed an answer and cross petition in which he alleged that he was the owner of the one undivided one-fourth interest in the property which had belonged to Charles Noonan in his lifetime, by purchase at a judicial sale pursuant to a judgment rendered in an action for the settlement of his estate, and united in the prayer of plaintiffs' petition for a sale of the property. The defendants, Lizzie Klenke and Wm. Noonan, by way of reply to the cross petition of Meninger, said that their father, Wm. Noonan, had devised the property in controversy to his wife, Ann Noonan; and that she had occupied it until her death on the 10th of December, 1893; that her son, Charles Noonan, had died in August, 1892, before his mother, unmarried and without issue, and did not, at the date of his death, have any right, title or interest in the property, and denied that Meninger, by virtue of his purchase, had acquired any interest or title therein. Meninger responded that on the 4th of February, 1897, he brought suit against all the heirs at law of Wm. and Ann Noonan, in which he alleged that their brother, Charles Noonan, was, at the date of his death, the owner of the one-fourth interest in the property in controversy; and that in that action it was adjudged that Charles Noonan was the owner of an undivided one-fourth interest in the property and a judgment of sale entered therein, at which sale he became the purchaser; and plead that the defendants, Lizzie Klenke and Wm. Noonan, were estopped from controverting that he was the owner of such interest. The chancellor found sufficient evidence to support the plea of a common law marriage between appellee and John Noonan, deceased, and sustained her claim; and that of her children and that of Meninger to the undivided one-fourth interest of Charles Noonan, deceased, and the defendant, Lizzie Klenke, has appealed.

We will first consider the issues raised by the pleadings of Meninger as to the interest of Charles Noonan in the property. While appellants, in their reply to the cross petition of Meninger, allege that their father, Wm. Noonan, devised all of his property of every kind to his wife, Ann Noonan, no copy of the alleged will is filed in the record; and it appears from the record of the chancery suit of Meninger v. Klenke, that Charles Noonan was adjudged to be the owner of an undivided one fourth interest in the house and lot in controversy in this action, and that it was sold to satisfy the claim of the appellee, Meninger, and purchased by him; that this sale

was confirmed and deed executed to the purchaser. The appellant, Lizzie Klenke, was a party to this suit, and the judgment in that case has never been appealed from, and must be held conclusive, under repeated adjudications of this court, not only as to all matters determined by it, but as to all incidental matters which might have been properly litigated and decided therein. We, therefore, conclude that as to the Meninger branch of this case the judgment should be affirmed.

Since the adoption of the Revised Statutes, there is in this State no such thing as a legal marriage by recognition and cohabitation alone. All marriages to be valid must be solomnized and contracted in the presence of authorized persons or societies. (Estill v. Rogers, 64 Ky., 62) But the question in this case must be determined by the laws of Ohio. Appellee alleged that in Ohio, where the parties lived, that common law marriages are upheld and can be proven by declarations, admissions and cohabitation and general reputation as to the fact. This is specifically denied by answer, and no evidence has been introduced to support the averment of the petition. Section 1640 of the Kentucky Statutes reads as follows: "The unwritten or common law of any of the United States may be proved as facts by parol evidence of one learned in the law, and the printed books of cases adjudged in the courts of sister States may also be admitted as evidence of such law."

In Miles v. Collins, 58 Ky., 312, and Honore v. Hutchings, 71 Ky., 689, it was decided that this court would presume, until the contrary was alleged and proven, that the common law was in force in other States of the Union.

It, therefore, follows that in the entire absence of proof, that the court must presume that the common law on the subject of marriage prevails in the State of Ohio. The question of marriage or no marriage must, therefore, be determined from testimony in the record. No witness has testified to the alleged parol agreement between John Noonan and appellee to live together as husband and wife. But to establish a common law marriage, an express agreement to be husband and wife need not be shown, such agreement may be implied from acknowledgment, cohabitation and reputation when long continued and open. In Re Taylor, 9 Paige's Chancery, 610 (4 New York Chancery Reports,) it was decided that where a gentleman introduced a female, who was previously living with him as a housekeeper, to his friends as his wife, and from that time for a period of eleven years continued to cohabit with her as his wife, holding her out to the world as sustaining that relation to him, and had several children by her, who were called by his name, that these facts were sufficient to authorize a court to presume an actual marriage between the parties by contract in praesenti at the commencement of such matrimonial cohabitation; and that the acts and declarations of the man and the other attending circumstances during their cohabitation together, being parts of the res gestæ, are proper evidence to show the character of their intercourse, whether it was matrimonial or meretricious. In Taylor v. Shemwill, 43 Ky., 536, it was decided that marriage could be established by repute, cohabitation, and living together as man and wife for many years. In Strode, &c. v. McGowan's Heirs, 65 Ky., 621, it was held by this court: "First, that the law presumes that every child in a Christian country is 'prima facie' the offspring of a lawful union of the parents; and that the mother by actual marriage or by cohabitation

and recognition was the lawful wife of the father, and in the absence of negative evidence, no supplemental proof of legal marriage would be necessary to legitimate the offspring; that mere rumors were insufficient to bastardize or require positive proof of actual marriage."

In Dannelli v. Dannelli's Adm'r, 67 Ky., 59, this court said: "The mere cohabitation of two persons of different sexes, or their behavior in other respects as husband and wife, always afford an inference of greater or less strength that a marriage has been solemnized between them, their conduct being susceptible of two opposite explanations, we are bound to assume it to be moral rather than immoral, and credit is to be given to their own assertions, whether express or implied, of a fact peculiarly within their own knowledge. The law is unwilling to bastardize children, and throws the burden on the party who alleges illegitimacy, and in the absence of evidence to the contrary, a child eo nomine is, therefore, legitimate, and the presumption of law is not likely to be repelled. It is not to be broken in upon or shaken by a mere balance of probabilities. The evidence for repelling it must be strong, satisfactory and conclusive."

It is shown in this case that John Noonan was an idle, improvident, dissolute person, who largely lived upon the bounty of his family. John Murray, the father of appellee, testifies that he had John Noonan arrested on charge of bastardy, and that in the presence of a magistrate he asserted that he was legally married to appellee and would produce his license in evidence thereof, which, however, he never did; and that he would furnish rooms and take his wife and child to them the next day. Laura Lewing testifies that she kept an apartment house in Cincinnati; that she rented one of her rooms to John Noonan and the appellee, and that they occupied it with their child for five or six weeks; that during this period, Noonan habitually spoke of appellee as his wife, and so introduced her to other lodgers and persons with whom they came in contact. Mrs. Heidel testifies that more than ten years before the death of John Noonan, he and the appellee, shortly after the birth of Helen Noonan, occupied rooms in her house for about six months; and that both of them habitually spoke of each other as husband and wife; and that Noonan introduced appellee as his wife and escorted her to public entertainments. It is also shown by the testimony of quite a number of other persons with whom Noonan associated that he always spoke of appellee as his wife and the infants as his kids. It is also shown beyond controversy, that both of the children always bore the name of Noonan and were known and recognized as his children. While a number of witnesses living in the vicinity of the home of John Noonan's mother and friends of the family, testify that he was an unmarried man, and was so spoken of by the family, this character of testimony is not sufficient to overcome the positive testimony of unimpeached witnesses to the contrary. Upon the whole case we have reached the conclusion that we would not be justified in disturbing the judgment of the trial court.

Judgment affirmed.

TATE v. ILLINOIS CENTRAL RY. CO.

(Filed June 7, 1904—Not to be reported.)

Railroads—Insult to passenger—Peremptory instruction—Duty of agent—Where the evidence shows that appellant was a passenger on appellee's road, had his ticket and was sitting in the depot waiting room by the fire waiting for the train, and was there assaulted by a section boss of appellee's road, cursed and insulted and driven out in the cold and compelled to stay out in the cold until his feet were frosted, and that the window of the room in which the depot agent was at work was open adjoining the waiting room, and the conduct and language of the section boss was loud and boisterous so that it could have been heard by the agent, it was error in the court to give peremptory instructions to the jury to find for appellee, as it was the duty of the agent to protect appellant, and whether he used ordinary care to do so, should have been submitted to the jury under the evidence.

J. C. Speight and H. L. Anderson for appellant.

J. M. Dickinson and Pirtle & Trabue for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Nunn.

The appellant instituted this action against appellee for $1,000 in damages resulting from an assault upon, insult and injury to him, in appellee's depot in Fulton, Ky., while he was a passenger. Upon a trial of the case and after appellant's evidence was heard, the court gave a peremptory instruction to the jury to find for appellee, and judgment was rendered by the court dismissing appellant's petition, and adjudged that he should pay appellee's cost, from which judgment appellant has appealed.

The facts of the case, as they appear of record, are, in substance, as follows: The appellant bought a ticket at Arlington, Ky., to Paducah, Ky. When he reached Fulton, Ky., it was necessary for him to change cars, that is, from one of appellees' trains to another. About the time the train going to Paducah was due to arrive, he went to the depot and entered the waiting room provided for colored passengers, he being a colored man. On entering the depot with his baggage he went to the office window and asked the agent how long before the train for Paducah would arrive, and upon being informed that the train was some minutes late, he thanked the agent and took his seat. In a short while a tall man, wearing a long gum coat and cap, came into the waiting room and said to a crowd of section hands, "get out, bullies, get out, G—d d—n, you, I will take a shot at you directly." He then walked around the stove and said to appellant, "Old nigger, where in the h—l are you going?" Appellant answered, "to Paducah." He said, "have you got a ticket," and appellant said, "yes, sir." He then said, "G—d d—n you, don't give me any of your head, I will blow you up to see you jump up," at the same time pointing his pistol at appellant. This excited the appellant and he arose, but stated that he did not know what for, unless to run, when one of the section men said to this tall man, who was the section boss, "let that man alone, he is a preacher," and he answered, "G—d d—n a preacher, he looks like any other man to me, I will shoot him to see him jump up." He then said to appellant, "you get out of here." Appellant obeyed him and walked around the wall of the room to the front door

and passed out. He remained out until the section boss got his hands out by driving and knocking them along. He stated that he then returned to the waiting room and took his seat by the fire, as he was suffering very much from the cold. The section boss returned, and said to appellant, "Old nigger, aint you gone from here yet? I'll bet you by G—d I will kill you. You get out of here and stay out." Appellant then left the room and stayed out until the train arrived. He also stated that the weather was very cold and that by reason of being forced to remain out of doors, his feet were frost bitten so that the skin peeled off of them. Appellant also stated that when he passed out of the door his hat was knocked off, but that he was too far away from the party to receive the force of the blow. Appellant introduced two witnesses who stated that as appellant was leaving the room the section boss struck and kicked at him and drew his pistol. All the witnesses prove that one Bennerman, a colored man, was an employe of appellee and was in the room at the time of both of the assaults and his business was sweeping and cleaning up the inside of the waiting room, waiting on the room generally and keeping up the fires. All the witnesses stated that the window between the ticket office and this waiting room was open all the time that appellant was in and around the depot, and that there was no attempt on the part of any one to save him from the assault, insult and injury. It was proven on cross examination that in the ticket office, which adjoined this waiting room, there were several telegraph instruments in operation, and that they made a considerable noise, from which it might be inferred that the agent could and did not hear the assault and the language used by the section boss. The proof of appellant showed that the noise made by the section boss was much louder than the noise made by the instruments. Appellee also attempted to show that this Bennerman did not have any position at the depot, or any connection therewith, but his only duty was to carry baggage to and from the depot. Some of the witnesses stated that that was his duty at the time of the trial, but at the time of the injury his duty was that of porter, as stated. Appellant also stated on cross examination that he did not complain to appellee's ticket agent and tell him of his ill treatment at the hands of the section boss, and appellee contends that even if he had done so, the ticket agent would not have had time to have prevented it. It is not claimed that the section boss, Boone, was in the discharge of any duty which he owed to appellee when he was guilty of the outrageous conduct toward appellant; the right to recover is not based on that ground.

The action of the lower court in giving the peremptory instruction, seems to have been based upon the idea that there was not any positive proof, showing that appellee's ticket agent had actual knowledge of the assault and injury to the plaintiff.

If there can be a recovery in this case it must be done upon the theory that the appellee was guilty of a breach of duty in the failure of those in charge of the depot to exercise proper care to protect appellant from assault and insult. In the case of Kinney v. Louisville & Nashville Railroad Co., 99 Ky., 59 the court said: "The principles of law applicable to such cases as this are well settled by the almost uniform adjudications of the courts in this country. Carriers are not held to be the insurers of the absolute safety

or their passengers, or of their entire immunity from the misconduct of their fellow passengers or of strangers; but there is an implied obligation growing out of the contract between the carrier and the passenger, that the former shall afford to the latter reasonable protection and immunity from insults, violence, and wanton inference of intruders, fellow passengers and the carrier and his servants."

In the case of Clarke, &c. v. Louisville & Nashville Railroad Co., 20 Ky. Law Rep., 1839, the court said: "It is undoubtedly true that the law implies, from the relation of carrier and passenger, a contract that the carrier will use all reasonable precaution necessary, for the purpose of protecting the passenger from violence and insult which may be reasonably anticipated or naturally expected to occur, under the circumstances of the case."

In the case of Winnegar's Adm'r v. Central Passenger Railway Co., 85 Ky., 553, the court said: "The doctrine is now well established that the law implies a contract for the protection of the party carried, from the insult and wanton interference of strangers, fellow passengers and the carrier and its servants, and for every violation of the implied contract by force or negligence, the carrier is liable in an action of contract or tort. The law makes the carrier responsible for the acts of the person in charge of the car and who, for the time has the voluntary custody of the passenger, with the implied obligation that he will exercise the highest degree of diligence to transport him safely."

It will be observed in the cases quoted from that the complaining passengers were upon the cars being transported, and were almost wholly under the care, control and protection of those in charge of the train, and, therefore, there was an implied obligation upon the part of those in charge of the train to exercise the highest degree of diligence to transport them safely. With respect to passengers in the depots, the circumstances are different. They are not so completely under the power and control, and to the same extent, helpless to protect themselves as when upon the cars, yet the same implied obligations on the part of those in charge of the depot, to protect them from insult and injury, exists, but not to the same degree or extent. Ordinary care is sufficient in such a state of case.

It is conceded in this case that the appellant was a passenger, as he was there within thirty minutes before the time the train was due to leave, with a ticket, and with the intention to take passage on it.

In the case of the Illinois Central Railroad Co. v. Laloge, 24 Ky. Law Rep., 693, after discussing the duty of a carrier to licensees, the court said: To the passenger, whether on its trains or at its station, its duty is materially different. It must use every care to prevent their injury, and if it has notice of its passenger being in danger of violence, or indecent treatment, whether at the hands of a fellow passenger or another on its premises or within its control, it must use its best endeavors to protect the passenger. (Kinney v. R. R. Co., 99 Ky., 59.) * * * But still it is his coming to the station within a reasonable time before, with the intention to take the next train, that creates the relation of passenger and carrier.

"But we have in this State what may be regarded as legislative construction of the length of time that should be considered reasonable for the carrier to be required to look out for and safeguard its passengers before they

have taken actual passage." The court then quotes section 784 of the statutes, and continues: "The carrier is not an innkeeper. It can not, in the discharge of its other duties required by law, be held to furnish accommodation for the entertainment for an indefinite length of time of those who contemplate in the future becoming its passengers."

If those in charge of appellee's depot knew, or by the exercise of ordinary care, consistent with other duties which they had to perform, could have known of the misconduct of the section foreman in the waiting room, and could by such care have protected appellant therefrom, he may recover, unless the injury was due to a want of care on his own part. In our opinion the appellant introduced some evidence entitling him to have his case submitted to the jury. The proof that the ticket agent was at his post of duty immediately preceding the outrageous and boisterous conduct of Boone; the window between his room and the waiting room being up during the whole of this unlawful conduct; the length of time which elapsed from the time when Boone began to drive his hands from the room and the altercation of words with appellant; his leaving the room and the length of time he remained out in the cold and then returning to the room and the second assault which again drove him from the room, and his remaining out in the cold from that time until the train started, all this was at least sufficient to put upon the appellee the proof to show that it was not responsible by its neglect or want of care, for the insult and injury received by appellant. We are of the opinion that the proof was not sufficient to show that Bennerman exercised any authority over the depot, or that it was any part of his duty to look after the safety and comfort of the passengers, and if such was not a part of his duty, notice to him was not notice to appellee.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

DAVIE, &c. v. DAVIE, &c.

(Filed June 7, 1904—Not to be reported.)

Wills—Devise to son for life—Provision as to remainder—Children—Grandchildren—Brother and sister and their children—Construction—Jacob W. Kalfus in his will made the following devise: "I give to my son, Southern Kalfus, for and during his life, and after his death in fee simple to his children or grandchildren, if there should be any living at his death, but if there should be none living, the same shall pass to his brother and his sister and the children or grandchildren, if there should be any living, the following pieces of property, to wit," etc. Southern Kalfus died in 1897 without children or grandchildren, leaving his brother, James S. Kalfus and his sister, Addie K. Davie. James S. Kalfus has no children or grandchildren. Mrs. Davie has two grandchildren, Ada B. and Jessie, the appellants herein, who are children of her deceased son, Southern Davie, who died before Southern Kalfus. Other portions of the will of Jacob W. Kalfus show that he intended by his will to make his three children, Southern Kalfus, James S. Kalfus and Mrs. Davie equal in the division of his estate between them. Held—That the interest of Southern Kalfus devised to him under said will, at his death vested in fee simple in his brother and sister equally, who were both living at the time of the death of said Southern Kalfus.

O'Neal & O'Neal and W. O. Harris for appellants.

C. H. Shield and B. F. Washer for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

This appeal involves the construction of the following provision contained in the will of Jacob W. Kalfus: "I give and devise to my son, Southern Kalfus, for and during his life, and after his death in fee simple to his children or grandchildren, if there should be any living at his death, but if there should be none living, the same shall pass to his brother and his sister and the children or grandchildren, if there should be any living, the following pieces of property, to wit, etc."

The cause of this controversy arises from the following facts: Southern Kalfus died in 1897, without children or grandchildren, and left surviving him his brother, James Kalfus, and his sister, Addie K. Davie, the appellees to this action. Appellee James S. Kalfus has, at this time, no children or grandchildren, while Mrs. Davie has two grandchildren, Ada B. Davie and Jessie Davie, children of a deceased son, Southern Davie. Southern Davie died before the death of Southern Kalfus. The question here presented concerns the interest taken by James S. Kalfus and Addie K. Davie in the property devised by Jacob W. Kalfus to his son, Southern Kalfus. The appellees contend that by the terms of the will they are vested with a fee-simple title in Southern Kalfus' portion of his father's estate. The guardian of the two children of Southern Davie, grandchildren of Mrs. Davie, asserts an interest in the property, the character and nature of which she does not allege; that is, she does not allege whether they own as joint tenants with their grandmother or whether they take in remainder.

It is a recognized principle, that in the construction of wills there can be no fixed rules applicable to all cases, but the application of all rules of construction must necessarily be varied by the language used by the testator, the object being to arrive at his intention, to be gathered from the entire will. If literal effect be given to the following words in the clause of the will quoted, "but if there should be none living, the same shall pass to his brother and his sister and their children or grandchildren, if there should be any living," it would give these grandchildren equal joint interest with James S. Kalfus and their grandmother, Addie K. Davie. From the whole will, we do not believe the testator intended such a result, nor is there any language used in the will showing that it was the intention of the testator that his children, James S. Kalus and Addie K. Davie, should take a life estate in their brother, Southern Kalfus' portion of the estate, and these grandchildren should take the remainder. The testator, Jacob W. Kalfus, made provision for his three children, and described the property given to each and fixed the value of each piece, and then directed that out of his personal estate they be made equal. It is shown throughout his will that it was his desire that his children receive the same amount of his property, and upon like terms and conditions, unless the literal construction be given to the clause above quoted, in which event his son, James S. Kalfus, and his daughter, Addie K. Davie, would receive a less estate by reason of such provision, than Southern Kalfus would have received had he outlived either of

them and participated in their portions. As evidence of this fact, we now quote the provision of the will with reference to his other two children: "I give and devise to my daughter, Adeline K. Davie, for and during her life and after her death in fee simple to her children or grandchildren at the time of her death. But if there should be neither at the time of her death, the same shall pass and go and I so devise it to her brothers or their children or grandchildren that may survive them, the following pieces of property, etc."

The other clause is as follows: "I give and devise to my son, James S. Kalfus, for and during his life and after his death in fee simple to his children or grandchildren, if there should be any living at his death. But if there be none living at his death, the same shall pass to his brother and sister or their children or grandchildren, if there should be any living, the following pieces of property, etc."

It will be observed that the clauses making the devise to his daughter, Addie K. Davie and to James S. Kalfus are in substance and effect the same. The one to Southern Kalfus is the same except the word "and" is used instead of "or" after the words "brother and sister," which literally makes quite a distinction. The question to be determined is, did the testator intend it?

We are of the opinion that he did not. It appears from the will that the draftsman was careless of the use of the words "and" and "or." He often used the word "and" when he meant "or," and vice versa. In the seventh clause of the will the testator openly states that "whatever stocks or bonds or money I may have on hand at the time of my death, my executor shall divide them equally between my children and their representatives, taking into consideration the amount or amounts that each one has received in money and the amounts each one has received in real estate mentioned in this will, so that each one shall be equal."

The testator evidently meant to say, "whatever stocks, bonds and money I may have, etc.," using "or" inadvertently for "and." Also here is a positive declaration on the part of the testator that Mrs. Davie, James S. and Southern Kalfus should take the same quantity and character of estate in the property devised to them by their father; that his desire was perfect equality between them, which could not be obtained if the construction contended for by appellants' counsel be sustained.

The authorities are numerous to the effect that it is within the power and it is the duty of the court, when necessary to effectuate the intention and purpose of the testator, to not only change or transfer "and" for "or," but to transpose words and sentences when absolutey necessary for such purpose. (Robb v. Bell, 12 B. M., 646; Williams v. Williams, 91 Ky., 556; Aulick v. Wallace, 13 Bush, 536; Moore's Adm'r v. Sleet, 24 Ky. Law Rep., 426.)

When a fair and reasonable construction is given to the language employed by the testator in all the clauses of the will, it is not difficult to understand what was intended by the testator in the use of the language employed in the second clause of the will, and this purpose can be ascertained without changing the word "and" to "or."

The devise to Southern Kalfus was made to him for life, and at his death to his brother and sister and their children or grandchildren, if either of

them should be dead at the time the property passed from Southern Kalfus. The property was to go to the brother and sister if living at that time, if not, then to the children, etc. The testator evidently knew how to create a life estate, for in each of the devises to his children he expressly stated that he gave the property devised to them "for life," but in disposing of each of the interests in the event of the death of the devisee without children or grandchildren, he directed that such interest should pass to the surviving sister and brother, and, understanding the words necessary to create a life estate, if he had intended that they should take only a life estate, he would have added after the words "brother and sister" the words "for life."

The conclusion we have reached is in conformity with the judgment of the lower court and it is, therefore, affirmed.

Whole court sitting.

ROOT, &c. v. GREEN, &c.

(Filed June 7, 1904—Not to be reported.)

Attorneys' fees—Personal representative—Fees of—Services performed by —Where the personal representative of an estate amounting to $350,000 or $400,000, although he had control of the estate for about one month, located various holdings of valuable real estate in various cities, collected and accounted for various rents, and had possession and control of money amounting to something over $140,000, defended tax suits upon a basis not essentially different from the contention of himself and his attorney, and performed various duties incumbent upon one in charge of so vast an estate, he should be allowed for his services as such representative $1,000; and his attorney who advised him in the settlement of the estate and represented him in the litigation, should be allowed $500.

O. W. &. A. T. Root and J. T. Thornton for appellants.

J. C. Wright for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Settle.

John Cline, a resident of Campbell county, died intestate on the 19th day of August, 1902, the owner of real and personal estate amounting in value to from $350,000 to $400,000. There being, for some reason, delay in granting letters of administration upon the estate, the Campbell County Court, by order of the 26th of August, 1902, duly appointed the appellant, O. W. Root, curator of the decedent's estate, and he immediately took the necessary oath and executed bond as such curator, and at once took charge of the estate, real and personal, which he continued in the possession of until about September 25, 1902.

After the appointment of the curator, the appellee, Fannie W. Green, an heir at law of the decedent, brought suit in the Campbell Circuit Court for a settlement of the estate, all other heirs at law and the curator being made parties to the action, and upon motion of appellee, Fannie W. Green, the case was referred to the master commissioner to ascertain and report the liabilities of the estate, and also the value of the personal property that went into the hands of the curator. The order of reference directed the curator

to pay and deliver to the commissioner, all moneys and other personal property in his hands belonging to the estate.

The curator filed response containing a statement of the personal estate that came into his hands as curator, a part of which was $119,146.78, which he found on deposit to the credit of the decedent in the Union Savings Bank and Trust Company, of Cincinnati, O., and which he caused the bank to transfer to his credit as cuartor, but it was continued on deposit in the bank as it was drawing 3 per cent. interest; that he was unable to turn over this sum to the commissioner because of a suit pending in Hamilton county, O., which had been instituted by an administrator of the estate of the decedent appointed by the probate court of that county and State, although the appellee, Fannie W. Green had, after the institution of the suit to settle the estate, duly qualified as administratrix thereof, by appointment of the Campbell County court.

With the exception of the $119,146.78 on deposit in the Cincinnati bank mentioned, the remainder of the personal estate, consisting of money, stocks, bonds and household effects, was paid and delivered by the curator into the hands of the commissioner as directed by the order of the Campbell Circuit Court. In a settlement made with appellant as curator by the commissioner, the former was given credit by certain costs of administration and other sums for taxes against the estate paid by him, which payments, altogether, amounted to something over $1,000. Appellant filed with the commissioner a claim of $1,200 for services performed by him as curator, and also a claim of $1,100 in favor of A. T. Root for services rendered as attorney for the curator. These claims were not allowed by the commissioner, but were reported, together with the evidence introduced by appellants in support thereof, to the court for its action.

These claims were passed upon by the court, but in the judgment rendered in regard thereto appellant, as curator, was only allowed $88.94 for his services as such, and $125 in addition, that sum being the amount paid by him to a security company for becoming surety upon his bond as curator. And A. T. Root was allowed for his services as attorney for the curator, only $50. Of that judgment the appellants, O. T. and A. T. Root, complain.

We are of opinion that the allowances to the curator and his attorney were too small. While it is true that the curator had control of the estate of the decedent only one month, he performed considerable labor in ascertaining the condition thereof, and of what it consisted, his investigations resulting in the finding of some of the money of the decedent in a Cincinnati bank, and some in the banks of Newport. There were also certain stocks and bonds found in one of the Newport banks. An appraisement of the entire personal estate was necessary, and was caused to be made by the curator in the usual legal form. In addition, he had to undertake the labor of looking up and locating the decedent's holdings of real estate, in order that he might ascertain how much of it was in the possession of tenants, and what rents were due thereon, and to collect such as were due and payable. Some of the real estate is situated in the cities of Newport and Dayton, Campbell county, some of it in the city of Covington, some in the city of Cincinnati, O., and some in the State of Florida. Certain rents were collected and accounted for by him as shown by the report of the commissioner

During the time of his curatorship he had the possession and control of money and other personal property belonging to the estate of the decedent, amounting to not less than $142,302.20. Though the larger part of the money was never withdrawn by him from the banks, it was on deposit to his credit, and he was responsible on his bond to the heirs at law of the decedent therefor.

Furthermore, immediately after his coming into possession of the estate of the decedent as curator, proceedings were set on foot by the proper officers, for the assessment for taxation of the entire estate left by the decedent for the years 1893 to 1902, inclusive, and to enforce the payment of taxes thereon alleged to be due the State of Kentucky, county of Campbell, cities of Newport and Dayton, and the district of Highlands in Campbell county, for those years, it being the contention of the officers seeking to collect such taxes, that the property of the decedent had been omitted from assessment and taxation during the years mentioned. The curator and his attorney, according to the evidence, gave especial attention to these tax suits, investigated the law in reference thereto, and made defense by the filing of demurrers, responses and answers, and the cases were all finally settled by the parties after the duties of the curator ceased, upon a basis not essentially differing from that contended for by the curator's attorney in the defense interposed by him.

In consideration, therefore, of the magnitude of the estate that went into the curator's hands, the value of the labor and services performed by him in preserving the same, as hereinbefore mentioned, and in resisting the tax suits, and in view of the responsibility accompanying the carrying out of such a trust as was imposed upon the curator, we are of opinion that he should have been allowed for his services at least $1,000. It appearing from the evidence that the attorney of the curator acted as his legal advisor while he was in possession of the decedent's estate, that he rendered him such services as were needed at the hands of an attorney in its management and preservation, and did all that was necessary in resisting and defending the tax suits instituted against the curator, and, besides, prepared and filed for him in this case the response made necessary by the order of the lower court, which required the curator to settle with and pay to the commissioner the personal estate of the decedent. We are further of opinion that the services of the attorney rendered the curator were and are reasonably worth $500, which sum should have been allowed him by the court.

For the reasons indicated the judgment is reversed and cause remanded, with directions to the lower court to set aside so much of the judgment appealed from as fixed the compensation of the curator and his attorney, and in lieu thereof enter judgment allowing O. T. Root for his services as curator $1,000, and to his attorney, A. T. Root, $500 for the services rendered by him.

HARRIGAN AND WHITE v. THE ADVANCE THRESHER CO.

(Filed June 7, 1904—Not to be reported.)

1. Sales of personalty—Warranty—In an action on a note executed for the purchase price of an engine, the proof showing that the engine was warranted to be in good condition and all right, and that it would do the work

of any twelve-horse power engine and that the purchaser relied on these statements, that they had no opportunity to test the engine, and but for these statements would not have bought it, and it turned out that it was not as represented and would not do the work as represented, they were entitled to have their note cancelled

2. Assignment of note—Construction of statutes—By the provisions of section 474, Kentucky Statutes, a note is subject to the same defenses as if it had remained in the hands of the original payee, and appellants are not estopped to deny liability on their note because, after the execution of it they acknowleged liability thereon, the proof showing that throughout the negotiations the agent agreed that the company should be bound on the warranty, in consideration of the execution of the note direct to appellee.

G. W. Whitesides for appellants.

John J. Milliken for appellee.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted by appellee against the appellants on a note for $300 executed for the purchase price of one "Star engine," purchased by appellants from West Brothers, the note having been executed direct to appellee at the request of West Brothers. The appellants answered the petition of the plaintiff and alleged that at the time and before they made the trade with West Brothers for the engine, West Brothers warranted the engine to be in good condition and all right, and that it would do the work of any twelve-horse power engine; that in buying this engine they relied upon these statements and warranty in making the trade; that they had no opportunity to test the engine as to its condition or power prior to the trade, and that but for these statements and warranty they would not have bought the engine; that they executed the note sued on to the appellee before they had received possession of the engine, with the positive representation and statement of West Brothers that the engine was in the condition and of the character as represented by them, which was made in the presence of one Boyd, the general agent of the appellee, who approved their statements and agreed that appellee would make good the representations and warranty of West Brothers; that in a few days after the execution of the note they received this engine and undertook to operate it and they found that it was not "all right;" that it was not in "good condition;" that it "would not do the work of any good twelve-horse power engine," and that in fact it was of no value; that they bought it for the purpose of running a thresher and corn shredder, which was, at the time, known to West Brothers and appellee, and that it was not in the condition nor did it have the power to run either the thresher or shredder, and it was not fit for any purpose, and that they had been damaged in the way of repairs and other expenses in attempting to run it, in the sum of $160. They asked that their note be cancelled, and tendered the appellee the engine, and asked judgment for $160.

The parties pleaded to an issue, the case was tried in equity, and the court adjudged that appellants pay the note with interest, from which judgment they have appealed. It appears from the proof that the engine was in very bad condition at the time appellants purchased it, that it would not do the work, and did not have the power of any good twelve-horse power engine,

nor half that power, and was worthless for the purpose for which they purchased it. It also appears that Tom West, of the firm of West Brothers, and the person who sold the engine to appellants, represented, at the time and before the trade to appellants, that the engine was all right, and that it was in good condition, had the power and could do the work of any good twelve-horse power engine. This proof was without any contradiction, except West stated that he did not warrant or guarantee the engine, but did not deny that he made the representations stated. It was not shown what, in the opinion of Tom West, it took to constitute a warranty. He, in all probability, did not believe that the representations attributed to him amounted to a warranty.

This court, in several cases, has passed upon this question. In the case of McClintock v. Emick, Stomer & Co., 87 Ky., 161, the court held that, while a trade for mules was in progress, the following amounted to a warranty for the soundness of the mules. The purchaser asked the seller, "are they all right?" The answer was, "they are." In that case the court said: "If a person makes a positive affirmation as to the condition of the property, or utters what is equivalent to a promise as to it, instead of expressing a belief merely, then such affirmation or promise amounts to a warranty, and he is liable upon it. It does not depend upon whether the vendor intends to be bound by his warranty or not, but upon whether he made an affirmation as to the condition of the article or merely expressed an opinion as to it." (Lamme v. Gregg, 1 Met., 444.)

In the case of Cook v. Gray, 2 Bush, 121, the court said: "There is a material distinction between a warranty of a chattel on an executed sale and a warranty that articles to be manufactured and delivered in the future shall be of a particular quality. In the former case the purchaser has the right to rely upon the warranty without examination or inspection of the article, and, therefore, may return the article or sue for the breach of warranty, or use it as a defense by way of recoupment."

Upon this authority and the other cases cited in the opinion supra, this being an executed sale, the appellants had the right to retain the engine and make defense by way of recoupment. And if the warranty be proven, the appellants should have a credit on the note for the difference between the price they agreed to pay and the actual value of the engine at the time they received it. Appellee contends that appellants are estopped from making defense to this note because, after the execution of it, they acknowledged their liability thereon, and also because the appellee was an innocent purchaser and holder thereof. The proof shows in this case that appellee's agent originated this trade and aided and induced, throughout the negotiations, the trade to be made, and there is proof, although contradicted, that he agreed that the company should be bound with West Brothers on this warranty, in consideration of appellants executing the note direct to appellee. At all events, the appellee became the owner of this claim by assignment from West Brothers, and, under section 474 of the Kentucky Statutes, it is subject to the same defenses as if it had remained the property of West Brothers. Appellee's plea in estoppel can not avail it, for the reason they do not plead nor show by proof, that by any act or omission of appellants that it has been placed in any more unfavorable position or suffered any loss.

Wherefore, the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

ALMON, &c. v. ELLISON, &c.

(Filed June 7, 1904—Not to be reported.)

Trustee and cestui que trust—Contracts—In this action to set aside a contract which appellants made with the widow of their deceased brother by which they took a transfer of $1,200 bank stock in lieu of their interest in his estate, the remainder of which they owned, the action of the chancellor in denying the relief will be upheld, where the facts show that the widow was left the estate for life with the provision that if the income should not be sufficient to support her, she should sell enough of the estate to provide for herself; that she became a nonresident, appellants saw the estate of their brother becoming exhausted and made a transfer of their interest in it to her for the bank stock, intending to get as much of it as they could and to protect themselves. There appears to be no fraud on her part, the paper which she signed in transferring the stock merely reciting that it was impossible for her to determine the extent of the estate that would be left at her death. Moreover, appellants did not offer to rescind the contract during the life of their brother's widow and the delivery of their bank stock to her.

Little & Slack, W. A. Taylor and L. P. Tanner for appellants.

W. B. Noe and R. L. Greene for appellees.

Appeal from McLean Circuit Court.

Opinion of the court by Judge Hobson.

L. E. Almon died, a resident of McLean county, in the year 1888, leaving an estate of about $7,000. He had no children and devised his entire estate to his wife for life, with remainder to his three brothers. He made his wife the executor of the will without bond, and provided that she might use the income for her support, and if at any time the income, which was hers absolutely, was not sufficient to support and maintain her comfortably, she to judge of that, she might sell and use so much of the principal as might be necessary, and for that purpose might make an absolute title to the purchaser. The widow qualified as executor, but returned no appraisement, sale bill or report to the county court, and made no settlement of her accounts. She then married a second time and moved to California. In the year 1898, the three brothers made a contract with her, in writing, by which she turned over to them absolutely, ten shares of bank stock worth about $1,200, and they in consideration thereof released and transferred to her all interest whatever they had in their brother's estate. In less than a year after this she died, and after her death the three brothers brought this suit, charging that the contract which they made with her releasing to her their interest in their brother's estate in consideration of the ten shares of bank stock, was obtained by fraud, and should be set aside.

She had no communication with appellants at all prior to the making of the contract. They employed a lawyer to investigate the condition of the estate, and he being unable to find any inventory or settlement could learn but little about it. In this condition of things he saw W. B. Noe, who was

an officer in the bank referred to, and told him about the bank stock. It is clear from the evidence that Noe was not the attorney of the woman in the transaction, but was simply acting on behalf of the bank. The woman made no representations of any kind, and what Noe said was justified by the facts known to him. The paper which the appellants signed contained these words: "Whereas, the said widow has about exhausted the whole of said estate, and has removed from the State of Kentucky, and has again married."

It is said that this statement was a fraud. It is conceded that she had removed from Kentucky and had married again, but it is said that she left them under a misapprehension when she accepted the paper which recited that she had about exhausted the whole of the estate. The paper which the woman signed and delivered to appellants did not contain this recital, but simply recited the fact that it was impossible for her to ascertain what estate of her husband might be left at her death. The proof shows she left an estate in California worth about $8,500; she also left some land in Kentucky, the value of which is not accurately shown. But at the time the settlement was made she was much younger than either of the plaintiffs, was in good health, and a nonresident of Kentucky. She had the right, under her husband's will, to use the principal of the estate for her support if necessary, and of this she was to be the sole judge. She had married a second time and was living with her second husband in California. She had collected the entire personal estate except the bank stock and taken it out there with her. She had sold off some of the land and had been trying to sell the bank stock and the rest of the land. What induced the plaintiffs to make the trade was the hopeless condition they were in and the improbability of their ever being able to find and identify any of the estate of their brother when the widow might die at some future time in California, possibly after they were all dead, as she was younger than they. They made a good trade under the circumstances, judging from probabilities and the usual course of such things. They did not offer to restore the bank stock to her in her lifetime and rescind the agreement, and we are satisfied from all the proof that they could not afford to do so now if she was living. In other words, we are satisfied from the evidence that the plaintiffs could not afford to set aside this contract but for the unexpected death of the woman about a year after it was made. The principle, therefore, that as between trustee and cestui que trusts a contract will be rescinded where a fair disclosure is not made, has no application. The plaintiffs made a chancing bargain, and did what seemed very reasonable under the circumstances surrounding them.

Judgment affirmed.

ROSE v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed June 7, 1904—Not to be reported.)

Railroads—Master and servant—Damages—Instructions—In an action by appellant against appellee for damages sustained by having been struck with a pick by D., a fellow servant, while engaged in removing a cross tie, it appearing that the section boss directed D. to help remove the tie while appellant was engaged in an effort to remove it, that D. was drinking, but

that fact was unknown to the section boss, there having been nothing in his previous conduct to show it, there was no negligence on the part of the section boss and the action of the trial court in sustaining a motion for a peremptory instruction, was proper.

M. C. Swinford and W. H. Lall for appellant.

J. I. Blanton, Benjamin D. Warfield and E. W. Hines for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Hobson.

Appellant filed this suit to recover for personal injuries received by him while in the service of appellee as a section hand, working under a section boss named Foley. He alleged that his injury was due to the negligence of Foley in this, that while he and two other men were pulling out a tie by sticking their picks into it, Foley, by gross negligence, ordered a number of other men to help pull out the tie and they, in obedience to his order, crowded up to do so; that one of them named Davis was drunk and that Foley knew this or ought to have known it by ordinary care, and that Davis struck the plaintiff with his pick above the left eye in attempting to stick his pick in the tie. At the conclusion of the evidence for the plaintiff, the court instructed the jury peremptorily to find for the defendant.

The action is not rested on the negligence of Davis in striking the plaintiff with his pick, for Davis was a fellow laborer with the plaintiff and the defendant is not responsible to him for Davis' negligence, and so the action is placed entirely on the negligence of the section boss. While there is evidence tending to show that Davis was drunk, and that by reason of his being drunk he negligently struck the plaintiff with his pick, we do not see anything in the evidence tending to show that Foley knew it or ought to have known it. The plaintiff himself did not know it. There had been nothing in Davis' previous conduct tending to show that he was drinking, so far as appears from the proof, and we think it may be inferred from the evidence that he had taken the drinks proven, not long before the accident. But, however this may be, the evidence does not show that the section boss knew he had been drinking or that there was anything in his conduct from which the section boss should have anticipated danger, in ordering him to pull out the tie or help in doing so.

While there is some evidence that a less number of men might have gotten out the tie, still in matters of this sort there must be a considerable margin for judgment, as a railroad track must sometimes be fixed very quickly to avoid delay of traffic, and we do not see that the section boss, in ordering the other men to help in getting out this tie from under the track, should have anticipated that one of them would come up behind another and hit him in the head in broad daylight with a pick in sticking the pick in the tie.

Judgment affirmed.

LITELL v. PETTIT.

(Filed June 7, 1904—Not to be reported.)

Peremptory instruction—Evidence—In an action by appellant for damages against appellee for the conversion of tramway cars, it was error for the trial court to sustain a motion for a peremptory instruction, where it appears there was sufficient evidence to have taken the case to the jury.

R. G. Hill for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, George C. Litell, brought this action against the appellee, Thomas S. Pettit, to recover the value of three tramway cars alleged to have belonged to him, and which the defendant had sold and appropriated the proceeds to his own use. The defendant in his answer, denied that he had sold or disposed of any tramway cars, but admitted that he had sold some car wheels and axles for which he had received $19.50, and which he had appropriated to his own use. He further alleged that these car wheels and axles had been left in his possession by one H. E. Miller more than seven years before the institution of plaintiff's cause of action, and he plead and relied upon the lapse of time and statute of limitation, in bar of plaintiff's claim. The averments of the answer as to possession were controverted by reply. Upon the trial before a jury, the plaintiff proved that he had paid a bill as security for H. E. Miller to the Owensboro Savings Bank for $225; and that Miller had transferred to him certain tramway cars owned by him, on the land of R. G. Hill.

H. E. Miller testified that these cars had wheels of heavy iron made to run on poles; that each car had four wheels and a set of trucks; that when he turned over the sawmill which he had rented from the defendant, Pettit, these cars were placed in a building belonging to Hill; that he had sold these cars to the plaintiff. Hardin Shepard testified that the defendant, Pettit, had given to his brother a written order for certain car wheels which he claimed belonged to him at the sawmill, and which he sold to Dall and Groet Zinger, of Owensboro, and that these were the same wheels that were left at Pettit's Station by Miller. John Wright testified that in 1898 he made three tramway cars for Miller, that the wheels were moulded from a special pattern, and that he subsequently bought of Dall and Groet Zinger twelve wheels of the same pattern as those moulded for Miller. Henry Krahwinkle testified that he lived at Pettit Station, and knew the three tram cars that were used by Miller, and that Hardin Shepard carried them away.

At the conclusion of this testimony the trial judge sustained a motion for a peremptory instruction, and to reverse that judgment this appeal is prosecuted. In our opinion there was sufficient evidence of the alleged conversion of plaintiff's tram cars by the defendant, Pettit, to have taken the case to the jury, and the trial court erred in the peremptory instruction.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

CENTRAL KENTUCKY ASYLUM FOR INSANE v. FRY'S COMMITTEE, &c.

(Filed June 7, 1904—Not to be reported.)

Commissioner's report—Weight of evidence—Service of lunatic—Where the finding of the commissioner upon a claim for service of lunatic against an asylum was sustained by the chancellor, though the evidence is conflicting such effect will be given the report of the commissioner as to refuse to disturb the judgment of the chancellor.

Holt & Alexander for appellants.

R. H. Blain for appellees

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Hobson.

This case is similar in its facts to the case of Henry Michaels v. Central Kentucky Asylum for the Insane, this day decided (ante, 304), and is governed by the principles announced in that opinion. While the proof is very conflicting as to the value of Susan Fry's services, the commissioner to whom the case was referred, fixed their value at $2 a week. The court, on final hearing, overruled the exceptions to the commissioner's report and gave judgment in favor of the asylum for the amount of its claim, subject to a credit for the services of the lunatic as allowed by the commissioner. Giving the finding of the commissioner, which was confirmed by the chancellor, some effect, we conclude that we ought not to reverse the judgment on the facts.

Judgment affirmed.

BOSWORTH, TREASURER v. SHUCK.

(Filed June 9, 1904.)

Claim against treasury—Appropriation exhausted—Mandamus—Ordinarily, when the law recognizes the validity of a claim against the State, it is payable out of any funds in the treasury not otherwise appropriated; but where a claim against the State is payable out of a specific appropriation which has been exhausted, the courts can not, by mandamus, require the auditor to issue a warrant for the claim or the treasurer to pay it.

N. B. Hays for appellant.

B. G. Williams for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 30th of July, 1903, the appellee, Finley Shuck, filed his petition in the Franklin Circuit Court against Gus G. Coulter, auditor of public accounts of the State of Kentucky, in which he alleged that he had rendered clerical services as chief of the claims department in the auditor's office from the 1st of March, 1900, until the 1st of March, 1903, under the following written agreement:

"I hereby appoint the Hon. Finley Shuck, of Lebanon, Marion county, to the position in the auditor's office, known as chief in claims department, at

a salary of $2,400 per annum. The salary of this place is to commence March 1, 1900.

"GUS G. COULTER, Auditor.

"February 28, 1900."

That the aggregate salary due him therefor was $7,200; that he had received at different times amounts aggregating $5,325, leaving due to him $1,875, and prayed that a writ of mandamus should issue, requiring the defendant to issue a warrant on the treasurer to him for the alleged balance. The defendant answered that the obligation sued on was executed without consideration, and that it was not intended by the parties that the plaintiff should fill the position of chief of the claims department or draw the salary stipulated for, except at the pleasure of the auditor; and that he did pay to the plaintiff $2,400 a year until about January 1, 1901; that after that date he was unable to continue to pay the plaintiff this sum out of the appropriations allowed to the auditor to pay for clerical assistance, and at the same time keep a competent clerical force to conduct the business of the office of auditor, and that this fact was well known to the plaintiff, and that he was paid a reasonable compensation for his services, which was accepted by him; that there was no fund in his hands or in the State treasury out of which the plaintiffs' claim could be paid; the appropriation had been exhausted in the payment for necessary clerical assistance, and asked that the plaintiffs' petition be dismissed. The plaintiff, in his reply, denied the affirmative allegations of the answer, and alleged that $16,200 had been appropriated by the general assembly to pay for clerical assistance in the auditor's office for each year; and that if this fund had been applied by the defendant to the payment of the clerical force in his office alone, there would have been more than sufficient to have paid his claim; but that the defendant had unlawfully diverted $3,000 per annum of the amount appropriated for clerical assistance in the auditor's office, for the payment of salaries to persons employed in the land office; and that there was a sufficient balance of funds appropriated for the clerical force in the auditor's office to pay the balance due to him; that by law only $1,200 was appropriated to the payment of assistants in the land office. The affirmative averments of the reply were denied by rejoinder, and the defendant further alleged that the office of register of the land office had been abolished, and that by the act of March 11, 1898, the duties imposed on the register of the land office, were transferred to and made a part of the duties of the office of auditor. On the 3d day of October, 1903, an agreed judgment was entered in this action, directing the auditor to draw his warrant on the State treasurer in favor of the plaintiff for $1,500. On the 25th of January, 1904, the appellee, Shuck, brought this action against the appellant, H. M. Bosworth, as treasurer of the State of Kentucky, for a mandamus requiring him to pay the $1,500 warrant which had, in the meantime, been issued pursuant to the judgment in the former action. The defendant answered that the appropriation made by the general assembly for clerk hire and clerical assistance in the auditor's office, for each of the years covered by plaintiff's term of service, had been exhausted by Coulter, before the issuance of the warrant sued for; that in fact, he had overdrawn the gross appropriations for this purpose for these years $2,143.82, before the warrant sued on was issued by the auditor; and that no appropriation had been made by law for the payment thereof; and

that there was no funds in the treasury available for its payment, and asked that the petition be dismissed. Plaintiff, in his reply to the answer of Bosworth, as treasurer, plead the judgment in the suit of Shuck v. Coulter, as an estoppel to the defense relied on by Bosworth. The case being submitted on the pleadings, it was adjudged that the defendant, as treasurer of the State of Kentucky, should pay the amount of the warrant, and the defendant has appealed.

The only question for decision is whether the appellant, as treasurer, can be required by mandamus to pay the warrant of appellee for clerical services rendered the auditor, after the appropriation for that purpose had been exhausted in the payment of previous warrants for similar services. By sections 188, 139, and subsection 4 of section 4001a, of the Kentucky Statutes, the auditor of public accounts is allowed $17,400 to enable him to employ and pay such clerks as he may deem necessary for the proper discharge of the business of his office, including the duties formerly performed by the register of the land office. The selection of the clerical force for the proper conduct of the business of the auditor's office, and the fixing or apportioning of their respective salaries is left to the sound discretion of the auditor, but the aggregate of such salaries, can not lawfully exceed the amount appropriated therefor by the general assembly. By section 144 of the Kentucky Statutes, he is required to keep an account between the Commonwealth and her civil officers to whom salary or wages are payable out of the treasury. Section 4688 provides "that no money shall be paid out of the treasury except upon the warrant of the auditor drawn upon the treasurer, and then only by check of the treasurer upon a designated depository; and that no such check shall be given by the treasurer, even though the auditor issues a warrant therefor unless the law under which the money may be claimed expressly directed and ordered that it shall be paid out of the public treasury."

It is not necessary for us to determine in this action what may be the ultimate liability of the State under the agreed judgment in Shuck v. Coulter, Auditor. All that was decided in that case was that appellee had a valid claim for $1,500 for clerical services rendered the auditor, and that warrant should issue therefor. When payment of the warrant so adjudged is demanded of the treasurer, he responds that the specific appropriation for the liquidation of claims for clerical services in the auditor's office had been exhausted previous to the issual of appellee's warrant; and that there were no funds in the treasury out of which such warrant could be lawfully paid by him. Ordinarily, when the law recognizes the validity of a claim against the State, it is payable out of any funds in the treasury not otherwise appropriated, but a wholly different rule prevails where a claim against the State is payable only out of a specific appropriation, which has been exhausted.

When this state of case is shown to exist, courts can not, by mandate, require the auditor to issue a warrant for the claim, or the treasurer to pay it. (Troop's Public Officers, sections 823-824; Western v. Daine, 51 Me., 631; Kentucky v. Boutwell, 13 Wallace, 526; United States v. Bayard, 127 U. S., 251; Paige, Superintendent, 85 Cal., 50; People v. Hyde Park, 117 Ill., 462.)

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

WATER SUPPLY CO. v CITY OF GEORGETOWN.

(Filed June 10, 1904—Not to be reported.)

In the controversy between the parties to this action as to their respective rights to the use of the water from what is known as the Royal or Republican Spring in the city of Georgetown, the court holds: First. That under the evidence and previous adjudications, that at the time John Nichols and his associates obtained their grant from the city of Georgetown, the entire title to the spring was in the city of Georgetown and J. D. Grover, and that Nichols and his associates, by their grant from the city and from Grover, obtained a perfect title to the perpetual use of the spring, and that the appellee, Georgetown Water, Gas, Electric and Power Co. has succeeded to all the rights of Nichols and his associates. Second. Whatever right the appellant, Water Supply Co. obtained under its deed from Montgomery, are subject to the prior rights of the appellee, Georgetown Water, Gas, Electric and Power Co., and when it comes to its permit from the city of Georgetown which was granted long after the grant to Nichols and his associates, it has only "permission to tap the spring branch by an underground pipe run from the power house, now occupied by the Georgetown Water Co., or along Water street and through the ground occupied by the ice company." This permit does not specify the point at which the ice company may tap the spring branch, and the court can not add to its terms. It may tap it any where it pleases within the limits specified in the ordinance, but may not run its pipe into the spring; that is, it must place its pipe below the point where the water ripples in leaving the pool of the spring. Third. The petition of the city of Georgetown, so far as it claims to be the entire owner of the spring, is dismissed without prejudice.

Victor F. Bradley and Montgomery & Lee for appellant.

J. B. Finnell for appellee.

Jas. F. Askew for Georgetown Water, Gas, Electric and Power Co.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Hobson.

There is a large spring at Georgetown, known as the Royal or Republican spring, on which the city depends largely for its water supply. This controversy arises between appellants and appellees as to the right to take water from the spring. The facts in regard to the title to the tract are thus stated by this court in the case of Floyd v. Adams, 8 Ky., 72: "On the 9th of February, 1781, John Floyd and Stephen Trigg entered into articles of agreement, whereby the former agreed to convey to the latter one thousand acres of land in Fayette county, on Elkhorn, the place whereon M'Clellan's fort stands, and five hundred acres adjoining thereto, for and in consideration of Trigg's settlement and pre emption on Harrod's Creek, and eight hundred acres on Gist's Fork of Brasheer's Creek. Tirgg was the next year killed by the Indians, and in the year following Floyd was also killed, but had previously made his will, whereby he directed his executors therein named, to convey to the heirs of Trigg, 'one thousand acres of land in Fayette, called the 'royal Spring tract.' Some time thereafter, Cobb filed his bill in the former supreme court for the district of Kentucky, alleging that he had purchased from Trigg in his life time, the tract of 1,000 acres, known by the name of the 'Royal Spring Tract,' to which suit he made

Trigg's heirs and Floyd's executors, defendants, and prayed that the conveyance should be made to him. On a final hearing of the cause, that court decreed Floyd's executors to convey to Cobb, and a conveyance was accordingly made by them. Cobb afterwards conveyed to Craig, who sold and conveyed distinct parcels to different individuals."

No paper title on behalf of the city of Georgetown to the spring is produced, but it is shown that, as a matter of right, as far back as the memory of any living witnesses go, the citizens of the town used it to get water. It is also shown from some old burned or charred papers in the clerk's office of the Scott Circuit Court, found among the burnt records in a suit between the heirs of Craig, that it was pleaded in that suit that Craig laid off and established the town and had a plat of it made, and that a piece of ground was left as a public ground near the spring and east of it as a watering place for wagons and teams, and in these pleadings it is stated that the middle of the Big or Royal spring or branch, was the western boundary of the town according to its meanderings. By an act of the legislature, approved February 11, 1835, the boundary of the town is stated as follows: "Beginning at a point known as the beginning of the boundary of the town at the head of the Republican spring (here follows several calls); thence up the middle of said branch to the middle of the head; thence around with the head of the spring to the beginning point of the Republican spring."

On the other hand, appellants also claim under Craig. One of his devisees named Pitts conveyed to W. B. Keene; Keene devised to Richards; Richards conveyed to Grinstead; Grinstead to Graves; Graves to Payne; Payne to Grover; Grover to Montgomery and Montgomery to appellants. In these deeds, so far as they are copied in the record, the land conveyed is bounded as follows: "Beginning at a point in the middle of the Georgetown and Frankfort turnpike in line with the west wall of Big Spring Branch * * * thence * * * to middle of Big Spring; thence with line of west wall of Big Spring Branch N. 7¾ E. 9 10-100 chains to the beginning."

It also appears that when Dr. Keene lived on the land, which after his death went to his grandson, Keene Richards, he said that the spring belonged to the town; he was then living on the tract west of the spring and there was at that time a partition wall that ran up through the head of the spring, which Dr. Keene said he had put there so he could fix for his milk and butter. He had a spring house which constituted part of the wall and he watered his stock on the west side of the wall. Just when this wall was placed there, nobody introduced as a witness is old enough to say, although some of the witnesses are over seventy years of age. There was an opening in the wall for the water on the west side to get out into the branch. After Dr. Keene's death and the property had fallen to his grandson, Keene Richards, Richards continued to water his stock at the spring, a neighbor suggesting to him why he did not get a force pump and force it up to his stable; he answered, "I don't know whether the town would let me do it or not to water my stock." The wall remained through the middle of the spring until the year 1889, when they had an epidemic of typhoid fever in the town, and the physicians thinking that the watering of the stock at the spring might befoul the water, made an arrangement with Payne, who then owned the Keene place, by which, with his consent, the town tore out, at its ex-

pense, the old wall running up through the middle of the spring, or a little west of the center, and made for Payne a watering place for his stock lower down on the branch. But this was all by consent, within fifteen years before this suit was brought, and there was then no controversy between the parties as to their rights in the spring. The old wall had then stood where it was, beyond the memory of any of the witnesses, perhaps for more than half a century. About this time John Nichols and others made a contract with the city to erect waterworks and supply it with water, and in this contract the city granted to them, among other things, the use of a lot described in the deed, also "the right to take water from the Big Spring Branch along the line of this lot, and also to pump out and take water from the head of said Big Spring." But it was stipulated: "The right to pump water out of Big Spring Branch and the head thereof, as above described herein, is perpetual, but not exclusive."

Nichols and his associates also obtained a lease from Grover, who then owned the Keene place, by which Grover leased to them "his portion of the spring in Georgetown, Ky., known as the Big Spring, for the purpose of using the water of said spring in supplying water for waterworks about to be put up in the town of Georgetown, and this lease is to continue as long as said Nichols or his assigns shall keep up waterworks in the town aforesaid; and in consideration of the lease of said spring aforesaid, the said Nichols agrees and binds himself to run a water pipe and put in a hydrant to the same, at any point said Grover may designate between the dwelling and stable on the farm of said Grover and furnish during the entire continuance of this lease, water to said Grover, without any expense or charge to him, through said pipe and hydrant, but whenever said Nichols or his assigns shall cease to furnish said water, then this lease to be null and void."

The appellee, the Georgetown Water, Gas, Electric and Power Co., has succeeded to all the rights of Nichols and his associates. In the deed from Montgomery to appellants, under which they claim there is this stipulation: "It is understood and agreed by the parties hereto that so far as release to the use of water by the second party in so much of the Royal Spring as is embraced in the aforesaid boundary, the same is subject to any right, real or supposed, that may have been conveyed by J. D. Grover, in writing from him to John Nichols, of date June 1, 1889, and recorded in deed book 25, page 124."

Appellants claim under this deed; they also claim under a permit from the city, which, so far as material, is as follows: "Whereupon the Georgetown Street Railway and the Georgetown Ice Co. having made their application for and the same being considered and the council advised, on motion it is ordered that the said companies be and are granted a permit to erect a brick, metal roof power house, car house and factory buildings on Water street, southeast of the Big Spring in the city of Georgetown, Ky., and said companies are also granted permission to tap the spring branch by an underground pipe run from said power house through the grounds now occupied by the Georgetown Water Co., or along Water street, and through the grounds now occupied by the said ice company."

In dry weather the spring gets low. The Electric Light and Water Co. has a pipe running into the head of the spring through which it pumps water

from it for its use. Near by appellants, the ice and street railway companies, have another large pipe through which they pump water from the spring for their use, and in times of drouth on two occasions there was a scarcity of water to supply the demand, although it does not seem actually to have failed at either time. The city of Georgetown brought this suit to enjoin appellants from taking water from the spring. The Electric Light and Water Co., on its motion, was made a party to the action. On final hearing the court enjoined appellants from taking any water from the spring, adjudging that the spring and the branch leading therefrom was wholly the property of the city. He also adjudged that appellant should not tap the spring branch at a point less than 200 feet north of the north line of College street, and that the city of Georgetown might build a dam at a point not exceeding 195 feet north of the north line of College street, and that the waste water from the ice plant should be piped back into the spring branch not less than 200 feet north of the north line of College street. From this judgment the ice company and the street railway company appeal.

The proof on the trial showed that running back for many years the town council had made appropriations for cleaning out the spring and keeping it in order, and that east of the spring there was a space used as a common over which teams and others approached the spring, or which were used by the public in connection with it in different ways. But there never appeared to be any question raised as to the part of the spring which was walled off to Dr. Keene, or those claiming under him. Some years ago A. K. Lair, who owned a mill on the spring branch, brought a suit against the town and the water supply company, charging that they were using more of the water by withdrawing it from the stream for manufacturing and other purposes, than they reasonably had a right to, to the damage of his mill, as the supply of water coming to the mill was thus reduced. In answer to this suit, the town alleged as follows: "That the Big Spring is within the town of Georgetown, and the stream therefrom for a long distance flows through said town, and that the spring is owned by said town, and the said town has owned it for one hundred and three years, and has owned the east bank of said stream for said time, commencing at the head of the stream and running northwardly ——— yards; that said spring and east bank were, in the laying out of the town, dedicated to said town and all of its inhabitants by the original proprietor, Elijah Craig, and the defendants state that the town of Georgetown was located where it was located, because of said spring, and that said town and all the inhabitants thereof, during all the time have claimed the right to use and have used the water for all purposes to which water could be applied, and have so openly, notoriously and adversely to all the world."

Appellant, the ice company, was defendant to this action, and filed an answer adopting as its own the answer of the city. The suit was afterwards settled and Lair is not a party to this action. It is insisted, however, that the ice company is estopped here by its adoption of the answer of the city in that case. But an estoppel never arises unless the adverse party relying on it has been misled to his prejudice. The city of Georgetown and the ice company were not adversary parties in that case. The ice company was withdrawing water from the spring branch above Lair's mill under its permit

from the city. The city claimed authority to give the permit and to control the water as permitted by it. As the ice company claimed under the permit of the city, it was proper that it should rely upon the defense made by the city. In doing this, it could not have misled the city to its prejudice, and it is not estopped in this case between it and the city to show a title independently of the permit of the city. For in the suit with Lair, all that it was required to do was to make a defense to Lair's suit. It was not required to set up facts not necessary to the defense of that suit.

It will be observed that previous to the year 1889 the Royal Spring was divided by the old stone wall, and that when Nichols and his associates were preparing to erect the waterworks, they obtained a grant from the city of the right to take water from the spring, and also obtained from Grover, who then owned the Keene place, a lease of his portion of the spring for the purpose of using the water in their waterworks. At this time, undoubtedly, the entire title to the spring was in Grover and in the city of Georgetown, and so Nichols and his associates obtained a perfect title, as their grant was from both the title holders. It will also be observed that when Montgomery came to convey to appellants the grant was expressly made subject to the right conveyed by J. D. Grover to John Nichols and his associates in the year 1889. Whatever rights, therefore, they obtained under the deed from Montgomery, are subject to the prior rights of Nichols and his associates which have passed and now belong to the electric light and water company. They can not, therefore, under their deed, exercise any rights in the spring to the prejudice of the rights of the electric light and water company. And when they come to their permit from the city, which was also granted long after the grant to Nichols and his associates, they only have "permission to tap the spring branch by an underground pipe run from said power house through the ground now occupied by the Georgetown Water Co., or along Water street and through the ground now occupied by the said ice company." The purpose of the council in thus limiting its permit seems to have been to avoid the conflict that might arise if the ice company was authorized to run its pipe into the spring; for then there would be no way to determine in time of scarcity, whether there was a surplus of water for the ice company over and above what the water company needed, and there might be contention and trouble between them; one insisting that there was plenty of water, and the other that it was prevented from properly discharging its duties to the public. The council desired evidently a water supply so that the waterworks would afford fire protection as well as furnish citizens with water for their own use. It, therefore, devise a self-regulating guage to determine when there was a surplus of water beyond the needs of the water company. The water company took its water from the spring. When there was a surplus it would run out of the spring down the branch. This surplus, after it left the spring, the ice company was permitted to use. The permit does not specify the point at which the ice company may tap the spring branch, and the court can not add to its terms. The ice company may tap the spring branch at any point it pleases by its underground pipe, within the limits specified in the ordinance, but it may not run its pipe into the spring; that is, it must place its pipe below the point where the water ripples in leaving the pool of the spring, for it must

tap the spring branch, and not the spring; but beyond this, its rights are only limited by the permit to the location of its pipe through the ground then occupied by the Georgetown Water Co., or along Water street and through the ground then occupied by the ice company.

We do not find it necessary in this case to determine whether the city of Georgetown only owns to the center of the spring, or whether Keene and those claiming under him owned so much of the spring as was included within the old stone wall or covered by the deeds under which they held. Appellants are exercising no rights in this part of the spring, but are piping the water from the east side under their permit from the city. There is nothing in the pleadings or in the proof warranting a judgment as to a dam across the spring branch or as to the point at which the waste water from the ice factory shall be piped back into the spring branch. The petition of the city of Georgetown, in so far as it claims to be the absolute owner of the entire spring, is dismissed without prejudice. Judgment will be entered in favor of appellees enjoining appellants from running their pipe above referred to into the spring or pumping any water through it from the spring, but allowing them, in the language of the permit, "to tap the spring branch by an underground pipe run from said power house through the ground now occupied by the Georgetown Water Co., or along Water street and through the ground now occupied by the said ice company."

Judgment reversed and cause remanded for a judgment as herein indicated.

SHINDLER, COUNTY JUDGE v. FLOYD, &c.

(Filed June 10, 1904.)

Local option election—Contest board—Kentucky Statutes, section 1534, provides that the county judge and two justices residing nearest the courthouse, in each county, shall be a contest board in contested elections of county officers, except members of the legislature; section 2566, Kentucky Statutes, part of the local option law, provides that in local option election, a contest shall be heard by the same board, which, by law, is authorized to determine a contest of an election for county officers; by section 18 of the election law of 1898, the county board of election commissioners is made a contest board in lieu of the county judge and two justices, and the election law of 1900 repealed the provision of the law making the county board of election commissioners a board of contest, and conferred jurisdiction upon the courts to try election contests of certain officers. Held—That as the legislature, in effect, wrote in section 2566 of the local option law, that a contested election under it should be determined by the county judge and two justices of the peace, the acts of 1898 and 1900, did not repeal it, therefore the county judge and two justices nearest the courthouse constitute the contesting board in a local option election contest.

Willis & Todd, John Speed, L. W. Ross, R. L. Greene and G. H. Briggs for appellant.

John S. Kelley and Reasor & Grume for appellees.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge Paynter.

A local option election was held in Taylorsville, and the result was duly certified. More than ten citizens and legal voters of the town proposed to contest the election and filed a written statement of the grounds of contest. They proposed to contest it before G. B. Shindler, county judge of Spencer county, and J. W. Snyder and B. L. Lutz, justices of the peace, living nearest to the courthouse. These officers appeared and after considering the question, decided that they did not, under the law, constitute a board of contest to try the contested election and refused to act; thereupon the contestants instituted this proceeding, and seek to compel them to do so by mandamus. To determine this question involves the necessity of examining to some extent the statutes with reference to contested elections, etc.

Section 1534, Kentucky Statutes (1899 edition, and it is part of the act of 1892, as amended on February 24, 1894,) reads as follows: "The judge of the county court and two justices of the peace residing nearest the courthouse in each county, shall be a board, with like powers as those named in the last section, for determining the contested election of any officer elective by the voters of the county, or any district therein, except members of the general assembly, and also of any police judge, clerk, marshal, or other elective municipal officers, where there is no other provision of law for determining the contested election of such municipal officers." * * *

It will be observed that this statute constitutes the judge of the county court and two justices of the peace residing nearest to the courthouse a board of contest to determine the contested election of any officer elective by the voters of the county, and also of any police judge, clerk, marshal, or other elective municipal officer, where there is no other provision of law for determining a contested election of such municipal officers. It is certain from the language of this section that this board was only authorized to determine the contested election of officers. No jurisdiction is conferred upon that board to determine a contest of an election held for the purpose of determining whether the local option law should become operative, or whether the prohibition law should become inoperative. Thus the matter stood until 1894, when the legislature enacted a law which provided that a local option should be contested, and that provision is part of the local option act, and in section 2566, Kentucky Statutes (1903 edition), it reads as follows: "The contest shall be heard and determined by the same board which, by law, is authorized and empowered to hear and determine a contest of an election for county officers." * * *

By section 18 of the election law of 1898, the county board of election commissioners is made a board of contest in lieu of the county judge and two justices of the peace, and this board was only authorized to determine the contested election of certain officers. There is nothing in the act showing an intention of the legislature to confer jurisdiction on this board to try a contested election growing out of an election under the local option law. The election law of 1900 repealed the provision of the law making the county board of election commissioners a board of contest, and conferred jurisdiction upon the courts to try contested elections of certain officers. It will be observed that the legislature enacted separate and distinct statutes relating to contested elections of officers from the statute providing for a contest of an election under the local option law.

The question here for determination is, did the provision of the statute conferring jurisdiction upon the county judge and two justices of the peace to try contests of local option elections, remain in force. When section 2566 was enacted, the general assembly in effect, wrote into it that the contests shall be heard and determined by a board consisting of the judge of the county court and two justices of the peace residing nearest the courthouse. The act of 1898, as we have said, only conferred jurisdiction upon the board of county election commissioners to try contested elections of officers. The act of 1900 only provided that such contests should be tried in the courts. As the general assembly in effect, wrote in the section of the local option law that a contested election under it should be determined by the county judge and two justices of the peace, it is evident that the acts of 1898 and 1900 did not repeal it, because no reference is made to the act; therefore it was not in terms repealed, and as the acts did not relate to the subject of contested elections under the local option law, it can not be held that it did so by implication. If the words had been actually written in the statute, which we have said in effect were written therein, no one would contend that the acts of 1898 or 1900 repealed it. The office of county judge still exists, likewise the office of justice of the peace, hence the incumbents of these offices may compose the board to determine contested elections held under the local option law, although the jurisdiction has been taken away from them to try contested elections of officers. We have reached the conclusion that the county judge and two justices of the peace compose the board to try the contested election in question.

The judgment is affirmed.

SEVEN HILLS CHAUTAUQUA CO. v. CHASE BROS. CO., &c.

(Filed June 10, 1904—Not to be reported.)

1. Principal and agent—Authority of agent—Where, by the terms of employment of an agent to sell trees, it was expressly stipulated that he was not to make any agreement or promise of any kind, verbal or written, other than those entered upon the regular order blanks of his company, a contract entered into with a purchaser by him in excess of the authority thus conferred upon him, which was not accepted by his employers, will not be enforced.

2. Same—In the absence of special authority to bind a principal, a drummer can merely solicit and transmit the order, and the contract of sale does not become complete until the order is accepted by the principal.

L. P. Tanner for appellant.

Powers & Anderson for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, the Seven Hills Chautauqua Co., a Kentucky corporation, brought this action against Chase Bros. Co., a New York corporation, doing business as nurserymen at Rochester N. Y., to recover $375 in damages for an alleged failure to deliver to them at Owensboro, Ky., five hundred Carolina poplar trees during the season of 1902, in compliance with the following written contract:

"For and in consideration of $125 Chase Bros. Co., Rochester, N. Y., party of the first part, agrees to sell, with the provisions set forth below, to the Seven Hills Chautauqua Co., party of the second part, five hundred Carolina poplar trees F. O. B. Owensboro, Ky., described as follows: Trees to be uniform in size, first grade, not less than twelve feet long, nor three inches in diameter at base, and to be three years of age. Party of first part agrees that all trees dying shall be replaced by live trees at the end of twelve months. The party of the second part, Seven Hills Chautauqua Co., agrees to pay party of the first part $100, the amount named as consideration, upon the delivery of said trees in accordance with the terms of the above contract. The party of the first part, Chase Bros. Co., agrees that party of the second part, the Seven Hills Chautauqua Co., shall retain $25 of the consideration above named for seven months, as guarantee of the fulfillment of the terms of this contract.

"October 30, 1902.

"CHASE BROS. CO.,
"By C. V. BARNES, Agent.
"SEVEN HILLS CHAUTAUQUA CO.,
"By W. G. ARCHER, Super."

The defendant, in its answer, alleged that it was engaged in the business of growing and selling fruit and other ornamental trees and flowers in Rochester, N. Y., and that it sold the products of its nursery through drummers, on orders from persons desiring to purchase their goods, and which were always subject to their acceptance or refusal; that C. V. Barnes was one of their drummers; that it received from him in due course of mail on one of their order blanks an order signed by the plaintiff, asking it to ship to the plaintiff five hundred Carolina poplar trees, three years old, twelve feet high and three inches in diameter at base; that accompanying the order was a copy of the alleged contract filed with plaintiff's petition; that it refused to accept the order or sign the contract, and immediately gave notice thereof to the plaintiff and returned the order and copy of the contract to Barnes. They further allege that Barnes had no authority to sign its name to the contract filed with plaintiff's petition, or to agree for it to ship or deliver the trees therein contracted for, and that these facts were well known to the plaintiff; that the limit of his authority was to solicit and transmit orders to them for their acceptance or rejection; and that this fact was well known to the plaintiff. The pleadings were made up by reply and rejoinder. Upon the trial of the case before a jury, the circuit judge directed a verdict for the defendant, and the plaintiff has appealed.

A copy of the contract evidencing the terms of C. V. Barnes' employment by Chase Bros. Co. appears in the record, and it is expressly stipulated therein that he was not to make any agreement or promise of any kind, verbal or written, with a customer, other than those entered upon the regular blank orders of the company, and which were required to be signed in duplicate by the customer, one of which was to be forwarded to the nursery company in New York, and the other left with the customer. On the 31st of August, 1902, Barnes wrote to the nursery company for prices on one thousand Carolina poplar trees to be consigned to appellant in the fall, requesting that the height and diameter of such trees should be given. The

company responded that they would furnish one thousand selected Carolina poplar trees, eight to ten feet high, for $275, or the same number from five to eight feet high, for $185, to be paid for in cash on delivery. This letter was shown to the plaintiff. On September 15, 1902, the company in response to a letter from Barnes asking a reduction of the price, offered to furnish one thousand Carolina poplar trees, eight to ten feet in height, for $250, to be paid for in cash. This letter specified that these trees would measure from one and three-fourths to two and one-fourth inches in diameter, three inches above the ground. On September 22, 1902, Barnes, at the request of plaintiff, wrote the company for information as to the size of their four-year-old trees, height and diameter, and for prices thereon. In response to this letter, the nursery company advised against the use of four-year-old trees for various reasons. It is also shown that they had no poplar trees four years old, or poplars three inches in diameter at the base. It is shown that Barnes was simply a traveling salesman for the appellee, without authority to do more than solicit orders for the products of the nursery, which were always subject to their approval. It also appears that appellant knew the instruction which had been given to Barnes by the nursery company, as to the prices and size of the poplar trees, which they were willing to furnish to them, and that the trees stipulated for in the contract were of a much larger and more valuable character. In fact, the proof shows that such trees sold at $1 each at the nursery in Rochester.

In Charles Brown Grocery Co. v. Beckett, &c., 22 Ky. Law Rep., 398, this court quoted and approved the rule laid down in 6 A. & E. En. of Law, 2d edition, 227, as to the authority of drummers to bind their principals; it is in these words: "In the absence of special authority to bind their principals, the drummer can merely solicit and transmit the order, and the contract of sale does not become complete until the order is accepted by his principal." John Matthews Produce Co. v. Rentz, 29 Ky. Law Rep., 1528.)

We think these cases are conclusive of the one at bar, and that the trial court properly instructed the jury to find for the defendant.

Judgment affirmed.

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COURT OF APPEALS OF KENTUCKY.

WILSON v. THE ALPINE COAL CO.

(Filed June 10, 1904.)

1. Pleading—Sufficiency of petition—In an action by one employed as a surveyor in locating an entry to a coal mine, and who was injured by the falling of coal and stone from the roof of the mine, an allegation in plaintiff's petition for damages, "that by the carelessness and negligence of the defendant and the superintendent and those in charge and control of the mine, large quantities of slate, and stone lying about the vein of coal in the entry thereof, where plaintiff's duties called him, where the coal had been removed, had become loose and unsafe and dangerous to persons entering said mines, with no support thereunder," were sufficient to sustain his action.

2. Cured by answer—Even if these allegations were insufficient in failing to allege that the defendant knew of the dangerous condition of the mine, they were cured by the answer which averred that the plaintiff had notice of the dangerous condition of the mine, and was notified not to place himself at the point where he was injured.

3. Relative duties of servant and master—It was not the business of the plaintiff in the performance of his duty to inspect the mine, and he had the right to rely on the defendant to perform that duty and keep the mine in a reasonably safe condition, and this duty is personal to the master and can not be delegated to another.

Virgil P. Smith and W. A. Morrow for appellant.

O. H. Waddle for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Paynter.

Appellee operates a coal mine. Appellant was an employe of the appellee and was assisting an engineer in the employ of appellee in surveying and locating an entry in the mine and in fixing the courses and distances for the information of those engaged in mining coal. The employment of appellant was that of a common laborer and he performed his duty under the direction of the engineer. His position was similar to that of a chain carrier in sur-

veying the surface of land. The evidence conduces to show that they were engaged in the work at night by the aid of lamps; that the engineer had stationed the appellant at a point in the entry of the mine, to hold a lamp to aid in the measurement of the distance between that and another point, and while standing there large quantities of coal and stone fell from the roof on his foot and crushed it; that the roof of the mine was not supported by props or supports at the place where the accident happened, to prevent it from falling, and that the character of the material overhead was shelly and full of seams and cracks, and that the safety of those entering the mines required a support overhead. The foregoing is the substance of the evidence offered on the trial. The court gave the jury a peremptory instruction to find for the defendant.

Appellee urges that the court did not err, because: First, that the evidence did not authorize the submission of the case to the jury; second, that the petition did not state a cause of action.

Appellant was not engaged in mining coal; he had nothing to do with the operations in the mine, except to serve under the engineer in making a survey for the purpose of locating an entry, etc. To discharge this duty it was necessary to go into the entry of the mines on the occasion when he was injured. It was not his business to inspect the mines; he had the right to rely upon the appellee to perform that duty and to keep the mines in a reasonably safe condition. Before entering the mines appellant had the right to assume that the appellee had performed its duty in that respect. The master is not held bound as the insurer of the safety of the place in which he puts his servant, but he is bound to exercise that care and diligence proportionate to the occupation which a reasonably prudent man would exercise under like circumstances, both to provide and keep in a reasonably safe condition the place where the servant is put at work. This duty is personal to the master, and can not be so delegated as to relieve him of liability. It is the duty of a master operating a coal mine, to have the duty of inspection performed by a competent inspector, for the eye of such one might discover defects in the mines which might not be discovered by a servant, and, if it was, he might not fully comprehend its significance, and the danger threatened. (Ashland Coal and Iron Co. v. Wallace, 101 Ky., 626.) If the roof was in the condition described in the testimony, if an inspection had been made its dangerous condition would have been discovered. The fact that it remained in that condition indicates that it was not inspected, or that if it was, the appellee failed to have proper supports placed under the roof, and thus prevent it imperilling the lives of its servants. If the testimony of the appellant be true, but one inference can be drawn from it, and that is, that the appellee was guilty of negligence in allowing the roof of the mine to remain in the condition shown by the testimony.

It is averred in the petition "that by the carelessness and negligence of the defendant and the superintendent and those in charge and control of the said mines, large quantities of slate and stone lying about the vein of coal and in the entry of said mines where the coal has been removed from, and in the entry where his duties called him, had become loose, unsafe and dangerous, and was suffered and permitted to remain loose, dangerous and unsafe to persons entering the said mines, and with no support thereunder."

It is insisted that in addition to this averment that there should have been one to the effect that the defendant knew of the unsafe and dangerous condition of the mines. It is charged that the mines were in that unsafe and dangerous condition by reason of the carelessness and negligence of the defendant. The right to recover is based upon a breach of duty of the defendant in allowing the mines to become unsafe and dangerous. It was the duty of the defendant to inspect the mines. In our opinion the averments of the petition are sufficient. It is also claimed that the petition was defective, because there was no averment that the plaintiff did not know of the unsafe and dangerous condition of the mines and could not have known it by the exercise of ordinary care. If the omission of this averment rendered the petition defective, it was cured by the answer, because it is there averred that the plaintiff had notice of the dangerous character of the roof where the injury was received, and he was notified not to place himself at that point. This is equivalent to charging that he had knowledge of the unsafe and dangerous condition of the mines. In our opinion the court should have allowed the case to remain with the jury under proper instructions.

The judgment is reversed for proceedings consistent with this opinion.

NEW YORK LIFE INSURANCE CO. v. MEINKEN'S ADM'R.

(Filed June 10, 1904—Not to be reported.)

Humphrey, Burnett & Humphrey and Jas. H. McIntosh for appellant.

C. H. Shield and Eli H. Brown for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Judge Hobson delivered the following response to petition for rehearing.

The learned counsel for appellee insist in the petition for rehearing that the court has misunderstood their real contention in the case. They say: "What we asked the court to decide was, and is, what was the legal effect of the acceptance of Meinken's $15 and $14.50 in money and his notes for $44.50 and $30 in payment or settlement of the third annual premium, and the retention of the money and the note for $30 without an offer to return either the money or the note?"

This question was considered by the court on the hearing, and in the latter part of the opinion the authorities bearing upon it are collected. The question was not more fully discussed in the opinion for the reason that in the recent case of Fidelity Mutual Life Insurance Co. v. Price, 25 Ky. Law Rep., 1148, it was considered at length and decided adversely to appellee's contention. The previous decisions of the court are cited and discussed in that opinion.

Petition overruled.

FIDELITY NATIONAL BANK'S, OF CINCINNATI, O., RECEIVER, &c. v. YOUTSEY, RECEIVER, &c.

(Filed June 10, 1904—Not to be reported.)

1. Commissioners and receivers—Fees of—Where the receiver of a national bank rendered services to the extent of investing by order of court $50,000 of the trust funds in government bonds, and in addition was engaged fifteen days in taking depositions, $2,200 was adequate compensation for such services and the court erred in allowing a sum in excess of that.

2. Same—The statute is specific as to the compensation of receivers in receiving and paying out money under an order of court, and where no services are performed which are not contemplated by statute, the allowance of a greater sum than that fixed by law will not be upheld.

W. H. Mackoy and John W. Herron for appellants.

Otto Wolff for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Paynter.

J. J. Youtsey was receiver of the Campbell Circuit Court. Under an order of the court, made in this action, there came into his hands nearly one hundred thousand dollars. Under an order of the court, he invested about fifty thousand dollars of the fund in government bonds to await the final judgment of the court. In addition to rendering services as receiver, one branch of the case was referred to him as special commissioner. He was engaged fifteen days in taking testimony. How long he was engaged in making his report does not appear, as he never made any written statement as to the time employed as special commissioner. Before the final order in the case, he asked the court to fix his compensation for his services as receiver and special commissioner at $6,000, this to include the $2,200, which had been previously allowed and paid to him. The court allowed him $2,800 in addition to the $2,200, making a total of $5,000. The appellants in the court below objected to the allowance of the $2,800, and from that judgment this appeal is prosecuted.

The fees of receivers and commissioners are fixed by section 1740, Kentucky Statutes, which are as follows: "To master commissioner or receiver, where the amount is not agreed upon by the parties, for each day they are actually engaged, three dollars For receiving and paying out money under an order of court, where the amount is one thousand dollars or less, two per centum. Where the amount is more than one thousand dollars, but does not exceed two thousand dollars, two per centum on the first one thousand, and one and one-half per centum on the excess. Where the amount is more than two thousand, but does not exceed five thousand dollars, two per centum on the first thousand, one and one-half per centum on the second one thousand, and one per centum on the excess. Where the amount is over five thousand dollars, he shall receive fees on the first five thousand dollars as above provided, and one-half of one per centum on the remainder."

By the provision of this act, Youtsey was only entitled to three dollars a day as special commissioner for the time actually engaged. The statute is specific as to the compensation of receivers in receiving and paying out money under an order of court. This court in McHenry v. Winston, 105

Ky., 807; Russell v. Averitt, 19 Ky. Law Rep., 909; Wathen v. England, 19 Ky. Law Rep., 1601; Morgan v. Wickliffe, 24 Ky. Law Rep., 1039, have held that the statute fixes the allowances which commissioners and receivers shall have for services described in the statute. There are other kinds of services which a receiver may render for which the court may make a reasonable allowance, as in the cases of Sherley v. Mattingly & Son, 21 Ky. Law Rep., 289, and Spears v. Thomas, Receiver, &c., 21 Ky. Law Rep., 1154. In this case the receiver performed no services not contemplated by the statute, except the investment of the money in United States bonds. If this investment was treated as a collection and disbursement, his total allowance as receiver should not have been as much as $1,000. Under section 896, Kentucky Statutes, he was not entitled to an allowance as commissioner, because he did not file a statement under oath showing the number of days he was employed. There was no question made in the court below as to the allowance of the $2,200 for services as receiver and commissioner, and for that reason we will not review the action of the court in making that allowance, except for the purpose of determining whether it was sufficient compensation for the services rendered. We are of the opinion that the $2,200 was ample compensation for the services rendered by Youtsey as receiver and special commissioner; therefore, the court erred in allowing the $2,800 in addition thereto. Some of the cases relied upon by counsel for the appellee were decided before the adoption of the present statute. Where the receiver only receives and disburses money, it is not competent to prove the value of services, because the statute fixes the compensation.

The judgment is reversed for proceedings consistent with this opinion.

TATE v. ILLINOIS CENTRAL R. R. CO.

(Filed June 10, 1904—Not to be reported.)

J. C. Speight and H. L. Anderson for appellant.

J. M. Dickinson and Pirtle & Trabue for appellee.

Judge Paynter delivered the following dissenting opinion:

If there can be a recovery in this case, it must be done upon the theory that the appellee was guilty of a breach of duty in the failure of its depot agent to exercise proper care to protect appellant from assault and insult. The evidence is, that the agent was in the ticket office immediately before Boone entered the waiting room; that the window of that office was raised; that no one who testified saw him during the time either of the events transpired of which complaint is made; that the appellant did not complain to him about the conduct of Boone, or tell him of it. It is also shown that there were telegraph instruments in the ticket office making a noise. The only way to reach the conclusion that the agent had knowledge of what transpired, is to infer it from the fact that the agent was in the ticket office with the window raised. When this is done, another fact must be found, to wit: That after obtaining that knowledge he could, by the exercise of proper diligence, have saved appellant from the assault and insult. The evidence tends to show that Boone was not talking in a loud tone of voice,

and it would be a mere guess to say that the agent heard him. There is no evidence showing that the agent had any reason to apprehend the assault. If the ticket agent had heard the first word that Boone addressed tc the appellant, he could not have reached the waiting room until the last one was spoken. When Boone left the waiting room, even if the agent had been aware of his conduct, he had no reason to believe he would return and renew it. The appellant did not apprehend it, for he returned to the waiting-room with a feeling of security. The second attack was as sudden as the first, and was over so soon that the agent could not have prevented it, if he had been at the ticket office window. While Boone's conduct was unprovoked, we are of the opinion that the appellee, in the exercise of proper vigilance, could not have anticipated and prevented it.

ORTH, &c. v. PARK & CO.

(Filed June 10, 1904—Not to be reported.)

Lane & Harrison for Orth, &c.

Hardin H. Herr, Tyler Barnett and R. L. Greene for Parks.

H. L. Stone for City of Louisville.

Helm, Bruce & Helm and Benjamin D. Warfield for L. & N. R. R. Co.

Appeal from the Jefferson Circuit Court, Chancery Branch, First Division.

Judge Hobson delivered the following response to petition for rehearing:

In entering the judgment of affirmance herein the clerk entered a judgment in favor of appellees, awarding them 10 per cent. damages on the amount superseded. Appellees have entered a motion to correct the mandate in so far as it awarded damages against them.

The property owner is not personally liable for an assessment to pay for a street improvement. The property assessed is only liable. The proceeding to enforce the assessment is strictly, therefore, a proceeding in rem or against the property. (Meyer v. Covington, 103 Ky., 546; Barker v. South Construction Co., 20 Ky. Law Rep., 796; Woodward v. Collett, 20 Ky. Law Rep., 1068; Fehler v. Gosnell, 99 Ky., 384; Bitzer v. O'Brien, 21 Ky. Law Rep., 1310; Henderson v. Lambert, 14 Bush, 30; Kentucky Statutes, section 2884.)

It has been held by this court in a long line of decisions, that 10 per cent. damages will not be awarded on the affirmance of a judgment in a proceeding strictly in rem, where the judgment has been superseded. (Worsham v. Lancaster, 104 Ky., 813; Cornwall v. Fletcher, 9 Ky. Law Rep., 408; Ross v. Wilson, 7 Bush, 86; Wilson v. Pope, 14 B. Monroe, 83; Wood v. Roman, 5 B. Monroe, 145; Simrall v. Reid, 2 Dana, 65; Talbott v. Morton, 5 Littell, 398; Hargis v. Mayes, 20 Ky. Law Rep., 1965.)

The motion to correct the mandate, in so far as it awards damages on the amount superseded is, therefore, sustained.

UNION CENTRAL LIFE INS. CO. v. GALVIN, GUARDIAN.

(Filed June 10, 1904—Not to be reported.)

Life insurance—Payment of premium—Former appeal—Where it was held on a former appeal to this court that the execution of a note for insurance premium by a third party, which was accepted by the company, did not render a policy void which contained the provision that the policy should be void if the first three notes executed to the company were not paid; the opinion on that appeal is the law of the case, and where the facts were undisputed there was nothing to submit to the jury upon the return of the case to the lower court.

Burnett & Burnett for appellant.

Forcht & Field and W. W. Thum for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Hobson.

On February 1, 1900, Sallie E. Galvin made an application to appellee for a policy insuring her life in the sum of $1,000 in favor of her child, W. T. Galvin.

She had at the time the money to pay the first premium, but for some reason not explained the agent took her husband's note for it, due in four months and delivered to her a binding receipt as though the premium was paid in cash. The husband neglected to pay his note at maturity, and when he offered to pay it the company declined to receive it. Subsequently Mrs. Galvin died, and this suit having been brought upon the policy, the circuit court, at the conclusion of the evidence, instructed the jury peremptorily to find for the defendant. On appeal from the judgment entered on the verdict of the jury in favor of the defendant, it was held by this court that the provision contained in the policy making it void if any notes given to the company for the first three annual premiums were not paid, referred only to notes executed by the assured and not to notes executed by a third party, taken by the company and accepted in satisfaction of the liability of the assured. (Galvin v. Union Central Life Insurance Co., 24 Ky. Law Rep., 2452.) On the return of the case to the circuit court it was tried again, and at the conclusion of the evidence the court peremptorily instructed the jury to find for the plaintiff and the defendant appeals. The opinion rendered on the former appeal is the law of the case. The facts were undisputed. The contract was in writing and there was nothing to submit to the jury. If the failure to pay the note did not avoid the policy as had been held on the former appeal, there was no reason why the plaintiff should not recover.

Judgment affirmed.

STACK v. COMMONWEALTH.

(Filed June 14, 1904.)

1. Office and officer—Usurpation—Tie vote for councilmen—Proceedings thereunder—Action by attorney general—In a proceeding by the attorney general against the appellant for usurpation of the office of councilman from the fourth ward of the city of Dayton, a fourth class city, the respondent

rests his claim to be a member of said board for the term beginning December 7, 1903, solely upon a certificate issued to him on November 23, 1903, by order of the board of councilmen of the city of Dayton, whose term of office expired on the very day on which the term of the council of which the appellant claims to be a member began, and the approval of the mayor of said certificate on November 24, 1903, to which response a general demurrer by the Commonwealth was sustained. Held—That under the provisions of subsection 5 of section 1596a, Kentucky Statutes, providing for the canvassing of returns and the issuing of certificates of election, that no power or authority is given to the canvassing board to determine which of the candidates are elected in the case of municipal officer. In such case their duty is fully discharged by certifying the vote to the common council of such municipality, and under the provisions of the charter of fourth class cities, the board of councilmen of the city of Dayton, whose term of office expired December 7, 1903, had no power or authority to determine who had been elected a member of the board of council of said city for the succeeding term; and, therefore, the certificate relied on by appellant, signed by the city clerk, conferred on him no right to discharge the duties of a member of the common council of said city whose term began December 7, 1903.

2. Burden of proof—In a proceeding instituted by the State to test the title of an alleged usurper, the burden of showing the right or title to the office alleged to be usurped, is upon the respondent.

Aubrey Barbour and Ramsey Washington for appellant.

James C. & B. A. Wright for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Burnam.

This proceeding was instituted by the attorney general under section 485 of the Civil Code, against Thos. Stack for usurpation of the office of councilman from the fourth ward from the city of Dayton, for a term beginning on the 7th of December, 1903. The petition alleges that on the 3d of November, 1903, a general election was held in the fourth ward of the city of Dayton for the election of councilmen to represent the said ward for a term of two years, beginning on the 7th day of December, 1903, and that at the election, Charles Thomas received 148 votes, F. A. Dietz 189 votes, and the defendant, Thos. Stack, 139 votes; that the defendant was not elected to the office of councilman in said city for said ward beginning on the 7th of December, 1903, but that notwithstanding this fact, he had taken the oath of office and qualified as councilman from the fourth ward, for the term beginning on the 7th of December, 1903, and had usurped and entered upon and then was in the exercise of the rights, powers and duties thereof, wrongfully. The defendant answered that he was a candidate for the office of councilman from the fourth ward of Dayton, a city of the fourth class, at an election held on the 3d of November, 1903, at which he received 159 votes as alleged in the petition; and that on November 16, 1903, the mayor and board of councilmen of the city of Dayton, appointed a committee of said board to canvass the returns of the election for the city offices and members of the board of councilmen of the city of Dayton, held November 3, 1903, as certified to said board of councilmen by the board of election commissioners of Campbell county; and that at a meeting of said board of council of the city of Dayton, held November 23, 1903, said committee made its report, and by the

terms of said report recommended that the certificate of election of councilman of the fourth ward be issued to the defendant, Thos. Stack; that said report was duly adopted by said board of councilmen on the said 23d of November, 1903, and approved by the mayor November 24, 1903; and said report and action by the mayor was approved by the said board of councilmen on December 7, 1903; and that in pursuance of said action of said board of councilmen and said mayor, the city clerk of said city of Dayton did, on November 23, 1903, issue a certificate of election to this defendant as a member of the board of councilmen for the fourth ward of said city of Dayton, to serve for the term of two years from the first Monday in December, 1903, and in pursuance of said certificate of election, this defendant took the oath of office and qualified as a councilman, and denied that he was wrongfully in the exercise of the rights, powers and duties thereof. The following exhibit was filed with the answer:

"Dayton, Ky., November 23, 1903.

"I, Charles A. Bird, city clerk, do hereby issue this certificate to Thos. Stack, by order of the board of councilmen of the city of Dayton, Ky. I do hereby certify that Thos. Stack has been elected as a member of the board of councilmen for the fourth ward of said city of Dayton, Ky., to serve for a term of two years from the first Monday in December, 1903. By order of the board of councilmen of the city of Dayton.

"CHARLES A. BIRD, City Clerk."

The folllowing amended answer was subsequently filed: "The defendant for amendment to his answer herein, says that said committee appointed on November 16, 1903, as alleged in said petition, and said board of councilmen, did canvass said returns as certified to said board of councilmen by said board of election commissioners of Campbell county; and that thereafter said committee reported as alleged in his answer."

A general demurrer was filed by the plaintiff to the answer as amended, and sustained, and defendant declining to plead further, it was adjudged that he had usurped the office of councilman in the city of Dayton for the term beginning on the 7th of December, 1903, and that he be ousted therefrom, and from that judgment he has appealed. In a proceeding of this character instituted by the Commonwealth, the burden of showing right or title to the office alleged to be usurped, is upon the respondent. (23 A. & E. En. of Law, 625, and authorities there cited.) The rule is admirably stated in Mechem on Public officers, section 491, as follows: "Where a proceeding is instituted by and on behalf of the State in its sovereign capacity, to test the title of an alleged usurper, much more generality of allegation is tolerated than in cases where a private individual is the prosecuting party. The title to all offices being derived from the State, and it having an inherent right at any time to call upon one who assumes to exercise the functions of a public office, to show his right to do so, it is evident that no specific allegation of right, or title upon the part of the State can be necessary. It is often said, therefore, that the State is under no obligation to show anything on its part; and that the charge in general language that the respondent has entered into, usurped and unlawfully exercised the functions of a certain office, is all that is required to put him to his answer."

The respondent in this case rests his claim to be a member of the board of

councilmen of the city of Dayton for the term beginning on the 7th of December, 1908, solely upon a certificate issued to him on the 23d of November, 1908, by order of the board of councilmen of the city of Dayton, whose term of office expired on the very day on which the term of the council of which appellant claims to be a member, began. It is true that he alleged that this certificate was approved by the mayor on the 24th of November, 1908, and that the action of the mayor was approved by the board of councilmen on December 7, 1908, but construing the pleadings most strongly against the defendant, as we must, all that this answer alleges is the approval of the mayor of the action of the council, and their ratification of his act before their term of office expired. Subsection 5 of section 1596a of the Kentucky statutes provides for the canvassing of returns of an election by the county board, and the issuing of certificates of election. It reads as follows: "On the next day, the said county board of election commissioners shall meet in the county clerk's office between 10 and 12 o'clock in the morning, open and canvass the returns of such election, and give triplicate or more written certificates of election over their signatures, of those who have received the highest number of votes for any office, exclusively within the gift of the voters of the county, one copy of the certificate to be retained in the clerk's office, another delivered to each of the persons elected, and the other forwarded by the county clerk to the secretary of State at the seat of government. For offices not within such gift, they shall give duplicate or more written certificates over their signatures of the number of votes given in the county, city, town, district, or precinct, particularizing therein the precinct at which the votes were given, one copy to be retained in the clerk's office, one delivered to the sheriff, and one, in case of municipal or district elections, to the common council of said municipality or the governing authority of such district."

The only duty imposed by this section upon the county board of election commissioners in cases of municipal offices, is to count the ballots and certify the returns to the common council of such municipality. They are not authorized in such cases to issue certificates of election. Subsection 11 of the same section of the statute provides that: "Where the canvassing board of two or more counties on comparison of the returns, or the board of canvassers for a county, find that two or more have received the highest and equal number of votes for the same office, they shall, by lot, determine which of the candidates is elected."

But no power or authority is given to the canvassing board to determine which of the candidates are elected in the case of municipal officers. In such case their duty is fully discharged by certifying the vote to the common council of such municipality; that this was the purpose of the general assembly is made quite clear by section 3486 of the Kentucky Statutes, which is a provision of the charter of fourth class cities, to which Dayton belongs, and which reads as follows: "In case of a vacancy in the board by death, resignation, or any other cause, such vacancy shall be filled as hereinafter provided. The board shall meet at such times and places as shall be provided by ordinance. It shall judge of the eligibility and election returns of its members, adopt rules for its proceedings and government, and enforce the same by appropriate fines, not exceeding $10 for each offense; and three-

fourths of the members voting affirmatively may, for good cause, expel any member."

Section 3552 of the Kentucky Statutes, which is also a section of the charters of fourth class cities, provides: "If a vacancy shall occur in any elective office, including the office of councilman, such vacancy shall be filled by the board of council, subject to the provisions of the Constitution applicable thereto. If the election of any elective officer in cities of this class be contested, such contest shall be conducted and determined as provided by law in cases of election of county officers."

It is apparent from these provisions of the charter of fourth class cities that the board of councilmen, whose term of office expired on the 7th day of December, 1903, had no power or authority to determine who had been elected a member of the board of council of the city of Dayton for the succeeding term, and that the certificate relied on by the appellant, signed by Charles A. Bird, city clerk, conferred upon him no right to discharge any of the duties of a member of the common council of the city of Dayton, whose term began on the 7th of December, 1903. But it has been suggested that as the statute has made the board of common council of cities of the fourth class judges of the eligibility and election returns of its members, and conferred upon them the power to fill vacancies, that the courts are deprived thereby of jurisdiction to determine the question in proceedings under section 483 of the Civil Code; and it must be conceded that there are some decisions of courts which seem to approve this doctrine, but after a very thorough examination of the question, we have reached the conclusion that the great weight of authority, and the better reason, is opposed to this doctrine, and the rule established that unless the statute conferring the jurisdiction upon the common council to judge of the election and qualification of its members unequivocally excludes, by express provision or necessary implication, the jurisdiction of the courts, that it remains in them, and that conferred upon the council is only concurrent or temporary. This rule is laid down by Dillon on Municipal Corporations, 3d edition, 203 and 203, and notes; McReary's American Law of Elections, section 295, where a great many cases have been collated and cited, and the 23d A. & E. En. of Law, 609. As the board of council of the city of Dayton, whose term began on the first Monday in December, 1903, has not passed upon the claim of appellant to be a member thereof, it is unnecessary for us to decide what effect might be given by the court to their determination of the question, if they had in fact so acted.

For reasons indicated the judgment is affirmed.

ILLINOIS CENTRAL R. R. CO. v. McINTOSH.

Gordon, Gordon & Cox, Pirtle & Trabue and J. M. Dickinson for appellant.

Fox & Morrow and C. J. Waddell for appellee.

Appeal from Hopkins Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

Counsel seem to misapprehend the opinion. We said: "If the foreman had not run his hand car negligently on the time of the train, there would have been no trouble from the failure to give signals of the approach of the train to the crossing. On the other hand, if these signals had been given, the consequences of his negligence might have perhaps been avoided. * * * The order of the section boss for them to throw the car off was proper to avoid a collision, but if by reason of the emergency thus negligently produced, the plaintiff was injured in obeying the order of the section boss to prevent a collision or loss of life or property, and his injury was the proximate result of his obeying the order of his boss and was not due to negligence on his part in overstraining himself to get the car off, of which the jury are to judge, he may recover."

The plaintiff on the first trial had asked an instruction predicated on the negligence of the section boss and also one predicated on the negligence of the trainmen. Further on in the opinion we said that in lieu of these two instructions the court should give one instruction as indicated in the opinion. What we meant is that if by reason of the gross negligence of the section boss or by reason of the negligence of the trainmen a collision of the train with the hand car was imminent, and to avoid the consequence of this the section foreman ordered the hands to take the hand car from the track, and in doing this the plaintiff was ruptured as the natural consequence of having to lift the hand car from the track quickly loaded, as it was, to avoid a collision, he may recover, unless his injury was due to contributory negligence on his own part.

Petition overruled.

PROCTOR v. PROCTOR'S ADM'R, &c.

(Filed June 14, 1904.)

1. Offset—Claim for board—Contract with person since deceased—In an action on a note executed by appellant to his deceased sister by her administrator, he pleaded as an offset a contract made with her, to take care of her as long as she lived, and as compensation for his services he was to have all her estate which she left, and that the note sued on was all of her estate; the appellant failing to prove the alleged contract, and the evidence showing that his sister's services were worth as much as her board, his plea on that ground must fail.

2. Payments alleged—Private account book as evidence—In an action on a note by the administrator of a deceased person, appellant claimed he had paid out for such person various sums as credits on the note sued on, and offered as evidence thereof a book kept by him, showing such credits. Held—That under Civil Code, section 66, subsection 7, providing that "a person may testify for himself as against persons who are under no disability, as to the correctness of original entries made by him in an account book according to the usual course of business, though the person against whom they were made may have died," which is but declaratory of the common law, was intended to apply to entries in a book kept according to the usual course of business, in those cases where the books themselves were evidence of the facts set out in them, and does not apply to entries made by a debtor in his private book, and in such case the entries themselves not being competent evidence, the appellant could not testify concerning them.

E. H. Gaither and W. L. Sumrall for appellant.

T. H. Hardin for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hobson.

On December 10. 1888, S. E. Proctor made a deed to her brother, William Proctor, for a tract of land in consideration of $750, for which he executed to her his note, due one day after date. She died in the year 1899, and this suit was filed by her administrator against William Proctor to recover on the note and enforce the lien on the land. He pleaded that in the year 1897 his sister made a contract with him, whereby it was agreed that he should take care of her as long as she should live, and as compensation for his services he was to have all the estate she left; that under this contract she lived with him from that time to her death, and that the note sued on was the only estate she left. In another paragraph he pleaded that his services were of the reasonable value of $100 a year; that he furnished board, lodging, clothing, medical attention, etc., and that it was understood that she was to pay out of her estate a reasonable compensation for these things, to be offset against the note. The allegations of the answer were controverted by the reply and on final hearing the court gave judgment against the defendant for the note, and enforced the lien on the land subject to certain credits allowed in the judgment.

William Proctor testified for himself that his sister made the agreement with him as set out in the first paragraph of his answer; but under section 606 of the Civil Code he can not testify for himself as to any transaction between him and the decedent. The court, therefore, properly sustained the plaintiff's exceptions to so much of his deposition as states what occurred between him and his sister. He introduced Mary Scott, his daughter, who stated that there was a general understanding in the family as to an agreement between her father and her aunt that he was to pay her bills and he was to get her interest in her father's estate at her death. He also introduced one of his sons who said that his father had told him that this was the agreement. But this evidence was irrelevant. He introduced another son, who stated generally that the understanding was that his father was to take care of his aunt as long as she lived for what she had, but he did not state from whom he got this understanding or show that he had really any personal knowledge as to what the agreement was. To the same effect is the testimony of a niece whom he introduced. There can be no recovery on the alleged contract without proof that it was made, and we think that the circuit court properly held the proof insufficient. The plaintiff proved by a number of witnesses that the deceased did not stay at the defendant's house all the time, but was at other places one-fourth of the time or more each year, and that while at his house she helped cook and do other house work, her labor being of value as much as her board. The proof as to the way the deceased labored at the defendant's house and the length of time that she was away, tend strongly to show that she was not there as a boarder.

The defendant claimed credit for a number of sums which he had paid out as he alleged for his sister, and in proof of these payments offered a book kept by him. Exception was filed to the competency of this evidence. Sec-

tion 606 of the Civil Code contains several exceptions to the general rule laid down in the section. Among these is subsection 7: "A person may testify for himself as to the correctness of original entries made by him against persons who are under no disability—other than coverture, or infancy and coverture combined—in an account book, according to the usual course of business, though the person against whom they were made may have died or have become of unsound mind; but no person shall testify for himself concerning entries in a book, or the contents or purport of any writing under the control of himself, or of himself and others jointly, if he refuse or fail to produce such book or writing, and to make it subject to the order of the court for the purposes of the action, if required to do so by the party against whom he offers to testify."

The question presented is to what account book does the statute refer. In Galbraith v. Starks, 25 Ky. Law Rep., 2090, which was like this action on a note where a book account was relied on to show payments on the note, this court held that the provision of the Code above quoted is but declaratory of the common law, with the addition that a party in interest may testify concerning such entries, even as against one who is dead. In Brannin v. Foree, 12 B. Monroe, 506, which was also a suit on a note where a book kept by the defendant was relied on to show payments on the note, the common law rule on the subject is thus stated by the court: "To render such entries admissible as evidence, the books must appear to contain a register of the daily business of the party, and to have been honestly and fairly kept; and the person who made the entries must swear that the articles charged were actually sold and delivered, that the entries are the original ones, and were made at or about the time of the transactions, and that the sums charged and claimed have not been paid. (1 Greenleaf on Evidence, section 118, and note 1.) Evidence of this description is admitted upon the principle of 'moral necessity.' It is received upon the presumption that unless it be admitted there will be a total failure of proof, and that injustice will consequently result. It is, however, but secondary evidence, and that of the lowest grade. The principle upon which it is rendered admissible is, therefore, limited in its operation to that character of dealing, to which the law has prima facie ascribed a destitution of the ordinary means of proof, viz., the daily sale and barter of merchandise and other commodities, the performance of services and letting of articles to hire, and probably the payment, from time to time, of money placed on deposit, circumstances so frequent in succession, and generally so trivial in their individual amount that the procurement of formal proofs can not be expected, and would not compensate for the time necessary for the purpose. If the competency of the proof in this case be tested by the subject-matter, the entries in the books and the evidence in relation thereto were properly rejected. It was not the sale of the merchandise, or the performance of services, or the use of the property hired and returned, or the payment from time to time of money on deposit, but the payment of an outstanding debt, evidenced by a note in writing; a payment on which should be established, according to the usual course of dealing, either by a written receipt endorsed upon the note, or taken upon a separate paper. In those States where this character of testi-

mony is deemed competent for any purpose, it is not deemed sufficient to prove the payment of money."

The entries in question where not, therefore, admissible at common law in cases of this sort; and as the statute relied on is but declaratory of the common law, it does not apply to entries which at the common law were inadmissible. Were the rule otherwise, the estate of decedents might suffer unduly in this class of cases, and notes held by deceased persons might be defeated by entries made by the debtor in his private book. The statute was not designed to accomplish this. Its purpose is to allow the debtor himself to testify to the correctness of entries made by him in his books kept according to the usual course of business, in those cases where the books themselves at common law were evidence of the facts set out in them. It was not designed to change the rule as to what books were evidence. We are not called on here to define more accurately in what cases entries in books may be admitted, for it is clear that in the case before us the entries were incompetent as held in the cases cited. We have carefully gone over the account and find no substantial error in the allowance of credits by the circuit court.

Judgment affirmed.

LOUISVILLE PUBLIC WAREHOUSE CO. v. MILLER AND TILFORD.

(Filed June 14, 1094—Not to be reported.)

Special commissioner—Authority of chancellor to appoint—Under Kentucky Statutes, sections 1044, and 1761 to 1771 inclusive, pertaining to the appointment of commissioners and receivers of courts having six circuit judges, and requiring the concurrent action of four of the six circuit judges in making such appointment, we have no hesitancy in reaching the conclusion that a chancellor of one of the chancery branches of the Jefferson Circuit Court has no jurisdiction to appoint a special commissioner except under the provision of Kentucky Statutes, section 399, where the commissioner is interested as an attorney or party to the action, or under section 400, where the parties or their attorneys may be permitted by the court to select a commissioner or receiver; as such action would in effect abrogate the statute authorizing the appointment of a commissioner by all of the six judges and leaves it in the hands of the judges of the equity branches. As to the wisdom of this legislation we have nothing to do, but it is certain that the legislature has withheld the power from the chancellors. This being true, the action of the chancellor of the first chancery branch of the Jefferson Circuit Court undertaking to appoint a special commissioner in the case at bar to perform the duties devolved upon the regular commissioner, was void, he being without jurisdiction, and the writ of prohibition should issue.

Helm, Bruce & Helm and W. O Harris for appellant.

John C. Doolan, Barnett & Barnett and H. H. Herr for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

The question presented for adjudication by this record is, whether or not judges of the chancery branches of the Jefferson Circuit Court have jurisdiction to appoint special commissioners, when, in their opinion, the neces-

sities of the case warrant it. As the question turns upon a proper construction of the statutes creating and regulating the office of commissioner, it will not be amiss to insert the following sections of the Kentucky Statutes, directly applying to the subject in hand:

"Section 892. Each circuit judge shall appoint a master commissioner for such court, may remove him and appoint another; but no master commissioner shall continue in office more than four years without a reappointment. Before acting, the master commissioner shall be sworn and execute a bond, with surety, to be approved by the court, for the faithful performance of the duties of his office. The bond shall be entered of record in said court, and shall be renewed once in each year, and oftener if required by the court, and a copy thereof, certified by the clerk shall be evidence in all proceedings in this State.

"Section 899. When the master commissioner is interested as an attorney or party in any action or proceeding which it is necessary or proper to refer to a commissioner, the court shall, by proper order, appoint a special commissioner to act in such action or proceeding, and shall require him to take an oath and execute bond as the regular commissioner is required to do.

"Section 400. The parties or their attorneys may be permitted by the court to select a receiver or commissioner, in any action or proceeding, to perform the duties of the master commissioner. Before acting, such receiver or commissioner shall be sworn and execute bond, with surety, in the same manner and the same in substance as is required of a master commissioner. They shall promptly and faithfully discharge the duties of their stations, and promptly comply with all orders and judgments rendered in the action or proceeding. Their compensation shall be the same as that of a master commissioner, and ascertained and allowed in the same manner.

"Section 1044. (Circuit courts having six judges.) The regular judges at any general term of the court, any four concurring, shall appoint a commissioner and a receiver of the court, who shall hold their office during four years, unless removed, as they may be, at the pleasure of the court in general terms, any four of the regular judges concurring. The commissioner shall discharge the duties and have the powers appertaining to the office of a master in chancery and as provided by law and the rules of the court. The receiver shall receive, care for and deposit all the moneys and property that may be paid or deposited into court, and shall disburse the same upon the orders of the court as provided by law and the rules of the court. Before entering upon the discharge of their duties, the commissioner and the receiver shall appear in open court, execute bond according to law and take an oath that they will honestly, impartially and to the best of their judgment discharge all the duties of their offices without favor or respect of persons, and render true and just reports and accounts of their actions and doings as such.

"Section 1761. * * * that in counties having a population of seventy-five thousand or over, commissioners or receivers appointed by the circuit court shall receive an annual salary of $5,000, and the number of deputies allowed to each of said officers, and the compensation allowed to each, and the amount, if any, allowed for the necessary expenses of the office, shall be regulated and fixed by an order entered upon the order book of the circuit

court, and a certified copy of said order shall, as soon as entered, be forwarded to the auditor of public accounts, as shall a copy of any subsequent changes made therein.

"Said commissioners and receivers shall, in a suitable book, kept in his office, keep and enter therein a true and faithful account of the amounts earned by him or due him for official services rendered to any person, company or corporation, when and to whom such service was rendered, and what part thereof, if any, has been paid, and when paid; and shall annually, in the month of January, report to the auditor, under oath, the amount received by him on account of his official duties or position from all sources, during the preceding year, as well as the amount paid out by him for necessary deputies or assistants, and for the expenses of conducting his office, giving separately the amount he has paid out on account of each item; and if it shall appear from such annual statement that any such officer has received as compensation on account of his official services from all sources more than $5,000 during such year, after the payment of the salaries of his necessary deputies or assistants, and the legitimate expenses of conducting his office, then such officer shall, with such statement, pay to the auditor the amount so received in excess of said $5,000 and the salaries of his deputies and expenses of his office; and any such officer who shall fail to comply herewith shall, upon conviction, be fined not less than $100, nor more than $500, and upon conviction shall be removed from office. But nothing herein contained shall be construed to prevent said officers from making up out of the overplus of any year any shortage in their salaries, or the salaries of the deputies, of any previous year.

"Section 1762. Each of the officers mentioned in the preceding section shall receive an annual salary of $5,000, and the number of deputies allowed to each of said officers, and the compensation to be received by each, except the chief deputy, and the amount, if any, allowed for the necessary expenses of the office, shall be regulated and fixed by an order entered upon the order book of the circuit court and county court, and signed by a majority of the judges of said courts; and a certified copy of said order shall, as soon as entered, be forwarded to the auditor of public accounts, as shall a copy of any subsequent changes made therein.

"Section 1763. The salary of the chief deputy of each of said officers shall be $2,000 per year, and the salary of each of the other deputies shall be fixed at a reasonable amount, not exceeding $1,500 per year.

"Section 1764. The salary of each officer, his deputies and expenses of office, shall be paid monthly by the treasurer of the State upon the warrant of the auditor, made payable to the officer. If 75 per cent. of the amount paid into the State treasury in any month is not sufficient to pay the salaries and expenses for that month, the deficit may be made up out of the amount paid in any succeeding month; but in no event shall the amount paid by the auditor to any officer for salaries and expenses exceed 75 per cent. of the amount paid into the treasury each month by such officer, during his official term.

"Section 1765. If any officer shall fail to make and file with the auditor, as herein required, the monthly statement, or shall fail to remit the amount shown by such statement at the time required, unless the time for filing

such statement and paying the money is extended by the auditor, which he may do, but not for longer than ten days in any month, such officer shall be fined for each offense not less than $500.

"Section 1766. If any officer shall knowingly omit to report, or fail to report or make, as herein provided, a correct statement of all the money received or collected the preceding month on account of his office, or shall knowingly make or subscribe any false statement concerning the same, such officer shall be guilty of a felony, and punished by confinement in the penitentiary for not less than one nor more than five years.

"Section 1769. If the amount paid to any officer during his term or incumbency shall not have been sufficient to pay the salaries and expenses of such officer and his office, the auditor shall, out of the money collected and paid as herein provided by his successor or the person appointed as collector, pay to such officers, or to the person entitled to receive the same, an amount sufficient to supply the deficit due for salaries and expenses, not exceeding 75 per cent. of the amount of fees accrued during his official term, and which shall have been collected and paid into the treasury."

It will be observed that, by the provisions of section 1044, the commissioner of a circuit court having six judges is appointed for a term of four years, subject to removal "at the pleasure of the court in general terms, any four of the regular judges concurring;" and that he "shall discharge the duties and have the powers appertaining to the office of a master in chancery and as provided by law and the rules of the court." By section 1761 to 1771, inclusive, there is provided an elaborate system regulating the fees of the office of such commissioner, and the payment of the salary of the chief officer and his deputies. An examination of these sections will show that all the fees of this office belong to and are appropriated by the State, and out of 75 per cent. thereof the salaries of the officer and his deputies are to be paid, the officer to receive a sum not greater than $5,000, his chief deputy $3,000, and the remainder of his office force such sums as are fixed by order of the court, not to exceed $1,500 each per year. The officer is required to keep an accurate account of all the fees made and collected in his office, and at fixed times to turn them over to the treasury of the State, and of the gross sum collected, the State receives 25 per cent. at all hazards.

In the case of Smith v Cochran, 7 Bush, 147, it was held that the commissioner of the Jefferson Chancery Court, who, under the act at that time regulating the office, was appointed by the chancellor for a fixed term of six years, and who was liable to impeachment and dismissal for misfeasance and malfeasance in office, could not be arbitrarily removed by the chancellor, there being no provision in the act regulating the office, which authorized such action, and it was, therefore, void. It was necessarily held in that case that there was no inherent power in the chancellor thus to remove his commissioner. In the case of the same style, Id., 548, it was held that the chancellor had no power to appoint a special commissioner to discharge the duties of the office of commissioner, and that an order referring the settlement of a decedent's estate to a special commissioner, over the protest of the regular commissioner, was void. At that time, there was a general act appertaining to master commissioners throughout the State, authorizing the circuit judge to appoint special commissioners at will; but the court

held that this act was not applicable to the commissioner of the Louisville chancery court, and, therefore, conferred no power upon the chancellor in this regard. The statutes above quoted, under the principle of Broadus v. Broadus, 10 Bush, 299, must be construed as containing all the law on the subject of which they treat, and, under the rule enunciated in the cases of Smith v. Cochran, supra, we would have no hesitancy in reaching the conclusion that the chancellors have no power to appoint a special commissioner, except under the circumstances provided for by sections 899 and 400, without reference to the sections regulating the fees of the office; for if they were invested with this authority, it is manifest that they could destroy the office, by so diverting the emoluments to special commissioners as to make it worthless, and thereby render it impossible for any one to hold the office, except such an one as they might favor. This would, practically, take from the other judges any participation in the appointment of the commissioner, although the law specifically devolves upon them this duty in connection with the chancellors; in other words, the construction contended for by the respondent would, in effect, abrogate the statute authorizing the appointment of a commissioner by all of the six judges, and leave it in the hands of the judges of the equity branches. But when, in addition to the foregoing reasons, we take into consideration sections 1761 to 1771, inclusive, it is inconceivable that it could have been intended that the chancellors should be invested with the power to divert from the State the emoluments of the office of the commissioner so definitely required to be paid into its treasury, by the appointment of special commissioners, who would receive the whole allowance made them, without any participation therein by the State. As to whether or not it is wise, thus to withhold from the chancellors of circuit courts having six judges the appointing of the officer with whom they are so intimately associated, and upon whom they must so often rely for assistance, is not a question for us to decide; it is certain that the legislature has withheld it from them. And the same may be said of the wisdom of withholding from them the power of appointing a special commissioner at will.

There is much cogency in the reasoning of the learned counsel for the respondent, that the chancellors should be invested with these powers, but a careful examination of the statutes relating to the subject, convinces us that it has not been given, and that they are limited in this matter to the express provisions of the statutes. This being true, the action of the chancellor of the first chancery branch, in undertaking to appoint a special commissioner in the case at bar to perform the duties devolved by law upon the regular commissioner of the court, was void, he being without jurisdiction to make it; and it follows, therefore, under the provisions of section 10 of the Constitution, as construed in the cases of Hindman v. Toney, 97 Ky., 413; Weaver v. Toney, 107 Ky., 419; Shackelford v. Patterson, 23 Ky. Law Rep., 816, and Louisville & Nashville Railroad Co., v. Miller, 23 Ky. Law Rep., 1714, that the writ of prohibition should issue.

MOORE v. COMMONWEALTH.

(Filed June 14, 1904—Not to be reported.)

1. Homicide—Verdict by lot—New trials—Under section 281, Criminal Code, decisions of the court on motions for a new trial are not subject to exception, and this court cannot review the action of the lower court where an affidavit of one of the jurors was filed tending to show that the number of years the appellant was to serve in the penitentiary, was determined by lot.

2. Absence of counsel—The defendant was indicted in October, 1901, and he was not tried until in March, 1903. The rule of the court is that a case should not ordinarily be continued on the sole ground of absence of counsel. It appearing that defendant was ably defended by local counsel, in view of the fact in the case the judgment is affirmed.

A. T. Wood and Z. T. Young for appellant.

N. B. Hays, Loraine Mix and H. B. Kinsolving for appellee.

Appeal from Rowan Circuit Court.

Opinion of the court by Judge Paynter.

The defendant was indicted for the murder of Fin Toliver, and was found guilty of voluntary manslaughter and sentenced to the penitentiary for eighteen years. He seeks a reversal upon two grounds; one, that the jury made its verdict by lot, and the other, on account of the absence from the trial of Col. A. T. Wood, one of his attorneys.

On the motion for new trial, the appellant filed an affidavit of one of the jurors which tended to show that the number of years he was to serve in the penitentiary, was determined by lot. The court overruled the motion for a new trial. Under section 281, Criminal Code of Practice, decisions of the court upon motions for a new trial are not subject to exception, and this court can not review the action of the lower court. (Redmon v. Commonwealth, 82 Ky., 333; York v. Commonwealth, 82 Ky., 362; Commonwealth v. Hourigan, 89 Ky., 308.)

The defendant was indicted in October, 1901. The case was not tried until in March, 1903. The case had been continued at a previous term for the appellant, because Col. Wood had not had an opportunity to become familiar with the case. The rule of this court is, that a case should not ordinarily be continued on the sole ground of absence of counsel. (Cook. v. Commonwealth, 24 Ky. Law Rep , 1409.) Z. T. Young, a local attorney, defended the appellant. He is an able and efficient attorney. In view of the facts of the case it is evident from the verdict that the appellant was ably defended.

The judgment is affirmed.

MONTGOMERY v. COMMONWEALTH.

(Filed June 14, 1904—Not to be reported.)

Homicide—Reckless shooting—Unintentional killing—The defendant with others were all out on Sunday at a place where liquor was sold and began to "fill up," defendant becoming very drunk. Several shots were fired, but by whom or for what object is not known. Soon afterwards defendant was

seen with a large pistol in both hands trying, apparently, to turn the cylinder. While so engaged the report of a shot was heard from the direction of a building about fifty yards away. It is not shown who fired the shot, nor for what purpose. The defendant immediately turned his gun in the direction where the shot came from and, apparently, without taking aim, fired, killing his brother-in-law with whom he was on perfectly friendly terms, and wounding another party. On the trial of an indictment for murder he was convicted of voluntary manslaughter and sent to the penitentiary for six years, from which verdict and judgment he appeals. Held—That whilst the instructions of the court as to voluntary manslaughter were prejudicial to the substantial rights of the defendant in omitting the use of the words "willful and intentional," the jury should also have been instructed, that if they believed from the evidence beyond a reasonable doubt, that the defendant intentionally, or in a wanton, careless manner fired off and discharged his pistol, and thereby shot and killed deceased, such killing was voluntary manslaughter. We are also of the opinion that the testimony in the case warranted the giving of an instruction upon involuntary manslaughter as defined in Conner v. Commonwealth, 76 Ky., 719.

A. F. Byrd for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Magoffin Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant was indicted for the murder of Charles Fletcher, and was convicted by a petit jury for voluntary manslaughter and sentenced to the penitentiary for six years. The testimony discloses that the defendant was a brother-in-law of the deceased, and that previous to his death they were perfectly friendly. The homicide occurred on Sunday. On the preceding Saturday night the deceased and Dud Montgomery spent the night at the house of the accused, and left there the next morning before breakfast for a place in the neighborhood where whiskey was sold; and that they were followed to this point after breakfast by the defendant and a brother of the deceased. After remaining at this point some little time, the whole party repaired to a neighboring church to attend divine services. At the conclusion of the church services, the whole party returned to the saloon, or perhaps it would be more accurate to say, place where whisky was being sold, and at once began to "fill up." The defendant became very intoxicated. While all the parties were present several shots were fired, but it is not shown who they were fired by, or with what object, if any; that soon afterwards the defendant was seen with a large revolving pistol in both hands, apparently trying to turn its cylinder. While he was engaged in this way, the report of a shot was heard from the direction of a building about fifty yards away. It is not shown who fired this shot, or for what purpose. But the defendant immediately turned his pistol in the direction where the shot came from, and apparently without taking aim, fired. In fact, most of the witnesses testify that he was not looking in the direction his pistol was pointed at the time, but the ball therefrom passed through the body of the deceased, killing him instantly, and wounding another party. The defendant claims that he was so drunk that he was unconscious of what he was doing; and that the killing of his brother-in-law was, in consequence thereof, a pure accident. A reversal of the judgment is asked chiefly upon two

grounds: First, because the trial court in the instruction given to the jury on voluntary manslaughter, did not require them to find from the evidence that the shooting of the deceased by the defendant was willful and intentional; second, for failure and refusal of the trial court to instruct the jury upon the theory of involuntary manslaughter.

The common law divides felonious homicides into murder, voluntary manslaughter and involuntary manslaughter, and under an indictment for murder the accused, if the facts warranted it, may be convicted of either degree of the offense. In 4 Blackstone, 192, voluntary manslaughter is defined as "the unlawful intentional killing of another without malice;" and involuntary manslaughter as "the killing of another in doing some unlawful act, but without the intention to kill;" and this may be either where the act is directed against the person killed, or where it is directed against a another person or thing, and kills one not intended to be hurt.

Substantially the same definition is given in 21 A. & E. En. of Law, 2d edition, 172. And these definitions have been frequently approved by this court. (Connor v. Commonwealth, 76 Ky., 719; Buckner v. Commonwealth, 77 Ky., 601; Mitchell v. Commonwealth, 78 Ky., 219; Trimble v. Commonwealth, 78 Ky., 176; Bush v. Commonwealth, 78 Ky., 268; Smith v. Commonwealth, 93 Ky., 318; Commonwealth v. Matthews, 89 Ky., 287; Greer v. Commonwealth, 11 Ky., 99.) It is essential to the commission of voluntary manslaughter that the homicide should have been willfully and intentionally committed, or under such circumstances as to strike one at first blush as so reckless and wanton as to be felonious, though apparently not intended by the perpetrator. The entire criminal law is pervaded by this doctrine. Bishop in his New Criminal Law, volume 1, section 314, says: "Every act of gross carelessness, even in the performance of what is lawful, and a fortiori of what is not lawful, and every negligent omission of a legal duty whereby death ensues, is indictable either as murder or manslaughter."

And as an illustration of this principle, he speaks of the reckless use of fire arms.

In 1 Russell on Crimes, 636, the author says: "There are many acts so heedless and incautious as necessarily to be deemed unlawful and wanton, though there may not be any express intent to do mischief, and the party committing them, and causing death by such conduct, will be guilty of manslaughter. As where a gentleman came to town in a chaise, but before he got out of it, fired his pistol in the street, which, by accident, killed a woman, it was ruled manslaughter, for the act was so reckless as to breed danger and was manifestly improper."

In Sparks v. Commonwealth, 60 Ky., 111, it was decided that where a man intentionally and in a wanton, reckless and careless manner, fired off and discharged his pistol on a public street and thoroughfare of a town, and thereby shot and killed another, that such killing was manslaughter.

This case was followed by Chrystal v. Commonwealth, 72 Ky., 669, and Yorks v. Commonwealth, 82 Ky., 360. In the last case this court, through Judge Holt, said: "It may now be regarded as well settled in this State by numerous decisions of this court, that when one intentionally does an act in such a reckless and careless manner that it is calculated to endanger human

life, and death ensues, he is guilty of manslaughter, although the death of the person killed may not have been intended."

This rule was also adhered to in Smith v. Commonwealth, 98 Ky., 318. In Spriggs, Jr. v. Commonwealth, 24 Ky. Law Rep., 540, the instructions in Sparks v. Commonwealth, Chrystal v. Same, and York v. Same were criticised because they made no distinction between voluntary and involuntary manslaughter, but authorized a conviction for the common law offense of manslaughter without the limiting adjective voluntary. But it was not decided in that case that if a a person willfully discharged a pistol in a street or other public place, and some one was killed by the shot, that such killing was not voluntary manslaughter. We are, therefore, of the opinion that whilst the instruction as to voluntary manslaughter was prejudicial to the substantial rights of the defendant, in omitting the use of the words willful and intentional, that the jury should also have been instructed that if they believed from the evidence beyond a reasonable doubt that the defendant intentionally, or in a wanton, careless and reckless manner fired off and discharged his pistol, and thereby shot and killed the deceased, that such killing was voluntary manslaughter, and punishable by confinement in the penitentiary. We are also of the opinion that the testimony in the case warranted the giving of an instruction upon involuntary manslaughter as defined in Connor v. Commonwealth, 76 Ky., 719.

For reasons indicated the judgment is reversed and cause remanded for a new trial consistent with this opinion.

SHAW v. LOUISVILLE RAILWAY CO.

(Filed June 15, 1904—Not to be reported.)

1. Street railroad—Injury to bicycle rider—Warning by motorman—Where appellant was riding on a bicycle in front of a street car, near the track, the company is not liable for his injury where the motorman gave the customary warning by continuously sounding the gong, and having the car under proper control, and whether he was so acting was submitted to the jury who found that he was not in fault.

2. Same—The failure of the court to instruct the jury that if the motorman saw, or by the exercise of ordinary care could have seen appellant's danger in time to have avoided injuring him, but failing to do it, is liable notwithstanding appellant's contributory negligence, was not error, as appellant was not on the track and not in danger so long as he continued in the course and was not injured until the front end of the car had passed the bicycle.

Thos. Welsh and Matt O'Doherty for appellant.

R. L. Greene and Fairleigh, Straus & Fairleigh for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge O'Rear.

Appellant, who was riding a bicycle alongside of appellee's track, was injured by falling against the side of a passing car, which was going

in the same direction he was. Whether appellant was startled by the sudden appearance of the car (which is his counsel's theory), or whether he lost control of his wheel by reason of unevenness in the street, or other cause, can not easily be determined from the evidence. But which ever it may have been, appellee is not responsible in law for it if its motorman in charge of the car was, at the time in the exercise of due care toward appellant, by giving the customary warning by sounding his gong, and having his car under proper control. Whether or not he was so acting, was submitted to the jury, and they found for appellee that its motorman was not in fault. The sole objection is that the court failed to instruct the jury that if the motorman saw, or by the exercise of ordinary care could have seen, appellant's peril in time to have avoided injuring him, but failed to do so, it is liable notwithstanding appellant's contributory negligence. The motorman says he saw appellant for a distance of 150 feet before reaching him; that he sounded the gong, and appellant appeared to draw further away from the side of the track, though he was then clear of the space the car would need to pass him; that he continued to ring the gong, and that the front end of the car passed him in safety. Other witnesses corroborate the motorman upon these points. The motorman's having seen appellant and his proximity to the car, his duty to give the customary warnings and to control his car with reference to appellant's movement, or anticipated movements, attached. There was no place in this case for the instruction asked for. Appellant was not upon the track; he was not even in danger from the car so long as he continued in his course. The motorman had the right to assume that as he rang the gong continuously and as appellant appeared to heed it, that he was aware of its approach, and would govern his course accordingly. Appellant's danger was not an obvious one, nor was it probable that it would culminate in his injury. It existed only as does that element in the proximity of any person to a moving car or train. Suddenly losing consciousness, the turn of a foot on a pebble, if walking, the giving away of the wheel if riding, any slight and unforeseen impediment or accident might throw him against or in front of the moving car. The chances of the thing happening are so remote as not to call for the exercise of any extraordinary precaution on the part of the car driver, further than to warn the person that the car is approaching, and see that the other person is aware of its approach. There appears to us to be no error in the trial.

Judgment affirmed.

SHIRLEY v. SOUTHERN RAILWAY IN KENTUCKY.

(Filed June 15, 1904.)

Consideration of land—Appeal—Supersedeas—Discharge—Tender of damages awarded—Where, in a proceeding by a railroad company to condemn land upon which to build its road, the damages have been duly assessed by a judgment in the circuit court upon an appeal from the county court, the land owner can not, after the payment by the railroad company of all costs, and the tender to him of the damages awarded by the verdict of the jury, delay the railroad company in taking possession of the land under the judgment, by the execution of a supersedeas bond.

Robert Harding and W. C. Bell for appellant.

Boyle & Yeaman and Humphrey, Burnett & Humphrey for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, the Southern Railway in Kentucky, instituted this proceeding against the appellant, Shirley, under subdivision 4 of article 5 of the Kentucky Statutes, for the condemnation of a strip of land one hundred feet wide and containing five and six-tenths acres of land for the purpose of constructing and operating their railroad thereon.

The commissioners appointed by the county court awarded appellant $2,500 for the value of the land actually taken, and incidental damages to the residue of the tract. Exceptions were filed by the railway company to the report of the commissioners, and a jury impaneled in the county court to try the issues of fact, who returned a verdict of $2,400 in damages for the appellant, and judgment was entered thereon. The railway company appealed from the county court judgment to the circuit court. A trial de novo in the circuit court resulted in a verdict and judgment in favor of appellee for $1,700.

A motion for a new trial having been overruled, the railroad company paid the cost incidental to the condemnation proceeding in the county court, and tendered to the appellant $1,700, the amount awarded by the jury in the circuit court, which was declined. It thereupon paid the $1,700 into court and filed the affidavit of the county clerk showing that all costs of the condemnation proceedings in that court had been paid, and a writ of possession for the strip of land was awarded the railroad company. Shirley thereupon appealed to this court and executed a supersedeas bond, suspending the circuit court judgment, and the case now comes up for hearing upon a motion filed by the railroad company to discharge the supersedeas, in order that they may take possession of the land and proceed with the construction of their railway thereon.

The question turns upon the construction which is to give to section 889 of the Kentucky Statutes, which reads as follows:

"Section 889. When exceptions shall be filed by either party, the court shall forthwith cause a jury to be empaneled to try the issues of fact made by the exceptions, and each juror shall be allowed $1 per day for his services to be taxed as cost. In assessing the damages the jury shall be governed by the rule prescribed in section 886 of this law, and, upon the request of either party, may be sent by the court, in charge of the sheriff to view the land or material. If sufficient cause be not shown for setting aside the verdict, the court shall render judgment in conformity thereto, and shall make such orders as may be proper for the conveyance of the title upon the payment of the damages assessed. Either party may appeal to the circuit court, by executing bond, as required in other cases within thirty days, and the appeal shall be tried de novo. Upon the confirmation of the report of the commissioner by the county court, or the assessment of damages by said court, as herein provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, as shown by the judgment of the county court when the damages are assessed by said court,

and all cost adjudged to the owner, the railroad company shall be entitled to take possession of said land and material, and to use and control the same for the purpose for which it was condemned as fully as if the title had been conveyed to it. But when an appeal shall be taken from the judgment of the county court by the company, it shall not be entitled to take possession of the land or material condemned until it shall have paid into court the damages assessed and all costs. All money paid into court under the provisions of law shall be received by the clerk of the court and held subject to the order of the court, for which he and his sureties on his official bond shall be responsible to the persons entitled thereto."

Appellant insists that the statute makes no provision for the tender and payment by the railroad company to the landholder of the damages which may be assessed in the circuit court upon the trial of the appeal, and confers no authority upon the circuit court to award to the railroad company possession of the condemned land except upon the payment of the judgment rendered upon the trial in the county court. On this point the statute says: "But when an appeal shall be taken from the judgment of the county court by the company, it shall not be entitled to take possession of the land or material condemned, until it shall have paid into court the damages assessed and all costs."

It is quite evident that the "payment into court" spoken of in this paragraph of the section of the statute does not refer to the payment of the county court judgment, as this has already been provided for by the preceeding paragraphs, but clearly referred to the payment into court of the damages which may be assessed upon the appeal in the circuit court. After the trial in the circuit court the judgment rendered therein takes the place of the county court judgment. On this point Freeman on Judgments, section 328, says: "The effect of an appeal from an inferior to a superior tribunal, where the superior tribunal is required to try the question appealed de novo, and render thereon such decision as in its opinion should be rendered under the law and evidence, is to vacate and set aside the judgment of the inferior tribunal."

The circuit court is the final tribunal provided by the statute for the determination of the amount which shall be awarded to the landholder by way of damages. No reason has been suggested, and none exists why a different rule of procedure should obtain after the trial in the circuit court than in the county court. We are supported in this view of the law by Blackkshire v. R. R. Co., 13 Kan., 514; Pool v. Breese, 114 Ill., 594; Peterson v. Fenly, 30 Ia., 537; Downing v. Demoines 63 Ia., 177; Jackson v. Baltimore, &c., R. R. Co., 45 N. J., Eq., 454; Lake Erie R. R. Co. v. Kinsey, 87 Ind., 514. It follows, therefore, that the landholder can not, after the tender to him of the damages awarded by the verdict of the jury in the circuit court, delay the railroad company in taking possession of the land under the judgment, by the execution of a supesdedeas bond.

For reason indicated the motion to discharge the supersedeas is sustained.

HOWARD v. COMMONWEALTH.

(Filed June 15, 1904—Not to be reported.)

W. M. Smith, J. A Violett, J. A. Scott and Carlo Little for appellant.

B. G. Williams, R. B. Franklin, L. W. Arnett, W. O. Davis and Poor & Stout for appellee.

Appeal from Franklin Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

The questions called to our attention in the petition for rehearing under the Constitution of the United States, were considered by the court on the original hearing and we adhere to the conclusion there reached that no right of appellant under the fifty-sixth or fourteenth amendment to the Constitution of the United States has been violated.

The motion for rehearing is overruled.

CITY OF LEXINGTON v. BATSON'S ADM'R.

(Filed June 15, 1904.)

Smallpox—Pesthouse—Negligence in management—Liability of city—Death resulting—A city is not civilly liable in tort for the death of a patient sent to and confined in the city pesthouse by order of the board of health of said city, although it is alleged in the petition that the city suffered its pesthouse to become foul and unfit for use as such, and that it negligently failed to provide a suitable pesthouse for the detention and treatment of those who had been exposed to, or had the smallpox; that it failed to provide competent physicans or suitable or any medicine, or sufficient clothing or covering, or sufficient or fit food; that those in charge neglected plaintiff's intestate, by reason of all which he died, and although it is conceded that the evidence was sufficient to sustain the jury's verdict, finding for the plaintiff.

Wm. Rogers Clay and C. W. Miller for appellant.

Beauchamp & Calhoun for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, a city of the second class, is given the power to establish and enforce quarantine laws and regulations to prevent the introduction and spread of contagious diseases within the city, and to establish and maintain eruptive hospitals in the city. (Section 3058, Kentucky Statutes.) It is likewise made the duty of the city council to appoint a board of health which has the same powers within the city that the county board of health has in the county under the statute. (Section 2089, Kentucky Statutes.) Appellant had established such hospital and appointed the board of health. During an epidemic of smallpox in the city, plaintiff's intestate had been exposed to contagion, and was consequently confined by the order of the board of health in the city hospital. He became sick of the disease and died. It is charged that the city suffered its pesthouse to become foul and unfit for use as such, and that it negligently failed to provide a suitable

pesthouse for the detention and treatment of those who had been exposed to or had the disease; that the city failed to provide competent physicians, or suitable or any medicines, or sufficient clothing or covering, or sufficient or fit food for the inmates; that those in charge neglected plaintiff's intestate in his sickness; by reason of all which he died. The evidence it is conceded was sufficient to sustain the jury's verdict finding for the plaintiff.

Under the authority of Twyman's Adm'r v. Board of Councilmen of Frankfort, 25 Ky. Law Rep., 1620, we must hold that the city is not civilly liable in tort for the acts complained of. The remedy, and so far as we know the only present legal protection of those unfortunates who may be maltreated as is charged in this suit, is by an indictment of the officers in charge for misfeasance or nonfeasance, and a civil action against the individuals who have been guilty of the wrongs. Plaintiff joined the members of the board of health as defendants to the suit. But the court let them out on a demurrer to the petition. Just why does not appear. But as there is no appeal or cross appeal by appellee, we refrain from commenting further on that action.

The judgment against the city is reversed and cause remanded, with directions to dismiss the petition.

ASHER v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed June 15, 1904.)

1. Judgment—Appeal—Reversal—Payment—Re-trial—Notice—In the year 1887 appellant Asher recovered a judgment against appellee L. & N. R. R. Co. for $3,000 damages for the right of way over appellant's land. On appeal this judgment was reversed in 1891, the same having been paid in 1888. At the May term, 1899, of the circuit court, eight years after the reversal, appellee filed a notice given to it by appellant that it would, on the second day of said term, file the mandate of the Court of Appeals, and redocket the case. No action was taken at that term and the notice was lost. At the October term, 1899, the court, without any additional notice, made an order reciting that the mandate had been theretofore filed, and ordered that the former judgment be set aside and directed the case to be redocketed. At the October term, 1902, when a special judge presided, a jury was impaneled, appellee introduced its evidence, and the jury returned a verdict for $900 damages. Thereupon appellee's counsel filed an affidavit that it had paid the former judgment of $3,000, and upon appellee's motion, judgment was awarded in favor of appellee against appellant for $2,100, the difference in the two judgments, with interest from August 10, 1888. All these proceedings were had in the absence of appellant and his counsel. Appellee contends that the proceeding is binding upon appellant because his attorney had stated to appellee's counsel a day or two before the judgment was rendered, that he did not regard this proceeding as regular, and did not intend to pay any attention to it until the time for him to make his defense, and then he would do so, and in addition to this, on the day of trial the court stopped the proceedings and sent a special messenger, who informed the appellant of the fact that they were about to enter upon the trial of the case, and he declined to make his appearance. Held—

First. That when a case has been stricken from the docket, and especially remained off as long as this one, before it could be reinstated by either

party, a notice should have been served upon the opposite party of the intention to have an order made to that effect.

Second. The court had no power to render the judgment against appellant for the $2,100, on the state of the record.

Third. Even if the proceeding were regular with reference to the second trial, and the appellant was before the court on that branch of the case, he still was not before the court on the other branch of the case, but would have to be brought before it by rule, or direct action for the restitution; and as neither remedy was followed the judgment for restitution was void.

Fourth. The appellant having entered his appearance by this appeal, on the return of the case no notice will be necessary for further proceedings on the condemnation proceedings.

N. B. Hays and Hazelrigg, Chenault & Hazelrigg for appellant.

J. W. Alcorn and Benjamin D. Warfield for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1887 the appellee began condemnation proceedngs to condemn a right of way over appellant Asher's farm in Bell county. A jury awarded appellant, in that action, $3,000 in damages. On appeal to this court that judgment was reversed, the opinion of this court in that case being delivered in February, 1891, and reported in 12 Ky. Law Rep., 815. It appears that the appellee paid appellant this $3,000 in the year 1888. Notwithstanding this payment and the reversal of that judgment in 1891, there is nothing in the record showing any effort made for the further hearing of the condemnation proceedings or to obtain another trial before a jury in that case until at the May term, 1899, over eight years after the reversal. At that term the appellee produced and filed a notice given by it to the appellant that it would, on the second day of that term, move to file the mandate of the Court of Appeals and redocket that case. This was all that was done at that term and no motion was in fact made to redocket the case and the mandate was not in fact filed. This notice was lost, not having been called up, and no action of the court obtained thereon, and the matter stood precisely as if no notice to file the mandate or docket the case had been given. (Section 447, Civil Code, and Foster v. Wade, 4 Met., 253.)

At the October term of the same year, the court, without any additional notice to the appellant, made an order reciting that the mandate of the Court of Appeals had been theretofore filed, and copied the mandate, and ordered, that in obedience to this mandate the, judgment for the $3,000 in favor of the appellant be set aside, and directed the case to be redocketed. The case remained on the docket without action until the October term, 1902, when a special judge, who had been appointed by the governor, presided in the trial of the case. A jury was empaneled, the appellee introduced its evidence and the jury returned a verdict allowing appellant only $900 for the damage to his land by reason of the road passing through it.

Appellee's counsel filed an affidavit to the effect that the appellant had been paid by the appellee the $3,000, the amount of the former judgment, and moved the court for a judgment against him for the difference, $2,100, with interest from the 10th day of August, 1888. The order recited that the motion came on to be heard, and on testimony heard in open court it found

that appellee had paid appellant this sum of $3,000 and deducted the $900 that day awarded, and rendered judgment in accordance with the motion. And on that day and in the same order the court appointed a special commissioner who conveyed the strip of land taken by the road, to the appellee. All of these proceedings were had in the absence of the appellant and his counsel.

Appellee contends that this proceeding is binding upon the appellant because his attorney, a day or two before this judgment was rendered, had stated to the counsel for the appellee that he did not regard this proceeding as regular, and did not intend to pay any attention to it until the time arrived for him to make defense, and then he would do; so and in addition to this, on the day of the trial and after the case had been called for trial, the court stopped the proceedings and sent a special messenger to inform the appellant of the fact that they were about to enter into the trial of his case. Appellant was informed in person by this mesenger, and he declined to make his appearance in court.

We are of the opinion that when a case has been stricken from the docket and especially after it had remained off the docket as long as this one, that before it could be reinstated upon the docket by either party, a notice should have been served upon the opposite party of the intention to have an order made to that effect. The record does not show, nor is it claimed by the appellee that any such notice was ever served upon the appellant, except the one referred to which was lost by the failure to have the court to act upon it.

The court erred in rendering judgment against appellant for the $2,100 and its interest, the difference between the two judgments. The court had not the power to render this judgment of restitution on the state of the record. Even if the proceeding were regular with reference to the second assessment of damages by the jury, and the appellants were before the court on that branch of the case, he still was not before the court on this branch of it, but would have to be brought before it by rule or direct action for the restitution. And as neither remedy was followed by the court, the action of the court in adjudging restitution in this case was void. There is no pretense that appellant had any notice of any kind or character of this proceeding of restitution. (85 Ky., 379; 6 Ky. Law Rep., 299.)

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent with this opinion, and appellant having entered his appearance by this appeal, on the return of the case no notice will be necessary for further proceedings on the condemnation proceedings.

HARRIS v. HOWARD, &c.

(Filed June 15, 1904—Not to be reported.)

Homestead—Widow—A widow is not entitled to homestead in a tract of land where neither the pleadings nor the record show that her husband ever occupied it or intended to occupy it as a homestead, or that she has ever lived upon it as such.

W. F. Hall and W. C. L. Huff for appellant.

Clay & Hardin for appellees.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge O'Rear.

The widow of a decedent who died intestate owning a lot of land worth less than $1,000, claims that the whole of it should be set apart to her, instead of being allotted merely dower in the lot. Her pleadings failed to show, nor does the record show, that her husband ever occupied it or intended to occupy it as a homestead; or that she has ever lived upon it as such. Upon the authority of Higgins v. Higgins, 25 Ky. Law Rep., 1824, and the statute therein referred to, the judgment of the circuit court denying her claim of homestead is affirmed.

E. T. KENNEY CO. v. ANDERSON, &c.

(Filed June 15, 1904—Not to be reported.)

This action was brought to recover the balance of the money agreed to be paid the appellees for "one Star engine on trucks," the price being $1,080, for which four notes were given and delivered to one Benefiel, and on which $372 had been paid to said Benefiel, who was the general agent of appellant. The engine was warranted to be of good material, well constructed, and, with proper care and management, to do as good work as any other engine of the same size and rated capacity (14-horse power) made for the same purpose. The appellees allege in their answer that the engine was worthless, had broken down in a few days after it was bought, and after being repeatedly repaired and worked on by appellant's employes, sent for that purpose, finally had to be abandoned as absolutely worthless; and in their answer tendered the engine to appellants and asked a cancellation of their notes, and a recovery of the purchase money paid, and for their costs and damages. The lower court adjudged that the notes sued on be canceled; that appellant take the machine, and pay appellees $300, with interest and costs. This case was decided mainly upon the evidence, the court holding:

First. That appellant did not prove its allegation that the engineers put in charge of the engine by appellees were incompetent or unskillful, except by inference, in that they did not make the engine run.

Second. Appellant contends that it is not liable on its warranty, for the reason that appellees did not, within six days after the engine failed to work, give written notice thereof. The purpose of this stipulation was to give the seller an opportunity to have an expert to visit and repair the defects in the engine, for its protection and benefit as well as that of the buyer; and it appears that it did get the notice and sent the expert, and thereby waived its right to the giving of the notice in the exact manner set out in the written warranty.

Third. Appellant contends that even if its agent, Benefiel, made an agreement with appellees which induced them to make a payment on the engine, still it is not liable because Benefiel was not a general agent with power to make a contract binding on the appellant. Held—That if appellant accepted and held the money paid by appellees to Benefiel, with knowledge of the contract made by him, it is estopped to deny his right to make it; and there is no evidence that appellees had any notice or knowledge of any limitation upon the power of Benefiel if there was any.

Fourth. The contract with reference to agent stated: "Local agents and

salesmen are only authorized to make sales in accordance with special instructions and upon forms furnished by the company. Mechanical experts are not agents and have no authority to bind the company by any contract or statement whatever." The use of this language in the contract, by implicaton, was notice to appellees that an agent other than those therein described did have such power as was excluded from those named; and Benefiel was shown not to be one of those described, but was a general agent transacting business generally and not confined to Kentucky.

Fifth. When appellant's agent, Benefiel, collected the first note, he then assured the appellees, that if the engine could not be made to fill the warranty, the company would take it back and furnish a new one or refund the money. Appellees accepted this proposition and when it was finally ascertained that the engine could not be made to do the work and appellant's agent asked for a return of the engine, appellees had the right to ask a return of the money before delivering up the engine.

Sixth. The preponderance of the evidence shows that the engine was not a 14-horse power engine as warranted, but was of less capacity.

Burnam & Moberly and W. S. Moberly for appellant.

Chenault & Chenault, H. C. Hazelwood and J. Tevis Cobb for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Nunn.

On the 13th of June, 1899, the appellees made an agreement with one Robt. C. Hall, for the purchase of one Star engine on trucks, at an agreed price which was afterwards modified on the date of the receipt of the engine, to wit: The 22d of June, 1899, and on that day the appellees executed to the Aultman Co. their four notes, three of them for $300 each, and one for $180. These notes were executed in the office of Delong & Co. and delivered to one Benefiel. At that time and for some months afterwards, appellees were under the belief that Hall, Benefiel and Delong & Co. were all the agents of the Aultman Co. and were also under the impression that they had purchased the engine from that company, when the fact was that the beforenamed parties were the agents of the appellant, the E. T. Kenney Co., who purchased and sold the machinery of the Aultman Co.

The appellees paid the first of the $300 notes, with its interest, and $72 on the $180 note, and failed and refused to pay anything further thereon, and this action was brought by the appellants to recover the balance of the purchase price and to enforce the mortgage lien which appellant had retained on this engine and trucks. To this petition appellees filed their answer and several amended answers, in which they, in substance, alleged that at the time of their purchase of this engine, the appellant warranted it to be made of good material, well constructed, and with proper use and management to do as good work as any other of the same size and rated capacity made for the same purpose; and they warranted it to be a 14-horse power engine and suitable for hauling a threshing machine over the country and driving the machinery when threshing. The written warranty of the appellant, which was delivered to the appellees at the time of the purchase of the engine, is as follows:

"The machinery and extra parts specified above are warranted to be made of good material, well constructed, and with proper use and management,

to do as good work as any other of the same size and rated capacity made for the same purpose. If, inside of six days after the date of its first use, it shall fail in any respect to fill this warranty, written notice shall be given immediately by the purchaser to the Aultman Co. at its office at Canton, Ohio, by registered letter, and written notice also to the local agent through whom same is received, stating particularly in said letter and notice what parts and wherein it fails to fill the warranty, and a reasonable time to be allowed said company to get skilled workmen to the machinery and remedy the defects, if there be any (if the defects be of such a nature that a remedy can not be suggested by letter,) the purchaser to render all necessary and friendly assistance and co-opperation in making the machinery a practical success. If the machinery, or any part thereof, or any of the separate attachments, can not be made to fill the warranty, then the defective machine, or part, or attachment (as the case may be), shall be returned immediately by the undersigned to the place where it was received, with the option in the company either to furnish another machine, or part, or attachment, in place of that so returned, which shall perform the work, or return the consideration or a proportionate share thereof, and rescind the contract in whole or in part, as the case may be, and be released from any other liability whatever herein, and to ascertain the proportionate share of the consideration for any machine, part or attachment, when its price is not specified separately, the gross consideration shall be apportioned in proportion to the list prices printed hereon, and shall be refunded out of the cash and credited on the several notes proportionately.

"If any metallic piece breaks during the first season by reason of any flaw therein, the company will furnish a new piece in its place, free on board cars at the factory, upon said broken piece being returned to the company promptly, if it appears thereby to the satisfaction of the company that the break was caused by a flaw.

"If a mechanical expert visits the machine for the company, and does not leave it working properly, the purchaser shall give immediate notice in writing or by prepaid telegram to said company at its home office, and to the local agent, and state in writing specifically any failure or neglect complained of.

"Failure to make settlement for the machine at the time and place of delivery and in the manner above provided; or a failure to give any of the notices in writing as provided for herein; or failure to render friendly assistance or co-opperation; or keeping the machine after the six days allowed as above provided; or any abuse, misuse, unnecessary exposure or waste committed or suffered by the purchaser, shall be a waiver of the warranty, and a full release of the warrantor, without in any way affecting the liability of the purchaser for the price of the machine or notes given therefor.

"Notice—All agreements appertaining to this order (except the mere acceptance thereof at the home office) are included in the above.

"The above warranty is the form furnished by the Aultman Co., and is the only form of warranty made or authorized by it to be given on the above named machine. No agent or other person shall make any different warranty, or vary or modify any of the terms, or waive any of the conditions of this warranty, and any attempt to do so shall not bind the company

nor affect this contract. Local agents and salesmen have no general agency powers, and are authorized only to make sales in accordance with special instructions and upon forms furnished by said company. Mechanical experts are not agents, and have no authority to bind said company by any contract or statement, whatever, or to vary any terms or waive any condition of any contract. This order is subject to the acceptance and approval of the company at its home office, and when so approved and accepted, is a binding contract which no person has authority to modify or vary in any respect, or to waive any of its conditions except in writing approved by the management at the home office, and any attempt to otherwise change any of the terms or waive any of the provisions of the warranty will not be binding on said company; nor will any modification in the price, terms of payment or securities in any way affect the warranty and its provisions Notes for any part of the purchase price must all be made payable to the company on the forms furnished by it; otherwise they will not bind said company nor release the buyer."

The appellees alleged that they performed specifically each of the conditions required of them by the contract, and also alleged that the engine proved to be worthless; that it was not made of good materials, nor was it well constructed, nor did it, with proper use and management, do as good work as any other of the same size and rated capacity made for the same purpose; that appellant did not and could not make it perform the work for which it was purchased, as required by the contract, and also alleged that they had paid about $400 of the purchase price after they and appellant had ascertained the defects and insufficiency of the machine as stated. The payments were made to Mr. Benefiel, appellant's alleged general agent, under the following circumstances and agreements. Appellees refused to pay anything on the machine for the reason of the failure of the warranty, whereupon Benefiel, promised and agreed with them that if they would make the payment, that before the next threshing season began the appellant would send an expert to the machine and have him make it comply with the warranty, and in case of a failure in this, the company would furnish the appellees a new engine, or surrender to the appellees their notes and return to them the cash they had paid.

Appellees alleged that the appellant had failed to comply with this agreement made by Benefiel, tendered the engine and asked a cancellation of the notes sued on and for a judgment for the money paid by them on the engine and other damages sustained.

Appellant replied to this answer entering a denial to each of the allegations therein, and specifically alleged that appellees were estopped from claiming any benefit under the warranty, for the reason that they had failed to give the Aultman Co. the notices, as required by the written warranty, and because the defects in the engine, if any there were, were the result of incompetent and unskilled persons being employed by appellees to run and manage it, and also because appellees had paid a part of the purchase price after the discovery of the defects. Appellant also denied the power and authority of Benefiel to make the contract alleged, or to waive appellant's rights under the warranty, or that it had notice of such a contract if made, and by reason thereof was not bound. The issues were completed, the proof

taken by deposition, and the court adjudged in effect as follows: That the notes sued on be cancelled, the appellant take the engine, and that appellant pay to appellees the sum of $300, with interest and costs.

The proof on the material questions involved on this appeal is in substance as follows: The appellees commenced to use this engine about the 24th of July, 1897, at which time it exhibited defects, which the engineer was able to remedy, until the fourth day thereafter, when it completely broke down. Appellee Anderson went to Richmond and called up over the long distance telephone appellant's agent, Delong, at Lexington, and informed him of the condition of the engine, and being unable, by the telephone, to make Delong understand the particulars of the defects and breakage in the engine, early the next morning he took the train for Lexington and called on Delong in person, and, after explaining to Delong the condition of the engine, asked him if it would not be right for him to notify the company; he then believing that the Aultman Co. was the proper company to notify. Delong told him that it would not be necessary as he had already notified them by telephone, and that they would have an expert there in a few days. Thereafter, and about the 9th of August, one Wilson, an expert machinist, representing appellant, arrived at the engine and attempted to remedy the defects. By his efforts he caused it to run for a very short time, but it broke down again a few hours after he left. Wilson stated when he left that he had to go to some other place, but would return again soon, but he did not return again that season. Appellees learned for the first time, from Wilson, on the occasion of his visit to the engine, that the appellant, and not the Aultman Co., was the real seller of the engine. Whereupon they wrote to appellant and stated that their expert had been there, but had failed to remedy the defects. Soon after this Benefiel appeared on the scene and undertook to aid in running it for about a week. With his help, and such other assistance as they could get in the vicinity, they succeeded in threshing a few crops, at the rate of 150 or 200 bushels per day. It finally gave down and they put it under the shed and notified the company that it would not work, and thus matters stood until the last day of December, 1899, when Benefiel arrived, as he claimed, for the purpose of collecting the first note, which was due the previous October. Appellees refused to pay him because the appellant had failed to make the engine run and perform the work as warranted. The proof shows by two or three witnesses that, to induce appellees to pay this note, Benefiel did make the promise, as stated in appellees' answer. Benefiel says that he only stated that appellant would comply with their written warranty. On this occasion appellees did not pay the full amount of their note, but paid a part, and promised to pay the remainder in a short time.

That the company had notice that Benefiel made an agreement with appellees in substance as stated, is evidenced by the following letter which the president of the appellant company files as a part of his deposition:

"Blue Grass, Ky., January 1, 1900.

"Dear Sir—In regard to your letter which was received a few days past I shall get the money as soon as possible as I was away from home when Mr. Benefiel was here and did not get to see him and have been confined to my bed sick ever since until now. We would have paid the note at once, except our engine did not work for us, and Mr. Williams saw Mr. Benefiel, who

said he would make it all O. K. and if could not make it all right didn't want us to keep it. It seems like we are dealing with a respectable company and when the company agrees to their part, we can't expect more, and that is all we can ask, so you may rest easy a few days and we will send the other money as quick as possible.

"Yours truly,

(Signed) "NEAL ANDERSON."

Some time in June, and before the threshing season began, the expert, Wilson, arrived and worked about an hour and a half on the engine. There was no test made of it at that time, but he said he would return when they began to thresh. This he did not do. They attempted to thresh a short time that season, but being unable to make the engine work, they pulled in long before the season was over. They had engineers of long practice and experience, but they could not manage it or make it work. Benefiel and Wilson appeared on the day they ceased to try to run it, and offered to make it run. Appellees told them that they had no objection to their doing so, but as to them, they were done with it, as it had damaged them too much already. Benefiel asked that they surrender to him the engine, which appellees said they would do, if he would surrender to them their notes and refund to them the money they had paid. This he refused to do, stating that he had no money, and they then agreed to have a friendly law suit.

Appellant did not prove that the engineers put in charge of this engine by appellees were not competent or skilled except by inference, in that they did not make this engine run. Appellant contends that it is not liable on the warranty for the reason that appellees did not, within six days, give written notice to the Aultman Co., by registered letter, of the defects in the engine, nor did it give such notice to the local agent, Delong & Co., at Lexington. The purpose of this stipulation, in this contract of warranty, was to give the seller of the engine an opportunity to have an expert visit it and repair the defects, for its protection and benefit, as well as that of the buyer. The notice was the essential thing, and it appears that it did get the notice and act upon it by sending its expert to the engine; and even if appellant had the right to demand the giving of the notice in the exact way and manner as prescribed in the contract, it waived its right thereto by accepting and acting upon the notice it did receive. See the case of Frick Co. v. Morgan & Co., 24 Ky. Law Rep., 837, in which there was a written warranty similar to the one in the case at bar. And there was no allegation or proof that the Frick Co. had any notice of any kind that the engine was defective in any manner. In that case the court said: "It is clear from the testimony, that appellants never waived the conditions of their contract as to the notice, and as appellees failed to comply therewith, they can not be permitted, after using the separator for more than two years, to defend an action for the purchase money on the ground that it failed to work satisfactorily."

The court in that case clearly indicated that warrantors in such cases may waive the conditions of their contract as to the manner and method of giving notice.

In Vol. 28, Am. & Eng. Enc. of Law, 1st edition, 832, in speaking of warranties similar to the one at bar, it is said: "The notice is not necessary

where the seller's agent is present at the trial of the machine, and sees its failure to work as warranted, or where he otherwise impliedly waives notice, as by attempting to remedy a defect." And again on page 833, in note 2: "And although a notice in writing may be required by the contract, yet if the seller responds to an oral notice given to an agent, he thereby waives his right to a notice in writing." (Davis v. Butrick, 68 Ia., 94.)

The appellant complains that this notice was not given to the Aultman Co., and that its, the Kenney Co.'s, compliance with this notice by sending an expert to this engine, was not a waiver of the notice to the Aultman Co. The president of the Aultman Co., in his deposition, stated that it was not the seller of the engine; that it sold to the appellant, Kenney Co., and that if the notice had been given to the Aultman Co., as required by the writing, that it would have sent the same to Indianapolis, Ind., to the Kenney Co., the seller of the engine to the appellees, that it, the Kenney Co., might send the expert. This witness was introduced by appellant and his testimony was not controverted by it. Under these facts it would have been a vain and useless thing to have sent a notice to the Aultman Co., at Canton, O. The reasonable and proper thing to have done was what they did do, to get the notice as quickly as possible to the person whose duty it was to send the expert and the real seller of the engine.

Appellant contends that, even if Benefiel made the contract with appellees which induced them to make a payment on this engine, and it accepted and held the money with knowledge of such contract, still it is not liable or bound thereby, because Benefiel was not a general agent with power to make such contracts. In this we think appellant is mistaken. If it accepted and held the money with knowledge of the contract made by Benefiel, it is estopped to deny that he had the right to make the contract. In addition to this, there is no evidnce showing that appellees had any notice or knowledge of the limitations upon the power of Benefiel, if any there was. The contract with reference to agents contains this language: "Local agents and salesmen have no general agency powers and are authorized only to make sales in accordance with special instructions and upon forms furnished by the company. Mechanical experts are not agents and have no authority to bind said company by any contract or statement whatever, or to vary any terms or waive any conditions of any contract."

The use of this language in the contract, by implication, at least, was notice to appellees that an agent, other than therein described, did have such powers, as therein excluded from the agents named. The proof shows clearly that Benefiel was not one of such agents. Appellant stated that he was the general collector of the company, but acted under special instructions. The proof showed that he not only collected for the company, but transacted generally the business of the company, and that he was not confined to Kentucky, but had territory in other States. The appellant also contends that the appellees can not claim the benefit of this warranty, for the reason they did not return the engine to appellant at the place at which they received it. The contract says that if the machinery can not be made to fill the warranty, then it is to be returned, but it is not stated in the contract who is to determine whether or not it fills the warranty. The appellees seem to have been under the impression that after appellant's expert

had attempted to make it fill the warranty and failed, that it could not be done. Appellant seemed to have had a different opinion, and desired further time in which to test this matter. When appellant's agent, Benefiel, collected the first note, he then assured appellees that, if the engine could not be made to fill the warranty, the company would take the engine back or furnish a new one or refund the money paid by appellees. Appellees accepted this proposition, and when it was finally ascertained that the engine could not be made to perform the work and appellant's agent asked for a return of the engine, appellees had the right to ask a return of the money before delivering to the appellant the possession of the engine.

The preponderance of the evidence was that the engine was not in accordance with the warranty, as it appears to have been light and frail, and did not have sufficient power to drive a thresher, and there must have been an inherent defect in the construction of it. There was an unusual "knock" in it from the very beginning, which continued until they ceased to use it. According to the evidence of appellant it is probable that this engine was less than a 14-horse power. The witness, Martin J. Hogan, said he superintended the construction of this engine, and in describing it used the following language: "It gave the full power of a 14-horse traction engine. The cylinder was 8¼ inches in diameter by 10 inches piston stroke, and running at 200 revolutions per minute will furnish power for a 14-horse traction engine." Appellant's witness, Tuttle, who professed to be an expret, on being asked how to explain or read horse-power in an engine, answered: "You take the diameter of the cylinder, stroke of the engine and revolutions per minute," and stated that the diameter of the cylinder of this engine was 8¼ inches, and that to produce 14-horse power, the length of the stroke should be 12 inches and the number of revolutions 240 per minute.

If Tuttle was right as to what it took to constitute a 14-horse power engine, and if Hogan, the person who superintended the construction of it, gave a correct description of it, then this engine was less than a 14-horse-power engine. As further evidence of this fact, the appellant filed as a part of the record, a copy of its letter in answer to its agent, Hall's letter, ordering the engine, in which it stated to Hall: "We might fill the order with a 12 h. p. engine, but want to call your attention to one thing, that is, we will not fill it with a 10 h. p. or 12 h p. when the order calls for a 14 h. p. We hold the order awaiting your advices before passing on it."

From this it appears that the company at least hesitated and possibly declined to fill the order with a 14-horse power engine for the price offered.

Appellant has referred to the case of Watts v. The National Cash Register Co., 25 Ky. Law Rep., 1947, and McCormick Harvesting Machine Co. v. Arnold, 25 Ky. Law Rep., 663, as in point and sustaining its contention. These cases have no application to the case at bar because in these cases the sale was a conditional sale or one in which the purchaser had the right to make a trial of the article before finally deciding whether or not he would purchase, and in these sales there was no sale with a warranty, as in the case at bar.

Wherefore, the judgment of the lower court is affirmed.

Whole court sitting.

EVENING POST CO v. RHEA.

(Filed June 16, 1904—Not to be reported.)

Libel—Actionable publication—Questionable acts of appellee—Excessive verdict—On October 26, 1900, appellant, a corporation owning a daily paper in Louisville, Ky., published an article concerning appellee, charging him with certain election frauds in his capacity as one of the county election commissioners of Logan county, for which appellee brought this suit for damages, to which appellant affirmatively pleaded justification as a purveyor of news in the defense of the action. A trial resulted in a verdict in favor of appellee in the sum of $4,500. Held by a majority of the court—That appellee, on the trial, established a cause of action against appellant, but all the court agree that the verdict is flagrantly excessive. Appellants' own evidence, including the avowal of his counsel at bar, showed that a letter referred to in the publication, was written for the purpose of making A. G. Rhea appear in the role of a political criminal, and that this letter deceived and imposed upon appellant's correspondent; that although it was untrue in fact, appellant believed it to be true, and if appellee and his brother chose to masquerade as criminals they ought not to much complain if they were taken at their word, and spoken and written of as belonging to the role which they voluntarily assumed, and it is this consideration that has enabled us to reach the conclusion that the verdict is excessive. We perceive no other error in the record.

Helm, Bruce & Helm and Wilbur F. & J. C. Browder for appellant.

W. P. Sandidge for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Barker.

On the 26th of October, 1900, appellant, which is a corporation owning a daily newspaper in Louisville, Ky., published the following article concerning appellee:

"1st. Same Old Tactics. They Name all Logan County Election Officers, Appointing a Few Men as Republicans Who are not Republicans.

"Evening Post. special service.

"Russellville, Ky., October 26.—The appointment of the precinct election officers for this county just made here indicates that the Goebel gang will this year resort to the same high handed tactics as employed last year.

"2d. The county board is composed of Tom Rhea, who is a brother of John Rhea, and is himself a candidate for sheriff; John Edwards and L. A. Freeman, the latter being the Republican member of the board. Of the forty-two officers to which they are entitled under the law, the Repuublicans got only fifteen of those recommended, the Democratic members of the board appointing sixty-nine of the eighty-four officers. In many cases the men appointed as Republican officers were not Republicans. At least one man appointed as a republican does not live in this county. The Republicans and Anti-Goebel Democrats are terribly wrought up over the outrage, and feeling is running high.

"3d. The frauds that were contemplated in certain Democratic precincts in the election last year, and which were detected and prevented, will probably be attempted this year on a larger scale than ever. The closest watch will be kept on all proceedings, and at the first evidence of fraud some sen-

sational arrests will follow. It is an open secret here that certain parties have written evidence, sufficient to convict at least one Goebelite in the Federal court, for an offense committed last year, and it is said that upon the first evidence of fraud in the approaching election, this party, and probably some others, will be taken in charge by the authorities.

"The people are long suffering, but have made up their minds this time to have a free ballot and a fair count."

The appellee, together with John Edwards and L. A. Freeman, composed the county election commissioners of Logan county, Kentucky, and were charged with the duty of selecting the precinct officers to hold the general election in that county in November, 1900; and it was the manner of the discharge of this duty that inspired the publication in question. Conceiving that the article was libelous as to him, appellee instituted this action in the Logan Circuit Court, to recover damages, making the usual and necessary allegations to present a cause of action against appellant. The latter entered a general denial to all of the material allegations of the petition, except as to the publication, and affirmatvely pleaded justification and its privilege as a purveyor of news in defense of the action. A trial resulted in a verdict in favor of appellee, in the sum of $4,500, to reverse the judgment, for which this appeal is prosecuted.

For convenience, we have divided the publication into sections 1, 2 and 3. It was written by S. W. Linebough, a special correspondent of appellant, living in Russellville, Ky. The facts constituting section 2 of the publication were obtained by the correspondent from L. A. Freeman, the Republican member of the board of election commissioners, and, while not altogether correct, they were in part, at least, true. The third section was claimed by the appellant not to have been intended to refer to appellee at all; and this is apparently true, as appears from an inspection of its contents; it was based upon, and referred to, the following transaction, as shown by appellee: The year before, just prior to the general election of 1899, the appellee and his brother, A. G. Rhea, in order to carry out a political plot formed by them, wrote a letter to one Joe Brown, whereby it was made to appear that A. G. Rhea had committed certain political crimes with reference to the colored voters in Logan county, and which, if true, would incriminate him under Federal statutes regulating the matter. This letter was to be taken by Joe Brown to Mr. Wilbur Browder, who appears to have been the treasurer of the Republican party in that county, and also an attorney for the Louisville & Nashville Railroad Co.; Brown was to pretend to betray the Democratic party, and to sell the letter to Browder for money, and also to regain a lost position, which he had formerly held with the railroad. This letter was not true, but only pretended to be, and will, perhaps, be more clearly explained by the following avowal made by counsel for appellee at the bar of the trial court:

"We propose to prove that * * * the plaintiff, T. S. Rhea and A. G. Rhea, laid a trap to catch Mr. Browder, and that they caught him; that the letter referred to by the witness was written and signed by A. G. Rhea, and pursuant to said plan or scheme adopted by said T. S. Rhea, A. G. Rhea * * * for the purpose of being sold to Mr. Browder; that the letter was to have the semblance of criminality, or was to appear to be incrim-

inating as affecting the said A. G. Rhea in its contents, and that on that account Mr. Browder would pay a good price for it; that that plan was successfully carried out, and that Mr. Browder has gotten the letter;" and by the following excerpts from the testimony of A. G. Rhea: "I wrote the final letter because I understood that I was the man they were after, and that I would bring a bigger price, and I said, 'I will write one that will bring it;' and in that letter I told him to keep the negroes away from the polls, and run them into Tennessee, any way to keep them out, and to get out the white folks. And the suggestion was made, and we put it in there, that Joe Brown could carry out his part, and that we would carry out ours, and we could get what we were justly entitled to, and you (addressing himself to Mr. Browder) would think that Joe had worked us, and we would get our normal majority by putting it up 150 higher than it ought to be. * * * It had been suggested that if he attempt to control the negro vote, either by purchase or keeping them away from the polls, or by any one using his influence among them who was friendly to them, that he would come under the jurisdiction of the Federal court, and I told them I would put it in there and keep them away if I could, and I would take the chance with the Federal court."

The letter referred to was sold to Browder, and the political conspiracy, from the standpoint of appellee and his friends, was eminently successful. Browder seems to have made no use of the letter, but filed it away in his desk at his law office, and it was subsequently shown to the correspondent of appellant by Browder's son; and this is the evidence referred to in section 3 of the publication complained of. It appears that Browder, his son, and appellant's correspondent, believed in the genuineness of the letter, and the truth of its contents. So far as the 3d section is concerned, appellant seems to have builded wiser than it knew; for, at the time of the publication, it had no intimation that appellee had any part in its composition, and, therefore, the reference was intended only to A. G. Rhea, whose name was subscribed thereto; appellee's complicity in the matter was brought out by himself, it being wholly unknown up to that time by appellant.

The majority of the court have reached the conclusion that appellee, upon the trial below, established a cause of action against appellant, but that, under all the circumstances of the case, the verdict is flagrantly excessive. Appellee's own evidence, including the avowals of his counsel at bar, showed that the letter referred to in the third section of the publication was written for the purpose of making A. G. Rhea appear in the role of a political criminal, and that this letter deceived and imposed upon appellant's correspondent; that although it was untrue in fact, appellant believed it to be true; and if appellee and his brother chose to masquerade as criminals, they ought not to much complain if they were taken at their word, and spoken and written of as belonging to the role which they voluntarily assumed; and it is this consideration that has enabled us to reach the conclusion that the verdict is excessive.

Perceiving no other error in the record the judgment is reversed, because the verdict is excessive, for proceedings consistent herewith.

Whole court sitting.

Chief Justice Burnam delivered the following dissenting opinion:

I concur in the reversal of the judgment in this case, but am clearly of the opinion that no cause of action is shown to exist in favor of the plaintiff, and the jury should have been directed to find for the defendant.

CITY OF LOUISVILLE v. LOUISVILLE RAILWAY CO.

(Filed June 16, 1904.)

1. Taxation—Ad valorem—License or occupation—Gross earnings—Constitution—Void ordinance—Prior to the adoption of the present Constitution, appellee had an arrangement with the city, by which, in consideration of the franchises granted, it was to pay the city $50 yearly for each car run upon its railway. After the adoption of the present Constitution and present statutes, an ordinance was adopted and it was agreed that the appellee should pay the city a license tax of 2½ per cent. on its gross earnings in lieu of all other taxes. This act went into effect February 1, 1894. This ordinance was void, but under it appellee paid a large sum of money to the city. The city sues in these actions for the ad valorem tax on appellant's property and franchises levied under the new Constitution and the statutes enacted thereunder. Held—That while under section 181 of the Constitution, a license or occupation tax may be authorized, and this power is conferred under sections 3011-3012, Kentucky Statutes, governing cities of the first class, no occupation or license tax was imposed by the general council under the power conferred, and therefore, in the absence of such action the appellee was not liable for a license tax during the time covered by the taxes sued for. It was not required to pay the $50 per car, for this old scheme had passed away, and it was bound to pay its ad valorem taxes on its property and franchises as other property holders. The ordinance allowing it to pay 2½ per cent. of its income in lieu of its ad valorem taxes and other taxes, was void; still the money paid under this void ordinance had gone into the city treasury and must be credited on the ad valorem taxes which were in fact due, and the circuit court properly allowed appellee credit for the sums so paid.

2. Failure to pay when due—Interest—Appellee could have learned exactly what its taxes were from the record made by the board of valuation and assessment, and should have tendered the money and stopped interest, and failing to do so, interest should have been allowed on the taxes for the years 1894-5 and 6, from the time they were payable.

H. L. Stone, City Attorney, for appellant.

Boyle & Yeaman and Humphrey, Burnett & Humphrey for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Hobson.

These actions were brought by the city of Louisville against the Louisville Railway Co. to recover certain taxes. This is the third appeal. (City of Louisville v. Louisville Railway Co., 111 Ky., 1, and City of Louisville v. Louisville Railway Co., 24 Ky. Law Rep., 438.) Nearly all the questions involved have heretofore been settled, and only the following need now be considered. Previous to the adoption of the present Constitution and the statutes pursuant thereto, the street railway company had an arrangement with the city, by which, in consideration of the franchises granted, it was provided: "That the said Louisville City Railway Co. shall, for the franchise and privilege herein granted to construct and operate railways over the streets hereinbefore named, pay into the city treasury of the city of Louisville, each and every year, the sum of $35, tax or license, for each and every car run upon their said railways, or such other sum as the general council may fix, not less than $25 and not to exceed $50 for each car so used

by said company, so long as said company shall operate said railways, or so long as the same shall be operated by any other company."

The amount to be paid was subsequently fixed by ordinance at $50 a car. After the adoption of the present Constitution and the present statutes, an arrangement was made between the street railway company and the city by which it agreed to pay a license tax of 2½ per centum on the gross earnings of the company in lieu of all other taxes. This ordinance, after setting out the previous arrangement, reads as follows: "Now, therefore, be it ordained that the said license tax of 2½ per centum on the gross earnings of the said company shall be in lieu and instead of the license taxes provided in the said contracts, and that the amount so paid shall be in full discharge of the taxes due to the said city, except that the said company shall pay the same tax upon its lands as is paid by other owners of lands in the city of Louisville. The provisions of this ordinance shall take effect upon the acceptance of its provisions by the said company, and the license tax to be paid under it shall be estimated upon its gross earnings from and after February 1, 1894."

The railway company paid its license tax of $50 per car until the ordinance above quoted took effect, and after that paid the tax of 2½ per cent. on its gross earnings. The tax year begins on September 1 of the preceding calender year. The taxes for 1894 are, therefore, assessed as of September 1, 1893. The city sues in these actions for the ad valorem tax on appellee's property and franchises, levied under the new Constitution and the statutes enacted thereunder. During the time covered by this tax the railway company paid to the city as license taxes at the rate of $50 per car the following sums:

October 12, 1893	$1,020 78
November 15, 1893	1,070 16
December 15, 1893	995 83
January 11, 1894	978 54
February 5, 1894	954 17
Total	$5,019 48

After the ordinance levying the tax of 2½ per cent. on the gross earnings was enacted, and under it the railway company paid to the city the following sums of taxes:

May 31, 1894	$27,892 82
January 29, 1895	27,186 89
February 1, 1895	2,233 84
January 29, 1896	32,204 30
January 21, 1897	30,863 06
Total	$120,379 91

The court on final hearing credited the railway company by the sums so paid on the taxes herein sued for, and of this the city complains. It is insisted that the tax of $50 per car was a bonus agreed to be paid the city for the use of its streets and that the railway company is not entitled to credit

for the money so paid on its ad valorem taxes sued for. In support of this position we are referred to Louisville City Railway Co. v. City of Louisville, 4 Bush, 478; City of Newport v. South Covington Street Railway Co., 89 Ky., 29, and Fidelity and Casualty Co. v. City of Louisville, 106 Ky., 207.

The tax of $50 a car was part of the scheme of taxation devised under the old charter of the city; that charter expired with the adoption of the new act for the government of cities of the first class. This act contained all the law on the subject and was a substitute for the old charter and all of its provisions. After it took effect, taxes could only be levied under it. They could not be levied in part under it and in part under the old charter. The levies authorized by the new act were the only levies that could be lawfully made or which the taxpayer could be required to pay. The new system of taxation which it devised was substituted in its entirety for the old system of taxation in vogue under the old charter. While, by section 181 of the Constitution, a license or occupation tax may be authorized, and this power is conferred in sections 3011-3012, Kentucky Statutes, governing cities of the first class, no occupation or license tax was imposed by the general council under the power so conferred, and, therefore, in the absence of such action the railway company was not liable for a license tax during the time covered by the taxes sued for. It was not required to pay the $50 per car, for this was part of a scheme of taxation that had passed away, and it was bound to pay its ad valorem taxes on its property and franchises as other property holders. The ordinance allowing it to pay a tax of 2½ per cent. on its gross income in lieu of its ad valorem and other taxes, was void. Still the money paid under the void ordinance having gone into the city treasury, must be credited on the ad valorem taxes which were in fact due. The parties made a mutual mistake. It is apparent they were both in good faith. The money was paid by the railway company as taxes and the court having held that it must pay an ad valorem tax instead of a license tax or a tax on gross earnings, the money so paid must be credited on the taxes which were legally assessed. It is true that the $50 a car license tax was for the use of the streets of the city; but this use of the streets of the city is one of the franchises of the company which is taxed in its ad valorem assessment, and without it the other franchises would be of little value. It is, therefore, true that the same property is taxed under the ad valorem assessment of appellee's property and franchises that was sought to be taxed in the ordinance fixing the license tax of $50 a car, and it must be presumed that the one was intended as a substitute for the other. If it was desired to impose in addition, a license or occupation tax on appellee, this could be done by the action of the council under sections 3011-12, Kentucky Statutes. This was not taken. There can not be an ad valorem tax under the present system and at the same time a license tax under the old system. The tax of $50 a car was levied under an ordinance enacted under the old charter which is no longer in force, and, therefore, money paid under this ordinance after it had ceased to exist, must be treated as paid on the taxes which the defendant in fact owed. We, therefore, conclude that the circuit court properly allowed the credits referred to. The tax bill of 1894, as originally made out, was erroneous and was withdrawn. A new bill was made out on June 8, 1897. But in making out this tax bill, so far as the tax on the franchise

went, the value of the franchise was not apportioned between the city and the county, although the line of railway lies partly in the city and partly in the county. The board of assessment and valuation in fact made the apportionment, but in certifying their action to the county clerk, the auditor certified the total amount of the assessment of the franchise as taxable by the city, instead of the amount which had been in fact apportioned to it. In the years 1895 and 1896 a different mistake was made in making out the tax bills. After ascertaining the total valuation of the property of the railway company they deducted from it the county assessment of its tangible property, and not the city assessment of the same property, although it was much higher than the county assessment. Thus the railway company was assessed twice for the same property, or the sum of the assessments against it was greater than the total amount at which its entire property was assessed. In Owensboro Waterworks v. Owensboro, 24 Ky. Law Rep., 2532, we held that the taxpayer was, in such case, entitled to have his franchise tax reduced to the amount which it should have been if the proper deduction had been made. The circuit court followed this decision and reduced the tax bills as there indicated. He also reduced the tax bill for 1894 to the true amount which was in fact apportioned to the city by the board of valuation and asessment; but he allowed no interest on these taxes, except from the date of the judgment. In doing this he departed from the rule laid down in the Owensboro case, for there the taxpayer was made to pay interest, notwithstanding the correction. (25 Ky. Law Rep., 484.) His ruling appears to be based on the line of authorities holding in cases of liens for street improvements, that no interest runs against the taxpayer until a correct apportionment is made. These cases are not in point, for there the taxpayer can not know what he is to pay until the cost of the improvement is apportioned to the property liable therefor. But here the taxpayer could have learned exactly what its taxes were from the records made by the board of valuation and assessment. It impeaches the record in the county clerk's office and shows it was incorrect, placing its taxes too high. But in showing this it shows precisely what its taxes ought to be and this it could have done when its taxes were due and could then have tendered the money to the city and stopped interest. We, therefore, conclude that interest should have been allowed on these taxes for the years 1894-5 6, from the time the second tax receipts (or those sued on) were payable. We see no other error in the judgment, and with this correction it is approved.

Judgment reversed and cause remanded for a judgment as herein indicated.

HARVEY, &c. v. BELL, &c.

(Filed June 16, 1904.)

William Payne died testate in 1890. He had but one child, a daughter, who married Dr. W. P. Harvey and died before her father, leaving four children, William P., Sibbie May, Lila Kate and Frank Wayne Harvey, all of them of age at testator's death. William P. died in 1891 unmarried and without issue; Sibbie May married W. C. Bell and died in 1897, leaving surviving her one child, W. C. Bell, Jr.; Lila Kate married J. W. Loving, and died childless in 1899; Frank Wayne Harvey died July, 1902, unmarried and

without issue, thus leaving the little boy, W. C. Bell, Jr., as the only representative in blood of the four grandchildren of the testator. The testator after making certain specific devises in trust to three of his grandchildren, Lila Kate, Sibbie May and Frank Wayne Harvey, made the following provisions:

"Seventh. I devise and bequeath three-fourths of all the residue of my estate, whether real, personal or choses in action, in trust to my aforesaid granddaughters and my aforesaid grandson, Frank Wayne Harvey, to be equally divided between them.

"Eighth. (Appointing W. P Harvey, the father of the devises, their trustee, with authority if he deems it best, to free the property from the trust at any time he may see proper.)

"Ninth. Should either of my said grandchildren, Lila Kate Harvey, Sibbie May Harvey or Frank Wayne Harvey die without issue of his or her body living, I devise the property herein devised to the one so dying, to be equally divided between the remaining ones or their issue.

"Eleventh. The other fourth of the residue of my property and estate (three-fourths of which is disposed of in the seventh clause of my will), I devise and bequeath to the children of my grandson, Wm. P. Harvey or their issue. Should my grandson, Wm. P. Harvey, die without child or children or their issue, the estate devised and bequeathed by this clause or section of my will, I devise to be held and disposed of as provided in the ninth clause of this my will."

Frank Wayne Harvey in December, 1898, sold and conveyed to W. E. Mitchell the two storehouses devised to him and an undivided one-third interest in 356 acres of land owned by testator, and afterwards he conveyed the same property to his father, Dr. W. P. Harvey, and also his interest in the real estate vested in his sister, Lila Kate, under said will. Under this will W. C. Bell, Jr., claims to be the sole owner of the property in controversy. W. E. Mitchell claims that Frank Wayne Harvey took the fee in the property conveyed to him and Dr. W. P. Harvey claims that the children took the estate devised to them in fee and that he, as heir at law of those who are dead without issue, is entitled to the interest they held in the property at their death. Held—

First. Where an estate is deivsed to one for life, with remainder to another, and if the remainderman die without children, then to a third person, the rule is, that the words "dying without children, or issue," are restricted to the death of the remainderman before the termination of the particular estate.

Second. Where there is no intervening estate and no other period to which the words "dying without issue," can be reasonably referred, they are held, in the absence of something in the will evincing a contrary intent, to create a defeasible fee, which is defeated by the death of the devisee at any time without issue then living.

Third. It must be presumed that the testator meant something when he devised part of his estate absolutely, and placed the remainder under elaborate limitations. The purpose of clauses eleven and twelve, was to secure the estate to testator's unborn great grandchildren, and illustrates the purpose of the eighth, ninth and tenth clauses which were all part of one plan to prevent his property falling to those who were strangers to his blood, by reason of the death of his grandchildren (then unmarried) without issue. We, therefore, conclude that the limitation as to the death of any of the grandchildren without issue, can not be restricted to a death in the lifetime of the testator.

Fourth. The provision of the will allowing the trustee to hand over all, or a part of the property, to the devisees, and free the same from the trust,

does not indicate that the testator had it in his mind to empower the trustee to add anything to the title which the devisee took under the will, or to change in any way the plans which he had devised to secure the estate to his own blood.

Helm, Bruce & Helm and Robt. Harding for appellants.

W. S. Pryor, W. G. Welsh and E. H. Gaither for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hobson.

This controversy involves the title to 356 acres of land in Mercer county and certain town lots in Harrodsburg, formerly owned by William Payne, who died testate in the year 1890. He had but one child, a daughter, who married Dr. W. P. Harvey, and died many years before her father, leaving four children, William P., Sibbie May, Lila Kate and Frank Wayne Harvey, all of them at his death, of age. William P. Harvey died on May 9, 1891, unmarried and without issue. Sibbie May married W. C. Bell and died on April 2, 1897, leaving surviving her one child, W. C. Bell, Jr. Lila Kate married J. W. Loving and died childless on February 12, 1899. Frank Wayne Harvey, on December 12, 1898, in consideration of $12,500, $7,300 paid cash and $5,200 to be paid in three years, conveyed to W. E. Mitchell two storehouses and lots in Harrodsburg and an undivided one-third interest in the 356 acres of land. On October 17, 1899, in consideration of $1 and other consideration, he conveyed to his father, Dr. W. P. Harvey, the same property; also his interest in the real estate vested in his sister, Lila, under the will of their grandfather. After this he died on July 8, 1902, unmarried and without issue. So that the little boy, W. C. Bell, Jr., is the only living representative in blood of the four grandchildren of the testator. It is insisted for him that he is, under the will of William Payne, the sole owner of the property in contest. It is insisted for Mitchell that Frank Wayne Harvey took in fee under the will, the property devised to him, and that Mitchell's title is, therefore, good. It is insisted for Dr. Harvey that the children took the estate devised to them in fee, and that he, as heir at law of those who are dead without issue, is entitled to the interest they held in the property at their death. The controversy turns on the proper construction of the will, which is as follows:

"Realizing the uncertainty of life, and being of sound mind and disposing memory, I, Wm. Payne, of Harrodsburg, Ky., do make this my last will and testament:

"1st. I direct my executor to sell all my personal property, except as hereinafter directed, collect all debts due me, pay all my just debts, and the residue he is to hold and dispose of as herein devised.

"2d. I hereby specifically devise to my granddaughter, Lila Kate Harvey, in trust as hereinafter named, two store buildings (here follows description).

"3d. I hereby specifically devise to my granddaughter, Sibbie May Harvey, in trust as hereinafter stated, two store buildings and lots (here follows description).

"4th. I hereby specifically devise to my grandson, Frank Wayne Harvey, in trust as hereinafter stated, my two store buildings and lots (here follows description).

"5th. I bequeath absolutely that all my beds, bedding, furniture, books and pictures, tableware be divided equally between my two granddaughters, Lila Kate and Sibbie May Harvey.

"6th. I bequeath absolutely to my grandson, Frank Wayne Harvey, my gold watch and chain and breech loading shotgun.

"7th. I devise and bequeath three-fourths of all the residue of my estate, whether real, personal or choses in action, in trust. to my aforesaid granddaughters and my aforesaid grandson, Frank Wayne Harvey, to be equally divided between them.

"8th. The property or interest in property herein devised or bequeathed to my said grandchildren, Lila Kate, Sibbie May and Frank Wayne Harvey, in trust, to be managed and controlled for their respective benefits by their father, W. P. Harvey, whom I hereby appoint my executor and their trustee, and desire that he shall act in both said capacities without bond or security. Said trust is qualified thus: If said W. P. Harvey deems it wise at any time, he may hand over all or any part of their property to said devisees, or any of them, at any time, and free the same from trust. The evidence that the same is so freed from trust shall be the written deed of said W. P. Harvey, filed and recorded as other deeds, both as to the realty and personalty so freed from trust. I also empower said W. P. Harvey to appoint his successor as trustee, but the freeing said property from trust is a power lodged only in said Harvey as trustee.

"9th. Should either of my said grandchildren, Lila Kate Harvey, Sibbie May Harvie, or Frank Wayne Harvey, die without issue of his or her body living, I devise the property herein devised to the one so dying to be equally divided between the remaining ones or their issue; or if all should so die without issue, then their respective shares I devise to ————.

"10th. Should the contingency arise as provided for in the next preceding (section 9) of this will, the property thus received by my said grandchildren or either of them, is to be in trust under the same powers as expressed in the 8th clause of this will.

"11th. The other fourth of the residue of my property and estate, three-fourths of which is disposed of in the 7th clause of my will, I devise and bequeath to the children of my grandson, Wm. P. Harvey, or their issue. Should my said grandson, Wm. P. Harvey, die without child or children or their issue, the estate devised and bequeathed by this clause or section of my will, I devise to be held and disposed of as provided in the 9th clause of this my will.

"12th. The said property I devise in the said 11th clause or section of this will, I put in the hands of my son-in-law, W. P. Harvey, as trustee to control and manage as he may deem best; and I hereby empower him, at his discretion, to use the income, issues or profits for the comfortable support and maintenance of my said grandson, Wm. Payne Harvey, during his life; but it is to be distinctly understood that I give my said grandson no interest in said income, issues or profits, leaving it wholly discretionary with my said trustee or his successor to use the said income, issues or profits in that way if he deems proper. I specially direct that said income, issues and profits can not be alienated or charged in any way by my said grandson, Wm. Payne Harvey, or any creditor of his; and I hereby specially declare

and will that any attempt to alienate said income, issues and profits by said grandson, or any attempt to subject said income, issues or profits by any creditor of said William Payne Harvey, shall terminate the right to use any of said issues, income or profits for the support and maintenance of said Wm. Payne Harvey.

"13th. I hereby provide that if any of my devisees, or my said grandson, Wm. Payne Harvey, contests this will, or tries to cancel the same by any proceeding in court, then the provisions in this will as to such contestee shall be considered annulled, and such contestee shall have only $100 of my estate in lieu of the devise as to such; and in such event the lapsed devise or bequest of such is to go to those of my said grandchildren, Lila Kate, Sibbie May, Frank Wayne Harvey, who do not contest, to be held in the same way as the devise to them so taking. Should my grandson, Wm. Payne Harvey, so contest my will, then and in such event, the discretionary power lodged in my trustee as to said income, issues and profits, is taken away from said trustee, and in such event the said income, issues and profits are to be paid over to the devisees not contesting.

"14th. I hereby empower my said executor and trustee to sell any or all of said real estate specifically or generally devised and reinvest the same either in or out of this State, the reinvested property to be held on the same trusts as the original."

The circuit court adjudged the property to W. C. Bell, Jr. Appellants maintain that the condition as to the death of the devisees without issue is limited to their death in the lifetime of the testator, and rely on section 2342, Kentucky Statutes: "Unless a different purpose appear by express words or necessary inference, every estate in land, created by deed or will without words of inheritance, shall be deemed a fee simple, or such other estate as the grantor or testator had power to dispose of."

At common law words of inheritance were essential to the creation of a fee and great strictness was applied in the enforcement of the rule. (2 Blackstone, 108.) To remedy this it was enacted in this State by section 11 of the act of 1796, as follows: "Every estate in lands which shall hereafter be granted, conveyed or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple, if a less estate be not limited by express words or do not appear to have been granted, conveyed or devised by construction or operation of law." (1 M. & B., 448.)

In the revision of 1851 the verbiage was changed as follows: "Every estate in land created by deed or will without words of inheritance, shall be deemed a fee simple or such estate as the grantor or testator had power to dispose of, if a less estate be not limited by express words or by necessary inference." (2 Stanton's Revised Statutes, 227.)

In the revision of 1873 this was again changed and put in the present form. (General Statutes, 824.) The rule is that the mere change of words in a revision is not to be regarded as intended to change the existing law, unless the new phraseology purports an intention to work a change in the sense. (Overfield v. Sutton, 1 Metcalfe, 624.) The idea conveyed in all three of the forms above given seems the same, and we are satisfied the legis-

lature had not in mind in changing the form of the provision, making any change in the other rules of law governing the construction of wills.

Appellee also relies on section 2344, Kentucky Statutes: "Unless a different purpose be plainly expressed in the instrument, every limitation in a deed or will contingent upon a person dying without heirs or without children or issue or other words of like import, shall be construed a limitation to take effect when such person shall die, unless the object on which the contingency is made to depend is then living, or if a child of his body, such child be born within ten months next thereafter."

This provision means that unless a different purpose is expressed, every limitation in a deed or will contingent upon a person dying without issue, shall take effect when this person shall die, unless the issue (the object on which the contingency is made to depend) is then living, or, if a child of his body, be born within ten months thereafter. It was first enacted in the revision of 1851. (Stanton's Revised Statutes, 227.) By the act of 1796 estates tail were made estates in fee simple. (1 M. & B., 442.) This provision, with a similar change of form to that above referred to, was brought over into the Revised Statutes (2 Stanton, 227), thence into the General Statutes and our present revision. (General Statutes, 825, Kentucky Statutes, section 2343.)

But under the act of 1796 there was a prolonged controversy whether the words, dying without issue, referred to an indefinite failure of issue and so created an estate tail. To settle this question and prevent such devises being held estates tail and thus being turned into a fee, the legislature enacted the provision above quoted. The statute simply abolishes the common-law rule by which such words were construed to refer to an indefinite failure of issue, and makes the estate to depend only on the failure of issue at the death of the person named. At the time of its enactment it was so construed by this court, and this contemporaneous construction can not now be departed from. (Daniel v. Thompson, 53 Ky., 533; Hart v. Thompson, 43 Ky., 482, and cases cited.)

We, therefore, conclude that the rights of the parties are not affected by either of these provisions, and are to be determined by the general rules governing the construction of wills. In the elaborate argument made by the distinguished counsel, many authorities are relied on as to the proper meaning of words of survivorship, and as there seems to be an apparent conflict in the decisions of this court on the subject, we have examined them with care. We find that while there are in some of the opinions dicta not readily to be reconciled, the decisions themselves are more harmonious, and may be summed up as follows:

1st. Where an estate is devised to one for life, with remainder to another, and if the remainderman die without children or issue, then to a third person, the rule is that the words, dying without children or issue, are restricted to the death of the remainderman before the termination of the particular estate. Thus in Birney v. Richardson, 35 Ky., 424, the testator devised the estate to his wife for life or during her widowhood and at her death or marriage, to be equally divided by his executors between his children, directing that if "any or either of the above-mentioned children should die without a lawful heir begotten of their body, then his or her part of the estate to be equally divided among my surviving children." The

children were at the time infants. The widow married about two years after the testator's death. After this a daughter married and subequently died without issue. It was held that her estate became absolute on the marriage of her mother and was not defeated by her subsequent death without issue. In Wren v. Hines, 59 Ky., 129, the testator directed the dividends on his bank stock paid to his widow until the youngest child arrived at age, adding this: "It is my will and desire that when my youngest child shall arrive at the age of twenty-one years, the $12,000 set apart in bank stock, shall be equally divided among all my surviving children or their heirs." One of the daughters married and died without issue during the life of the widow and before the youngest child was twenty-one years of age. It was held that the death, without issue, before her mother and before the youngest child was of age, defeated her interest in the estate. (Pool v. Benning, 48 Ky., 623; Mercantile Bank v. Holland, 83 Ky., 481; Ferguson v. Thompson, 87 Ky., 519; Dickison v. Ogden, 89 Ky., 162; Pruitt v. Holland, 92 Ky., 641; Lewis v. Shropshire, 24 Ky. Law Rep., 33; Baxter v. Isaacs, 24 Ky. Law Rep., 1618.)

2d. On the same principle, where property is devised to one or more infants and is to be held by their trustees or guardians until they are twenty-one years old and then to be turned over to them or divided between them, with the proviso that if they die without issue it shall go to the survivors, or if all die to a third person, it has been held that the limitation as to dying without issue is to be limited to a death in infancy before the period of distribution. (Hughes v. Hughes, 51 Ky., 115; Thackston v. Watson, 84 Ky., 206; Trabue v. Terry, 10 Ky. Law Rep., 345; Wilson v. Bryan, 90 Ky., 482; Jones v. Moore, 96 Ky., 273; Kephart v. Hieatt, 25 Ky. Law Rep., 1602.)

3d. And where, by the will the devise is to a class and the period of division is postponed even where the devisees are not infants, it has been held that the limitation as to dying without issue, must be confined to a death without issue before the period of division fixed by the will. (Duncan v. Kennedy, 72 Ky., 580; Webster v. Webster, 93 Ky., 682.)

4th. On the other hand, where there is no intervening estate and no other period to which the words, dying without issue, can be reasonably referred, they are held, in the absence of something in the will evidencing a contrary intent, to create a defeasible fee which is defeated by the death of the devisee at any time without issue then living. Thus in Hart v. Thompson, 42 Ky., 482, the devise was: "My will and desire is that all my estate, both real and personal, be equally divided amongst my said nine children, then living or their lawful heirs if dead, and if either of my nine children should die without heirs of their body, lawfully begotten, that their part, so allotted and given them as aforesaid, be equally divided amongst my other children then living."

One of the devisees died a single man and without issue a few years after his father, leaving a will by which he devised his share of the property. It was held, in an opinion by Judge Ewing, that he took a defeasible fee which was defeated by his death without issue, and that his share passed to the other children then living. The same rule was followed in Deboe v. Lowen, 3 B. Monroe, 616, Judge Marshall writing the opinion, where the devise was to the children of the testator with this qualification: "It is also my will

that if any of my children die without lawful heir or heirs, the property hereby willed go to my surviving children." The question was again presented in Daniel v. Thompson, 53 Ky., 533, where the will read: "It is my wish that all the property that may be included in this my last will and testament to my sons, C. R. and J. R. Thompson, in case either or both dying without leaving a lawful heir begotten of their own body, in that case the property so left shall be equally divided among their sisters or their legal representatives."

C. R. Thompson sold and conveyed to Henry Daniel the land devised to him and thereafter died unmarried and without issue. The children of the sisters sued Daniel for the land and recovered. The case was twice argued orally, and in an elaborate opinion by Judge Marshall the judgment of the circuit court was affirmed. In Harris v. Berry, 70 Ky., 113, the testator devised his estate to his fifteen children, providing: "Should any of my children die before they attain lawful age or without lawful issue, the portion of my estate bequeathed to them to be equally divided between the survivors." One of the sons died after the testator without issue and after reaching his majority. It was held that his share went to the other children or their representatives. In Sale v. Crutchfield, 71 Ky., 636, the testator devised to his son, Edmund Lampton eight acres of land in Louisville, providing: "And if said Edmund shall die without lawful issue, it is my will and desire, and I do hereby direct that the estate herein devised to him shall go to his sisters in equal portions, and if either or both of them be then dead, to the child or children of such dead sister, the children taking the share of the dead parent."

Edmund Lampton sold off the land in lots and many years afterwards died childless. After his death the surviving sister and the children of the one who had died, sued his vendees for the property. On an elaborate review of the authorities the judgment in their favor was affirmed. In Crozier v. Cundall, 99 Ky., 202, the testator devised certain property to his daughters, Almyra and Patsey "to them and their heirs forever," with this clause qualifying the devise: "In the event that either of my daughters, Patsy or Almyra, should die without bodily issue, then such portion of my estate as is devised to them shall revert back to and be equally divided between the rest of my children and the children of those who are dead." Almyra sold part of the land devised to her. Both Almyra and Patsy died without issue, leaving wills disposing of their estates. It was held that they took only a defeasible fee and that the property passed under their fathers' will. (Moran v. Billshay, 8 Bush, 484; Best v. Conn., 10 Bush, 36; Parrish v. Vaughn, 12 Bush, 97; Bayless v. Prescott, 79 Ky., 252; Hood v. Dawson, 98 Ky., 285; Dorsey v. Maddox, 103 Ky., 253; Turpin v. Turpin, 4 Ky. Law Rep., 488; Hayden v. Wilson, 4 Ky. Law Rep., 827; Ecton v. Smith, 6 Ky. Law Rep., 216; Varble v. Phillips, 14 Ky. Law Rep., 363; Collins v. Thompson, 19 Ky. Law Rep., 1194; Smith v. Ballard, 25 Ky. Law Rep., 1290.)

In Birney v. Richardson, 5 Dana, 424, which involved only personalty, this was said: "The dying without issue seems to have been intended not as a qualification of the right of each legatee after actual distribution among them, but an explanation merely as to the mode of division." Also this: "Had the bequest been direct and immediate to the testator's children as

tenants in common, then the only question as to dying without issue would have been, whether it meant a death in the testator's lifetime, or at any time, however remote. And nothing else appearing to aid in the interpretation, the law would incline to construe 'dying without issue' as meaning the death of the legatee without issue in the testator's lifetime."

In Wren v. Hines, which was also a controversy as to personalty, it was again said: "Where a devise is made to several persons as a class with words of survivorship annexed, it becomes material to determine, in order that a proper construction may be given to the devise, to what period the words of survivorship are intended to refer. If the gift is to take effect in possession immediately after the death of the testator, the uniform rule of construction is, to refer the words of survivorship to that event and to regard them as intended to provide against the contingency of the death of the object of the testator's bounty in his lifetime. In such a devise, when made to several persons by name, there is no other period to which the words could be made to refer."

But in these cases the question was not before the court because the devises were not direct. In the case of direct bequests of personalty which the court evidently had in mind, the rule stated obtains; for it perishes with the using and the testator is not presumed to look beyond the distribution he desires his executor to make. But in devises of real estate, as shown in the cases cited, the rule is different; and in these, words of survivorship will not be referred to death without issue in the lifetime of the testator, unless there is something in the will showing this was his meaning. It is alleged here in the petition, to which the court sustained a demurrer, that the testator left an estate of about $60,000, $10,000 in personalty and $50,000 in land. The allegations of the petition must be taken as true on demurrer, and we have, therefore, a case where both realty and personalty are involved, and where both are, by the will, placed in the hands of the trustee, the personalty standing as the realty and not being directed to be distriubted by the executor to the devisees.

Appellants rely on Wills v. Wills, 85 Ky., 486; Carpenter v. Hazelrigg, 103 Ky., 534, and Jackman v. Jackman, 24 Ky. Law Rep., 2245. In the Wills case it was held that the devisee did not take a defeasible fee, but either a life estate or a fee simple; and then from a comparison of all the provisions of the will, the conclusion was reached that the testator intended to pass to the devisees, who were his children, the property in fee. In Carpenter v. Hazelrigg and Jackman v. Jackman the property was devised to a class and directed to be divided between them. The devisees survived the period of division and these cases may be rested on the ground that the dying without issue was intended merely as a guide to the mode of division. The dicta above referred to were alluded to in the Wills and Carpenter cases, although they involved real estate; but these cases plainly were not intended to announce a new rule, or to depart from the principles theretofore laid down, and they are not to be understood as conflicting with the previous decisions of the court. All the cases recognize the rule that where there is any period to which words of survivorship can be reasonably inferred, they will be so construed. All the cases also recognize the rule that in the end all rules of construction are but means of ascertaining the testator's intention, and that

when this is apparent from the whole will it must be enforced. No procustean rule can, therefore, be laid down as to the construction of words of survivorship. For while the words in one clause may have a well defined legal meaning, there may be other things in the will making it manifest that the testator actually used the words in a different sense, and when this is the case the rights of the parties must be determined by the meaning of the will taken as a whole. It is rare that two wills are exactly alike, and so after all rules of construction are often difficult of application. From this arises much of the apparent confusion in the decisions.

Under these principles, how stands the case before us? Did the testator contemplate the death of the devisees without issue in his lifetime, or intended the words of survivorship only to apply in this event?

In the 5th and 6th clauses of his will the testator uses the words "I bequeath absolutely." In all the other clauses words of different effect are used; thus showing that he had in mind the difference between an absolute devise and a limited estate; for in all other clauses the devises are not absolute, but limited. No part of the will took effect until the testator's death, and it must be presumed the testator meant something when he devised part of his estate absolutely, and placed the remainder of it under elaborate limitations. Section 4839, Kentucky Statutes, provides: "A will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

By the 11th clause of the will the testator devises one-fourth of the residue of his estate to the children of Wm. P. Harvey or their issue, subject to a provision for his support, and should he "die without child or children or their issue," this part of the estate is to go as provided in the ninth clause. Wm. P. Harvey then had no children, and so far as appears, was unmarried. It was possible he might marry, have children, and yet survive all his children or grandchildren. Yet it is incredible that the testator, his grandfather, in making the will, could have contemplated all this occurring in the testator's lifetime. The property devised in the 11th clause is, by the 12th clause, charged with the support of Wm. Payne Harvey, which must of necessity refer to a support after the death of the testator. By the 13th clause if any of the devisees contested the will their part of the estate should go to the others not contesting "to be held in the same way as the devise to them so taking." There could be no contest of the will until the testator's death, and in this event the contesting devisee lost his devise, yet it did not then pass to the others absolutely, but "to be held in the same way as the devise to them," thus showing that the testator had in mind in "the devise to them" conditions which were to extend beyond his death. This is emphasized by the last of the 13th clause requiring the trustee, if Wm. Payne Harvey contested the will, to pay over to the other devisees the income from the fourth of the estate devised in the 11th and 12th clauses, the distinction being here sharply made between the income and the corpus of the estate in a contingency which must occur, if at all, after the lifetime of the testator.

By the 10th clause it is stipulated that if the contingency provided for in the 9th clause arises, that is, if any of the devisees die without issue and this share go to the others, then "the property thus received" is to be in trust

under the same powers as expressed in the 8th clause. The devisees could receive nothing under the will during the lifetime of the testator, and if he had had in mind only a death in his lifetime, he would simply have directed a division of the estate among the survivors; for in this event they would have taken directly, but the use of the words "the property thus received," shows the testator contemplated the devisees might receive property under the 9th clause after the division directed in the 7th clause was made. The devisees were all of age and if the testator had not in view preserving the estate for his own blood as against the collateral heirs of the devisees, all then unmarried, the whole fabric thus constructed by the will was meaningless. The purpose of clauses 11 and 12 was to secure this part of the estate to the testator's unborn great-grandchildren, the children of Wm. Payne Harvey. The devise to these possible great-grandchildren illustrates the purpose of the 8th, 9th and 10th clauses which were all part of one plan. The testator aimed to prevent his property falling to those who were strangers to his blood, by reason of the death of any of his grandchildren (then unmarried) without issue. With this view he directed in the 10th clause that the property falling to the survivors by reason of the death of any of the devisees without issue as provided in the 9th clause, should be held under the same trusts as the property originally falling to them. He seems to have entertained the design of providing to whom the property should go if all his blood became extinct, but the blank left for this purpose at the end of the 9th clause, for some reason was never filled; yet this evidences his purpose that the property should not go to others as long as any of his blood remained. We, therefore, conclude that the limitation as to the death of any of the grandchildren without issue, can not be restricted to a death in the lifetime of the testator.

It remains to determine whether there is any other period to which it may be reasonably referred. The 8th clause creating the trust, as shown, contains these words: "If said W. P. Harvey deems it wise at any time, he may hand over all or any part of their property to said devises, or any of them, at any time, and free the same from trust. The evidence that the same is so freed from trust shall be the written deed of said W. P. Harvey, filed and recorded as other deeds, both as to the realty and the personalty so freed from trust. I also empower said W. P. Harvey to appoint his successor as trustee, but the freeing said property from trust is a power lodged only in said Harvey as trustee."

By a deed executed on March 11, 1898, Dr. Harvey, as trustee, conveyed to Mrs. Loving, in fee simple and free of the trust, both the realty and personalty devised to her in the will; and on March 16, 1898, he executed a similar deed to Frank Wayne Harvey. The deeds set out the provisions of the will and in each the granting clause is as follows: "Now in consideration of the above the party of the first part sells, aliens and conveys, and likewise frees and relieves from every character of trust, both as to the realty and personalty, and invests the party of the second part with a fee-simple title to the following estate (here follows description of land in controversy)."

The question is raised that at least the dying without issue as provided in the will, must be limited to the continuance of the trust and that these deeds invested the grantees with the absolute fee; that this was the intent of the

deeds is evident, but when Mrs. Loving died she left a will devising her part of the estate to her husband; there was a contest over her will and in the settlement of this contest it was agreed, on March 17, 1899, that the personalty should go to her husband, the contract being based on the following recitals:

"Whereas, Mrs. Lilah Harvey Loving, late wife of the undersigned J. W. Loving, departed this life February 14, 1899, residing at Campbellsville, Taylor county, Ky., leaving a last will, which is not yet probated, in which the undersigned, J. W. Loving, is the principal devisee, she dying without issue, and appointing said Loving her executor without bond; and, whereas, under the will of her grandfather, William Payne, none of the real estate mentioned in said will passed to her only for and during her life, but only personalty owned by her at her death; and, whereas, the said Loving and the undersigned, W. P. Harvey, the father of the said deceased, Frank W. Harvey, and W. Conn Bell, Jr., represented by his father, W. C. Bell, are the only persons interested in the distribution of her estate," etc.

The trustee had only such power as the will conferred on him and his deeds are inoperative in so far as they are not authorized by the will. The construction placed by the parties on the will is not conclusive; for the proper construction of the instrument is a question of law for the court. We must, therefore, determine whether the testator contemplated that the termination of the trust under the 8th clause should defeat the limitation under the 9th clause as to the real estate. The case of James v. Moore, 96 Ky., 274, is relied on by appellants on this point. But that case is simply in line with the first and second clauses of cases above cited. Part of the estate went to the widow for life and at her death to her son, if living, and if not to certain collaterals; the remainder of the estate was placed in the hands of the guardian of the son to be held for his benefit, with the provision that if he died without issue the estate should go to certain collaterals. The son was at the time an infant a few months old. As to the estate which went to the widow for life it was held that the son, if living at her death, took it then absolutely; and as to the part of the estate placed in the hands of the guardian for the son, it was held that his title became absolute when he became of age and the estate was distributed to him. The purpose of the testator in the case before us in providing that the trustee might hand over all, or any part of the property to the devisees and free the same from trust does not seem to have been to change in any way the estate which, by the will he vested in the devisees. He seems to have contemplated that as the grandchildren married and settled in life, it would be proper for the trustee if he saw fit to turn over to them the property devised. As to the personalty, if it was turned over by the trustee to the devisees and was consumed by them, no one could complain. But in simply authorizing the trustee to free the property of the trust, the testator does not seem to have had in mind empowering him to add anything to the title which the devisees took in the real estate under the will, or to change in any way the scheme which he had devised to secure the estate to his own blood. The trustee was the father of the devisees. The testator had in mind that the father would consult the true interests of his children, and would hand over their estate to them as their real interest might require. But the father was also the heir-

at-law of his children if they died without issue, and the testator evidently contemplating this, undertook, by his will, to prevent the property devised passing under the statute of descent in case any of the devisees died without issue, and in authorizing the father to free the property of the trust which he created to carry out his purpose of preserving the estate, it can not be presumed that he contemplated empowering the trustee to set at naught the settled purpose which he manifested to secure his estate to his possible great grandchildren.

We, therefore, conclude that the circuit court properly held that W. C. Bell, Jr., took, under the will, the entire title to the real estate referred to.

Judgment affirmed.

HOUGHTON v. LOUISVILLE RAILWAY CO.

(Filed June 16, 1904—Not to be reported.)

Street railroad—Negligence of conductor—Starting car as passenger was alighting—Instructions—In an action by a passenger against the Louisville Railway Co. for an injury caused by the alleged negligence of defendant's servants in starting the car while plaintiff was alighting therefrom, the evidence being conflicting as to which side of Fourteenth street on Main street, that the car stopped, the court instructed the jury as follows: "If the jury believe from the evidence that at or about the time and place complained of, the car of the defendant railway company on which plaintiff was riding, stopped for the purpose of allowing plaintiff or other passengers to alight therefrom, and that while plaintiff was in the act of alighting from said car, the same was started by defendant's agent in control of said car, and thereby plaintiff was thrown to the street and injured, they shall find for the plaintiff; but if the jury shall believe from the evidence that the said car did not stop for the purpose of allowing plaintiff or other passengers to alight therefrom, and that while said car was in motion plaintiff attempted to alight therefrom and was thereby thrown to the street and injured, they shall find for the defendant." It is clear that the jury could not have returned a verdict for the plaintiff unless they believed the car was stopped for the purpose of allowing the plaintiff or other passengers to alight from the car. Held—That plaintiff's right to recover does not depend upon the question as to whether the car was stopped on the east or west side of Fourteenth street. If it was stopped on either side to allow passengers to leave it, and was suddenly started forward while plaintiff was in the act of alighting, and she was thereby thrown to the ground and injured, she is entitled to recover. Although it was the custom to stop the car on the east side to allow passengers to leave it, yet if it came to a full stop on the west side, and plaintiff believed it had stopped to allow passengers to alight, she can recover if those in charge of the car suddenly started it forward, and injured her, when known, or by the exercise of proper care could have known, she was alighting therefrom, and the jury should have been instructed as indicated herein.

Matt O'Doherty for appellant.

Fairleigh, Straus & Fairleigh and R. L. Greene for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Paynter.

The appellant instituted this action against the appellee for a special injury alleged to have been inflicted by the servants of the appellee who were in charge of its street car. It is averred in the petition that the plaintiff was a passenger on one of its cars which was going eastwardly on Main street, in the city of Louisville; that before it reached Fourteenth street she notified the conductor in charge of the car that she wished to get off at the railroad depot on the north side of Main street, near Fourteenth street; that when the car reached the depot it was stopped; that she thereupon arose from her seat and started to alight from the car, and while doing so the defendant's agents and servants in charge of the car, by gross negligence caused the car to move suddenly forward, and that she was thereby thrown from it to the street, and received the injuries of which she complains.

The plaintiff introduced herself and sister as witnesses, and they testified that they took a car at Sixth and Walnut streets which carried them to Eighteenth street, there they transferred to an Eighteenth street car; that after they got on the last named car, they apprised the conductor that they wanted to get off at Fourteenth street to catch the "dinkey" train; that the conductor advised them that he would get there in time to do so, and said that "the car would not be apt to stop until it reached Fourteenth street." They further testified that when the car was crossing Fourteenth street they felt the car slacking speed, and they picked up their bundles and when the car came to a standstill they started to the platform, and as the plaintiff was alighting from the car, it started suddenly, and threw her to the street, inflicting very serious injuries upon her, from which she had not recovered when this case was tried. The defendant introduced as witnesses three ladies who were passengers on the car in question, and who testified that the car did not stop from the time it crossed Fifteenth street until it was crossing Fourteenth street, and not until after plaintiff stepped off of the car while in motion and received the injuries. The testimony of the plaintiff and sister tended to show that the car stopped on the east side of Fourteenth street. The testimony of the three lady passengers tended to show that it did not stop on the west side of Fourteenth street, or at all, until it stopped to pick up the plaintiff after she had fallen. Appellee then introduced William H. Brightman and R. L. Rice, respectively, motorman and conductor of the car from which the plaintiff fell. They testified that they stopped on the west side of Fourteenth street on account of the railroad track on that street. So we have a conflict in the evidence both between that of the plaintiff and that of the defendant and also a conflict in the testimony offered by the defendant.

We have gone into detail as to the evidence with a view of considering the question as to whether the court properly instructed the jury. The court gave the jury instructions as follows: "If the jury believe from the evidence that at or about the time and place complained of the car of the defendant railway company on which plaintiff was riding, stopped for the purpose of allowing plaintiff or other passengers to alight therefrom, and that while plaintiff was in the act of alighting from said car, the same was started by the defendant's agent in control of said car, and thereby plaintiff was thrown to the street and injured, they shall find for the plaintiff; but, if the jury shall believe from the evidence that the said car did not stop for

the purpose of allowing plaintiff or other passengers to alight therefrom, and that while said car was in motion plaintiff attempted to alight therefrom and was thereby thrown to the street and injured, they shall find for the defendant. If the jury find for the plaintiff, they will award her such sum in damages as will fairly and reasonably compensate her for mental and physical suffering endured and to be endured by her, if any, as the direct result of her injury, and for the roduction, if any, in her power to earn money, resulting directly from said injury, in all not to exceed the sum of $20,000, the amount claimed in the petition. If they find for the defendant, they will say so, and no more."

It is clear that the jury could not have returned a verdict for the plaintiff, unless it believed the car was stopped for the purpose of allowing the plaintiff or other passengers to alight from the car, and while the plaintiff was in the act of alighting therefrom the car was started and she was thereby thrown on the street and injured. Under this instruction, although the car was stopped on the west side of Fourteenth street, and the plaintiff believed that it was stopped to allow her and other passengers to alight therefrom, and while attempting to do so it started, still there could be no recovery although the conductor may have been guilty of the grossest kind of negligence in failing to look after the safety of the plaintiff, or in failing to use any care to guard the passengers against such an accident. Plaintiff's right to recover does not depend upon the question as to whether the car was stopped on the east or west side of Fourteenth street. If it was stopped on either side to allow passengers to leave it, and was suddenly started forward while she was in the act of alighting, and that she was thereby thrown to the ground and injured, she is entitled to recover. Although it was the custom to stop the car on the east side of Fourteenth street to allow passengers to leave it, yet if it came to a full stop on the west side of the street and the plaintiff believed that it had stopped to allow passengers to alight from it, she can recover, if those in charge of the car suddenly started it forward and injured her, when they knew, or by the exercise of proper care could have known, she was alighting therefrom. The conductor testified that after the car stopped he left the rear platform and went forward to change the register. The plaintiff and her sister testified that he had left the rear end of the car and was talking to the motorman when the car stopped, and was at the front end of the car when she attempted to alight from it. The conductor said it was not proper to leave the rear end of the car when it was stopped. The motorman testified that he had a signal to stop, and did so; that he did not start the car until he receive the signal to go ahead. From the evidence the conductor must have been at the front end of the car when he gave the signal to start. It is evident that the plaintiff was in the act of alighting from the car when it started, because she and her sister so testified, and the evidence of the defendant shows that she was found about ten feet to the rear of the car, and the motorman testified that the car had gone about ten feet when it was stopped.

In addition to the questions submitted by the court to the jury by instruction No. 1, the court should have told it that although it may believe from the evidence the car was not stopped on the west side of Fourteenth street for the purpose of allowing passengers to leave it, still if it did stop there,

and that the plaintiff while it so stood upon the track went upon the platform, and attempted to leave the car, and that the defendant's servants or either of them in charge of the car started it forward when they, or either of them knew, or by the exercise of proper care could have known, that the plaintiff was attempting to alight therefrom, and that she was thereby caused to fall to the ground, and receive the alleged injuries, the jury should find for her.

Instructions Nos. 1 and 4 offered by the plaintiff should have been given. They define the kind of care which the defendant owed to the plaintiff as a passenger, and the kind of care she should exercise for her own safety. (Louisville City Railway Co. v. Weams, 80 Ky., 420; Davis v. Paducah Railway and Light Co., 24 Ky. Law Rep., 137.)

The judgment is reversed for proceedings consistent with this opinion.

Whole court sitting.

Chief Justice Burnam and Judge Hobson dissent in part.

Judge Hobson delivered the following dissenting opinion:

I concur in the reversal in this case, but I do not concur in so much of the opinion as allows a recovery if the conductor, by ordinary care, might have known that the plaintiff was leaving the car, without any qualification as to the circumstances under which he should exercise care for this purpose. The rule is, as I understand it, that where the circumstances are such when a stop is made that the conductor in the exercise of proper care should anticipate persons alighting from the car, he should not start it without exercising proper care to see that they are safe. But I do not understand that where there has been no signal given by a passenger for the car to stop and the conductor has no reason to anticipate that any one will leave the car, he should be on the outlook for passngers getting off when the car stops, because there is a wagon in front, or for any other temporary reason. In Belt Electric Line v. Tomlin, 19 Ky. Law Rep., 433, which was a case like this, the following instruction was approved: "If the jury believe from the evidence that the car did stop opposite the side door of the Clarendon Hotel, but that such stop was not for the purpose of letting off passengers, and was not at such place or under such conditions that the plaintiff had a reasonable right to suppose that an opportunity would be afforded to alight; and that, while the car was so stopped, the plaintiff attempted to alight, without the knowledge of or notice to the employes in charge of the car, and that the car was started while he was in the act of getting off, without the knowledge of or notice to such employes that he was so doing; and that their failure to become aware of his getting off was not due to a failure on their part to exercise ordinary care, then the defendant is not liable, and the jury should find for it."

The same principle was again followed in Louisville Railway Co. v. Rannaker, 21 Ky. Law Rep., 250, where this instruction was approved: "But if the driver saw her when she was about to leave the car and knew, or ought to have known as a prudent man, that such was her purpose, then it was not necessary for her to give him further notice."

In 3 Thompson on Negligence, section 3526, the rule is thus stated: "And although the car may come to a stop, yet if it is not at a place at which passengers are accustomed to alight, but if the stoppage is made under a

regulation of the company before crossing another track to avoid the danger of collision, it is not an invitation for a passenger to alight, and if a passenger so alighting is hurt by reason of the car starting forward, the company will not be liable in the absence of statutes imputing special fault to those in charge of the car."

It seems to be evident in this case that the stop was made on the west side of Fourteenth street before crossing the railroad track to avoid danger of collision, and that plaintiff attempted to get off the car when stopped for this purpose alone. Her sister got up with her and the conductor knew they wanted to get off at Fourteenth street. Whether, as a prudent person, he should have anticipated their leaving the car when this stop was made was a question for the jury, but he should not be required to keep a lookout for passengers leaving the car, unless, as a reasonable person, he should have anticipated that they would understand the stop was made for them to alight, or should have anticipated under the circumstances attending the stop, that passengers would get off.

I, therefore, dissent from the opinion.

Chief Justice Burnam and Judge O'Rear join in this dissent.

EVENING POST CO. v. SMITH.

(Filed June 16, 1904—Not to be reported.)

Helm, Bruce & Helm for appellant.

Wm. Cromwell, J. H. Hazelrigg and Molloy & Utley for appellee.

Appeal from Lyon Circuit Court.

Opinion of the court by Judge Barker.

This case is affirmed by an equal division of the court: Judges Paynter, Hobson and Nunn for affirmance; and Chief Justice Burnam and Judges O'Rear and Barker for reversal. Judge Settle, being of kin to appellee, did not sit in the case.

COMMONWEALTH, BY, &c. v. UNION REFRIGERATOR TRANSIT CO.

(Filed June 16, 1904—Not to be reported.)

Henry L. Stone and Samuel B. Kirby for appellant.

Humphrey, Burnett & Humphrey and Forcht & Field for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Judge Barker delivered the following response to petition for rehearing.

As the record shows, without contradiction, that appellee owned two thousand cars of the value of $200 each on the assessment day of each year in which they are sought to be taxed by this proceeding, the opinion is extended so as to require the lower court, upon the return of the case, to enter a judgment against appellee for the amount due upon the above-named property for taxes for the respective years, at the legal rate of taxation for each year, with legal penalties.

The petition for rehearing is overruled.

CONNOR v. COMMONWEALTH.

(Filed June 16, 1904.)

1. Homicide—Conflicting evidence—Sufficient to convict or acquit—Jury—Judges of facts—The defendant was indicted for murder and convicted by the jury of voluntary manslaughter and his punishment fixed at ten years in the penitentiary. The evidence was such as would authorize the jury to either convict or acquit the defendant, and in such cases it has often been held by this court that it will not reverse on the facts where there is sufficient evidence to go to the jury.

2. Instructions—Errors are complained of in the instructions as follows: Instruction No. 2 as given, required the jury, apparently, to find from the evidence to the exclusion of a reasonable doubt, that the shooting was not done maliciously or with malice aforethought, in order to reduce the crime from murder to manslaughter. This error was not material as the jury found the defendant guilty of manslaughter, but would have been material if the jury had found him guilty of murder.

3. "Safe means of avoiding danger"—Complaint is made of these words in third instruction. "And he believed he had no safe means of avoiding said attack." This court has in several cases condemned the use of the word "escape" in self-defense instructions, but the word "avoid" has been several times sanctioned.

4. Retreat—Question for jury—The defendant asked that the following words be inserted in instruction No. 4 after the words safe means of avoiding said danger, viz.: "Then the defendant was not obliged to retreat but had the right to stand and repel the assault." The court properly refused to modify the instruction. The right of self-defense is but the right of necessity. The rule now is that whether one should stand his ground or give back is a question for the jury, and that he may properly follow that course which is apparently necessary to save himself from death or great bodily harm.

5. Fair trial—On the whole case we conclude that appellant has had a fair trial and no legal reason appears for disturbing the verdict of the jury.

Sweeney, Ellis & Sweeney and C. M. Finn for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hobson.

On December 25, 1902, W. M. Parsons insulted Ben Cutler in a saloon in Owensboro. Cutler struck Parsons, and thereupon a fight ensued between Parsons and Ben Cutler and his brother, Fred. Parsons was forced to the back part of the room and was pretty badly beaten up, when the bartender and a man named Davidson intervened and took from Ben Cutler a chair with which he was about to strike Parsons, throwing him back toward the center of the room. Appellant, Connor, who had taken no part in the fight, was standing near the bar counter. As to what followed the proof is somewhat conflicting. The proof for Connor is to the effect that Ben Cutler, with a knife in his hand, advanced on him threatening to kill him and that he retreated behind the counter and got a pistol there and shot Ben Cutler with it after twice calling upon him to stop, just as he was about to come around behind the counter.

The proof for the Commonwealth tends to show that Connor had the

pistol in his hand and was out in front of the counter before Ben Cutler was thrown around, and that he first aimed at Fred Cutler, and when he dodged down, shot Ben. Ben Cutler died almost immediately. The numerical weight of the evidence sustained the defendant's version of the affair, but the jury found him guilty of manslaughter and fixed his punishment at ten years in the penitentiary. Parsons and the Cutlers were all drunk; Connor was sober, was about thirty years of age, and so far as appears was on good terms with all of the parties. While the evidence would have sustained a verdict for the defendant, the jury saw and heard the witnesses. There was sufficient evidence to go to the jury, and it has often been held that this court will not reverse in criminal cases, on the facts. We need not, therefore, discuss the evidence but only state so much of it as is material in determining the objections urged to the instructions of the court to the jury. In instruction 1 the court defined the crime of murder. Then he gave instruction 2 in these words: "The court further instructs the jury that if they believe from the evidence to the exclusion of a reasonable doubt, that in the county of Daviess, and before the finding of the indictment herein, the defendant did unlawfully, willfully and feloniously kill and slay one Ben Cutler by shooting him to death with a pistol loaded with powder and ball, or other hard substance, of which shooting and wounding said Ben Cutler did die within a year and a day thereafter, but they further believe from the evidence to the exclusion of a reasonable doubt, that said shooting was not done maliciously and with malice aforethought, but do believe beyond a reasonable doubt that same was not done in his necessary self-defense, or what appeared to him at the time to be his necessary self-defense, but was done in a sudden heat and passion, or sudden affray, and under such provocation as was reasonably calculated to excite an ungovernable passion, then they should acquit him of the charge in the indictment, and find him guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary for a period of not less than two years, nor more than twenty-one years, in the discretion of the jury."

The court apparently meant to tell the jury that if they believed from the evidence beyond a reasonable doubt that the defendant shot and killed Ben Cutler, and had a reasonable doubt as to whether the shooting was done with malice aforethought, but believed from the evidence beyond a reasonable doubt that the shooting was done in a sudden heat and passion or sudden affray, and not in his necessary or apparently necessary self defense, they should find him guilty of voluntary manslaughter. The instruction as given required the jury, apparently, to find from the evidence to the exclusion of a reasonable doubt, that the shooting was not done maliciously or with malice aforethought in order to reduce the crime from murder to manslaughter, and if the jury had found the defendant guilty of murder the error would be material. But the jury only found him guilty of manslaughter. All the instructions given by the court must be read together. Instructions 5 and 6 are as follows:

"5. The court further instructs the jury that if they believe from the evidence to the exclusion of a reasonable doubt, that the defendant is proven guilty, but entertain a reasonable doubt as to whether he is proven guilty as to the offense defined in the first instruction, or the one in the second in-

struction, they should find him guilty of the less offense, and should fix his punishment for the less offense.

"6. The court further instructs the jury that the defendant is presumed innocent until proven guilty to the exclusion of a reasonable doubt, and this presumption attends him at every stage of the trial, and if the jury entertain a reasonable doubt as to whether the defendant is proven guilty, they should acquit him."

It will thus be seen that the court told the jury that the defendant is presumed innocent until proven guilty to the exclusion of a reasonable doubt; that this presumption attends him at every stage of the trial, and that if they had a reasonable doubt as to whether he was proven guilty of murder or voluntary manslaughter, they should find him guilty of the less offense.

There was no question under the evidence that the defendant shot and killed the deceased, in a sudden affray. The only real question in the case was, whether the shooting was done in self-defense. The verbiage of instruction 2 could not have misled the jury on this question. As to self-defense, the court gave these two instructions:

"3. The court further instructs the jury that if they believe from the evidence to the exclusion of a reasonable doubt, that the defendant killed one Ben Cutler by shooting him to death with a pistol loaded with powder and ball, or other hard substance, but they further believe from the evidence that at the time of said shooting and killing the defendant was engaged in a sudden affray with said Cutler, and was being attacked by said Cutler, and the defendant believed he was then in danger of suffering great bodily harm, or death, at the hands of said Cutler, and he believed he had no safe means of avoiding said attack, or to him apparently safe means of avoiding same, and the defendant shot said Cutler in his necessary self-defense, or what appeared to him under the circumstances to be his necessary self-defense, considering all the circumstances and surroundings at the time of said shooting, they should find him not guilty, on the ground that said killing was done in self-defense.

"4. If the jury believe from the evidence that at the time defendant shot and killed deceased he was being assaulted or menaced by the deceased, and he (defendant) believed, and had reasonable grounds to believe from the character of the deceased, his previous threats, if any proven, and from the circumstances of the meeting, and the nature of the assault or menace that he (defendant) was then and there in danger of loss of life or suffering great bodily harm, and he believed, and had reasonable grounds to believe, that he had no safe, or to him apparently safe, means of avoiding said danger, then the defendant had the right to use such force as was necessary, or to him apparently necessary, to repel such assault, and protect himself from such danger; and if he shot deceased under such circumstances, the jury should acquit defendant on the grounds of self-defense."

Complaint is made of these words in instruction 3: "And he believed he had no safe means of avoiding said attack, or to him apparently safe means of avoiding same."

This court has, in several cases, condemned the use of the word "escape" in self-defense instructions; but the word "avoid" has been several times sanctioned. (Hughes v. Commonwealth, 19 Ky. Law Rep., 501; Arnold v.

Commonwealth, 21 Ky. Law Rep., 1566; Barnes v. Commonwealth, 22 Ky. Law Rep., 1802.)

The objection to instruction 4 is that the defendant asked that the following words be inserted in it after the words "safe means of avoiding said danger:" "Then the defendant was not obliged to retreat, but he had the right to stand and repel such assault." The court properly refused to so modify the instruction. The right of self-defense is but the right of necessity. A man may not slay another in defense of himself unless necessary to secure his own safety. It is true that when attacked by another feloniously, he is not obliged to retreat, for this often would be but to increase his peril; still the apparent necessity is the measure of his right to slay the assailant. Where a man is attacked in his home, and in a few other like cases, the instruction referred to has been given, but there was nothing in this case requiring any other rule than that laid down in the instruction that the defendant had the right to use such force as was necessary, or apparently necessary, to protect himself. This left the jury to determine from all the evidence whether it was necessary for the defendant to shoot the deceased when he did, or whether he had other apparently safe means of securing his safety. They were thus left to determine whether he should have stood his ground, or given back before shooting. It used to be laid down as the rule that before killing his assailant the assailed, to be justified on the ground of self-defense, must retreat to the wall, and only slay him as a last resort, when he could retreat no further. But the rule now is that whether he should stand his ground or give back is a question for the jury, and that he may properly follow that course which is apparently necessary to save himself from death or great bodily harm. The case of Oder v. Commonwealth, 80 Ky., 33, was overruled in Reynolds v. Commonwealth, 24 Ky. Law Rep., 1743. The verdict of the jury shows that they did not credit the defendant's version of the transaction, but came to the conclusion, as no reason was shown for an attack by Ben Cutler on appellant, that the latter in the remark he made as he was thrown around by Patterson had in mind some one in the difficulty with him, and that it was unnecessary for appellant to shoot him as he did. Had they believed appellant's version of the shooting they would have acquitted him as readily under the instruction given by the court as under that asked by him. On the whole record, therefore, we conclude that appellant had a fair trial on the merits of his case, and no legal reason appears for disturbing the verdict of the jury.

Judgment affirmed.

FIDELITY TRUST CO., &c. v. LOUISVILLE GAS CO.

BOONE v. SAME.

(Filed June 18, 1904.)

1. Corporations—Right to incur indebtedness—The Louisville Gas Co. owns $1,600,000 of the bonds of the Louisville Lighting Co., on which there is an indebtedness of about $800,000 to certain corporations who have agreed to take in payment thereof the lighting company's bonds at $102 due October 1, 1918, if guaranteed by the Louisville Gas Co., as follows: "For value received the Louisville Gas Co. hereby guarantees the payment of all cou-

pons on this bond maturing on or prior to October 1, 1918, as and when the same may mature. It further agrees to purchase this bond at par on October 1, 1918, if so requested by the holders not less than sixty days prior thereto." Held—That there being nothing in the charter of the Louisville Gas Co. to prohibit such guarantee or the incurring, of such liability, it may legitimately make such guarantee.

2. Charter of gas company—Limitation on power to incur indebtedness—The provision of the charter of the Louisville Gas Co., that it may issue bonds for $500,000, and execute a mortgage on its property to secure them, to be used in improving its plant, is not a limitation on its power to contract any other kind of indebtedness in the execution of the purposes of its organization.

3. Right to borrow money—All corporations, other than those organized for governmental purposes, have the right to contract debts or borrow money for the purpose of accomplishing the purposes of their organization; and this power exists although not expressly granted by their charters, as fully as is possessed by individuals. This power is only limited by the provisions of their charter or by statute.

DuRelle & McHenry for appellants.

Strother & Hardin for appellant Boone.

Humphrey, Burnett & Humphrey for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Paynter.

The matter in controversy is as to the right of the Louisville Gas Co. to guarantee certain bonds of the Louisville Lighting Co., which the first-named company owns. The Louisville Gas Co. was chartered by an act of the legislature, approved March 16, 1888. There are two acts amendatory of its charter, one approved April 26, 1890, and the other May 3, 1890. By the charter the gas company's capital stock may be $4,000,000 and all of it has been sold, except $400,000, so it will be seen that its capital stock is $3,600,000. Previous to the enactment of the amendments to its charter it was supplying the city of Louisville and the citizens thereof with gas. The city of Louisville owns about one-fourth of the capital stock of the gas company. There being a demand that the city be lighted with electricity, the city and the gas company joined in a request to the legislature to pass the amendatory act. By section 1 of the act approved May 3, 1890, it is provided that "the general council of the city of Louisville and the board of directors of the Louisville Gas Co. having assented thereto, that the act entitled 'An act to incorporate the now existing Louisville Gas Co. and grant it a new charter,' be, and it is hereby, amended as follows: The said company shall have all the power and authority necessary for the manufacture, distribution and sale of electricity for illumination; and to that end may purchase, hold and sell all real and personal property, including stock in other companies, necessary or convenient to the conduct of such business."

By virtue of this provision of the charter the plaintiff bought the stock of a corporation called the Louisville Electric Light Co. It expended in the purchase of land and the erection of an electric light plant more than $1,200,000.

Afterwards the electric light company, by lawful authority, consolidated

with the Citizens Electric Light Co. and the name of the company formed by the consolidation of the two companies is the Louisville Lighting Co. As a result of, and as a consideration for, the consolidation the gas company received $1,600,000 of the bonds of the Louisville Lighting Co., and they are secured by a mortgage. The right of the gas company to acquire and own the $1,600.000 of bonds is not questioned.

In the erection of the electric light plant and otherwise, the gas company contracted a debt of about $800,000, and about $770,000 of which is due the Fidelity Trust Co., National Bank of Kentucky, German Bank and German Insurance Bank. The gas company desired to discharge its indebtedness and the institutions named agreed with the gas company to take the lighting company's bonds at $1.02, sufficient to discharge their debts. The gas company agreed to make a guarantee on the bonds as follows: "For value received the Louisville Gas Co. hereby guarantees the payment of all coupons on this bond maturing on or prior to October 1, 1918, as and when the same may mature. It further agrees to purchase this bond at par on October 1, 1918, if so requested by the holder not less than sixty days prior thereto."

The question having arisen as to the right of the gas company to deliver the bonds with the above guarantee, this action was instituted to have the question determined. The Louisville Gas Co. is a trading corporation, its chief business being to manufacture and sell gas and electricity. The rule is well recognized that corporations, other than those organized for governmental purposes, have the right to contract debts or borrow money for the purpose of accomplishing the purposes of their organization. This power exists, although not expressly granted by their charters, as fully as possessed by individuals. They also have the power to give the customary evidences of debt and the customary security therefor. This power is only limited by provisions of their charters or statute. It would be a meaningless thing to grant a corporation a charter empowering it to conduct a certain enterprise, and then say that the right to obtain the means necessary to the execution of the purposes of its organization was impliedly denied by the charter.

In section 760, 3 Cook on Corporations, it is said: "The power of a corporation to borrow money is implied, and exists without being expressly granted by charter or statute. * * * Common law places no limit upon the amount which the corporation may borrow. The amount borrowed may be greater than the capital stock. * * * Although a gas company has no power to issue bonds in excess of its capital stock, yet this does not restrict its right to issue notes."

In section 761 it is said: "The power of a corporation to sell and endorse notes received by it in connection with its own business, is of course, undoubted. It is a part of the every day business of most corporations."

In 7 Thompson on Corporations, section 8340, it is said: "In the United States, in the absence of statutory provisions, the power to emit negotiable paper is regarded as one of the incidental or implied powers of every private corporation. The power necessarily follows from the power to borrow money, or to become indebted in any lawful way. This is nothing more than giving that form of security for a debt which is exacted by ordinary business usages. Nor is this power affected by constitutional provisions or statutes imposing restraints upon the issuing of stocks or bonds."

The conclusion can not be avoided that the gas company to carry out the purposes of its organization (unless denied by its charter), has the right to contract debts, borrow money and give customary evidences of debt. It is urged that because the charter of the gas company provides that it may issue bonds for $500,000, and execute a mortgage on its property to secure them, and that their proceeds shall only be used in improving the plant, that it hereby limits its power to contract any other kind of indebtedness or liability. Those who prepared the charter and its amendments and the legislature knew the meaning of the words and terms employed in defining the power and limitations on the power of the corporation. If it had intended to limit the amount of indebtedness it should contract to the $500,000 of bonds, it would have been quite easy to have so said. As the limitation is only as to a bonded indebtedness which may be secured by mortgage, the necessary implication is that no limitation was intended to be placed on its power to contract other indebtedness which like corporations may legitimately contract in the execution of the purposes of their organization.

The charter of a corporation read in connection with the general law applicable to it is the measure of its power.

In Greenbay & N. R. Co. v. Union Steamboat Co., 107 U. S., 100, the court said: "The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers; and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws reasonably construed, may fairly be regarded as incidental to the object for which the corporation is created, is not taken to be prohibited."

This rule of construction is approved in Rhorer, Receiver v. Middlesborough Town and Land Co., 103 Ky., 150. In Merchants National Bank v. Citizens Gas Light Co., 159 Mass., 505, the court had under consideration a question very similar to the one here for solution. It was an action on a promissory note.

The statute construed reads as follows: "No gas company, unless specially authorized by the legislature, shall hereafter issue any bonds at less than the par value, nor for an amount exceeding its capital actually paid in, and applied to the purpose of its incorporation. The proceeds of all bonds issued shall be applied to the payment of obligations incurred for the enlargement or extension of the works and the purchase of real estate for the use of the company, or for the payment of liabilities existing at the time of the passage of this act. A company may, upon vote of a majority in interest of its stockholders, at a meeting duly called for the purpose, issue bonds in accordance with the provisions of this section, to bear interest at not exceeding 6 per cent. per annum, and may secure the payment of principal and interest which shall accrue by a mortgage of its franchise and other property."

The court said: "The defendant corporation's first request for instructions relates to the effect of statutes of 1886, chapter 346, upon the power of defendant corporation to issue promissory notes. The third section of that statute relates to the issue of bonds by gas companies, and gives the company the right to secure bonds issued in accordance with the provisions of the section by mortgage of the franchise and property of the company; but we find nothing in the charter which affects the right of such company to

issue promissory notes when convenient or necessary in the prosecution of its business."

The Constitution of California prohibited corporations from increasing their stock and bonded indebtedness, except in a specified manner. A corporation contracted a debt, executed its note therefor and a mortgage to secure it, without doing that which the statute required to be done before increasing its bonded indebtedness. In an action to enforce the payment of the debt the court in Underhill v. Santa Barbara Co., 93 Cal., 300, among other things, said: "Manifestly it is not the intention of the Constitution to prohibit the increase of all kinds of indebtedness since the prohibition of a particular kind implies that there may be indebtedness of another kind."

In Clark & Marshall on Corporations, section 179, it is said: "A limitation of the amount of a particular kind of indebtedness does not apply to other kinds of indebtedness."

We conclude that the gas company had the authority to contract the debts due the appellants.

It is conceded that the gas company was authorized to consummate the deal which resulted in its rightful ownership of the $1,600,000 of the lighting company's bonds. As the gas company owns the bonds its right to sell them necessarily exists. It owes debts and it is under a legal obligation to pay them. In the judgment of the corporation it is best to sell the lighting company's bonds which it owns for that purpose. If it has the right to sell them, it certainly has the right to apply their proceeds to the payment of its debts. If it can apply the proceeds to that purpose, it can sell them to its creditors and thus discharge its debts. The bonds not having a market value can not be sold at their real value, unless the gas company gives the guaranty to which we have alluded.

As the gas company acquired the bonds in carrying out the legitimate purposes of its organization, and desire to sell them in furtherance of the same purpose, it follows that if the guaranty is necessary to make the proceeds available, it has the right to make it. It surely creates a personal liability. If it had the power to contract debts and thus create a personal liability, it certainly has the power to create another personal liability to meet the former one. An objection is made because the bonds did not mature until 1918. This objection can only go to the question of the advisability of creating an obligation to continue during that period, which question alone must be determined by the gas company. The objection can not go to the question of power, which we alone have under consideration. Notes executed by the gas company to the appellant for the debts which it owes them would be valid whether they were made payable one day or several years after date. If it held notes of customers, payable years after date, it could assign them to the appellants in payment of their debts. The assignment by operation of law would create a personal liability. In the instance cited as would be in the proposed guaranty, a personal liability would be created in the execution of the purposes of the organization and would be enforceable. The guaranty required the gas company to redeem the bonds if not paid. That fact can not affect the question of the power to create a personal liability. The purpose of the guaranty is to give a market value to the bonds and make them available. Suppose instead of selling the bonds with the guaranty, the gas company should execute its promissory notes to the appellants

for the debts and pledge the bonds to secure them, certainly it would not be contended that a personal liability would not be created because the bonds were pledged as collateral. The difference in the liability between that arrangement and the proposed one is simply in form. In one instance the gas company would be required to pay notes which it had executed for the debts, in the other it would be required to pay its debts by the redemption of the bonds if not paid. The proposed guaranty by the gas company is not for the benefit of the lighting company, but for its own benefit. Therefore, the precise question is not here involved, as would be in a case where one corporation guarantees the bonds of another corporation for the latter's benefit. There are some instructive cases involving the power of corporations to make contracts and also guarantee the payment of another corporation's obligations, when to do so is beneficial to the former company by enabling it to promote its legitimate ends. In Railway Co. v. Howard, 7 Wall, 412, the court said: "Abundant proof exists in this record that railway companies may issue their own bonds to raise money to carry into effect the purpose for which they were created; and it is difficult to see why they may not guarantee the payment of such bonds as they lawfully received from cities and counties, and put them upon the market instead of their own, as the means of accomplishing the same end. Undoubtedly they may receive such bonds under the laws of the State, and if they may receive them, they may transfer them to others; and if they may transfer them to purchasers, they may, if they deem it expedient, guarantee their payment as a means of augmenting their credit in the market, and saving the corporation from the necessity of issuing their own bonds to accomplish the same purpose. Considered, therefore, as an open question, the court is of the opinion that the objection is without merit. Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business."

In Frankfort Bridge Co. v. City of Frankfort, 18 B. M., 45, the court in effect held that if the charter and statutory law is silent upon the subject of the power to make a contract, it may be implied on the part of the corporation, when directly or indirectly necessary to enable it to fulfill the purposes of its existence.

In section 775, Cook on Corporations, 5th edition, it is said: "One of the most important and yet difficult branches of railroad corporation law is the question whether one railroad corporation may guarantee the bonds or dividends or another railroad corporation. After a great deal of litigation the rule has become established that such a guaranty is valid, provided it is based on valuable consideration, and the consideration is such as the guarantor has power to receive or invest in."

The case of Todd, &c. v. Kentucky Union Land Co., 57 Federal Rep., 47 (opinion by Judge Lurton), and the same case on appeal, 62 Fed. Rep., 335 (opinion by Judge Taft), supports our conclusion that the gas company has the right to guarantee the payment of the bonds. By a provision of the charter, the city of Louisville has an option to purchase the gas company's property at the expiration of the charter.

It is urged that if the liability resulting from the guarantee of the bonds exists at the time its right to purchase accrues, it would be embarrassed thereby. It is difficult to see how it will affect the rights of the city as a purchaser (not stockholder,) because the amount of outstanding liabilities would have to be deducted from the purchase price ascertained in the manner provided by the charter. However the question before us is not whether the city of Louisville will be able to become a purchaser of the property of the gas company, but it is whether the gas company proposes to exceed the power which we find it to possess when we read its charter in connection with general laws applicable to it. We concur in the conclusion reached by the learned circuit judge in his able opinion.

The judgment is affirmed.

COMMONWEALTH, BY, &c. v. BANK OF COMMERCE.

(Filed June 18, 1904.)

1. Taxation—Deposits in bank—Liability of bank for taxes thereon—In a proceeding by the auditor's agent to require the banks of this State to list for taxation and pay the taxes on funds deposited therein by its depositors, upon the theory that the property sought to be taxed belongs to the bank, or is held by it for others, and that it should be assessed regardless as to how it was acquired, or is held, we adhere to the conclusions of the court in the case of Deposit Bank of Owensboro v. Daviess County, 102 Ky., 214, "that banks are not required to pay taxes on the money deposited with them by their customers, or assets which represent it; and that under the law the depositors are required to pay the tax on the money so deposited," and it necessarily follows that the bank as quasi trustee, or bailee, or otherwise, is not under a duty to list the property sought to be assessed by such proceedings, and the same can not be maintained.

Taylor & Lucas for appellants.

Dodd & Dodd and Humphrey, Burnett & Humphrey for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Paynter.

Through Frank A. Lucas claiming to represent the Commonwealth as auditor's agent three proceedings were instituted against the appellee to compel it to list for taxation of the date of September 15, 1899, notes secured by mortgage of the fair cash value of $———; other notes of the fair cash value of $———; certain accounts of the fair cash value of $———; cash on hands of $———; cash on deposit with other banks or due from other banks of $———; certain sums due as overdrafts from sundry persons and corporations of $———; certain bonds and stocks of the value of $———, and in the aggregate of the fair cash value of $4,008,125.34. By each of the proceedings it is sought to compel the appellee to list the same kind of property for taxation for the years 1900, 1901, 1902 and 1903, but the aggregate amount varying with the years. We shall designate for convenience the proceedings by numbers. By proceeding No. 1, the plaintiff seeks to compel the appellee to list the property sought to be taxed, upon the theory that the appellee owns it and that it has been omitted from assessment to it. By

the second proceeding it is sought to compel the appellee to list the property in question as trustee. By the third, to list it as bailee in possession. By agreement the three proceedings were heard together. It was eminently proper to hear them together, because the same property is sought to be taxed for each of the years named.

The cash and assets sought to be assessed were acquired with money deposited by the bank's depositors or in part by the money which was paid by the stockholders and the accumulations thereon, or by the money derived in both of the ways named. For the bank it is contended that it is an effort to tax the money deposited by its depositors. For the appellant it is claimed that this is a misstatement of the purpose of the proceedings, that plaintiff only seeks to tax certain assets of the bank. The plaintiff does not in terms state how the bank derived the property sought to be taxed, but when we take the three statements together it may fairly be concluded that it is the purpose to tax property derived from sums deposited by appellee's depositors. This conclusion is supported by the fact that the bank's capital stock, surplus and undivided profits were assessed by the board of equalization in fixing its franchise tax. The correctness of that assessment is not questioned, and it is admitted that it paid its tax due thereon. It is the theory of the appellant that the property sought to be taxed belongs to the appellee or is held by it for others, and that it should be assessed regardless of the question as to how it was acquired, or is held.

The claim that the property should be assessed as omitted property is based upon sections 171, 172 and 174 of the Constitution, and section 4020, Kentucky Statutes. Section 171, in speaking of taxes, provides: "They shall be uniform upon all property within the territorial limits of the authority levying the taxes; and all taxes shall be levied and collected by general laws."

Section 172 provides: "All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value."

Section 174 provides that: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property."

Section 4020, Kentucky Statutes, was enacted pursuant to the provisions of the Constitution. A bank does not keep the funds arising from the contributions of shareholders and depositors separate, therefore, the only way to approximate the amount which each class may have contributed to the cash on hand and to the purchase of notes, bills of exchange, etc., is by proportion. Evidently the auditor's agent in his calculations segregates the items of value which produces the total credits of the bank, and thus ascertains the value of the alleged omitted property. The amount thus ascertained is the proportion of the contribution made by the deposits. The law in the affairs of State and men regards the substance of things; while the auditor's agent does not eo nomine seek to assess the appellee's deposits, but he in effect does so. The legislature was confronted by a condition. In its wisdom it knew that banks and similar institutions are necessary to conduct the business affairs of the State. It likewise knew to establish and conduct a bank it was necessary that persons should contribute a banking

capital and that persons should deposit their money therein. It knew that persons would not contribute their money to acquire a banking house, equip it with vaults, safes and furniture, and put it in charge of salaried officers and clerks, if there were to be no depositors. Necessarily those who contributed to the capital and those who might contribute to the deposit account were under a duty to pay taxes. The question then necessarily arose as to how this burden of taxation should be borne. The legislature recognized it had a delicate and difficult question for solution. Presumably it recalled the legislative history of the State on the subject of bank taxation and the public necessity for solvent banks and financial institutions. It likewise knew that the Constitution required that taxation in so far as possible should be equal and uniform. It also knew that contributors to the capital stock and to the deposit account were equally necessary to establish and successfully conduct a banking or financial institution. It knew that contributors to the capital stock expected to make a profit in the conduct of the business and to be paid for the risks they assumed in handling the money of its depositors. It knew the depositors expected to be compensated for making the deposits by way of interest on them or by way of convenience or benefits in a business way. It knew that most of the depositors in banks could withdraw their deposits on demand and that, therefore, it was necessary to keep on hand money to meet such demands and it so provided. It was aware of the fact that in the case of the Commonwealth v. Gaines, 80 Ky., 495, in construing a statute authorizing the assessment of property in the possessory control of another, said: "The rule should not be misapplied to an absurd assessment of property which may be loaned to a neighbor for a day or that necessarily passes through different hands in its temporary use and which may be easily and properly assessed to the owner." It likewise was aware that in Spalding v. Commonwealth, 88 Ky., 140, the court held it would not be proper to charge officers, like receivers and sheriffs, with taxes upon funds transiently in their hands and which may happen to be held by them upon the particular day when the owner or possessor is chargeable with the taxes. It presumably knew that in Louisville & Evansville Mill Co. v. Barbour, 88 Ky., 78, the court had, under consideration the question, whether under a law requiring stockholders to list and pay taxes on their stock in corporations (it being alleged they had failed to do so,) and held the corporation could not be compelled to list and pay taxes on its property represented by the stock, as it would be double taxation, and that the legislature had no power to directly impose double taxation. Likewise the legislature presumably knew that after the decision in Louisville & Evansville Mill Co. v. Babbour, the law was changed and the corporation was required to pay taxes on its property, instead of the shareholders paying taxes on their stock, and the court in Whitaker, Auditor's Agent v. Brooks, 90 Ky., 68, held that the corporation, and not the shareholders, should pay the tax.

It has never been the policy of the Commonwealth to require bankers and banking institutions to pay taxes on their deposits, or on that part of them preserved in cash, or on the part invested in notes, bills of exchange, etc. So far as we are advised, no effort to do so has ever been made in a Constitutional Convention, or in any legislature assembled in the State.

Neither has any political party or association of voters, so far as we are aware, ever advocated the justness or advisability of such a provision in the tax laws of the State. It, therefore, is fair to conclude that the members of the several constitutional conventions and the many members of the legislatures which have assembled in the State, did not deem it a wise policy to engraft in the tax laws such a feature. Besides, it is proper to conclude that the sovereigns who were represented in the several constitutional and legislative bodies approved the action of those bodies, as they never demanded such legislation. In addition to this, the legislature has enacted laws from time to time which show such a system of taxation, in its judgment, should not be established. And the only time the court has spoken upon the question, it said that such a system of taxation was not provided by law, but that another and different one was established. If this feature of taxation is required by the Constituton, then we must ascribe to the Constitutional Convention a purpose to make necessary legislation which was never suggested, much less demanded, by the taxpayers of the State; the practical effect of which would be to put out of business State banks and trust companies, and likewise national banks, if they can be subjected to the same taxation as other moneyed institutions in the State. To illustrate: It is safe to say that the average tax rate for State, county, municipal and school purposes is $2 on each $100 of valuation. If a State bank has a capital stock of $25,000, and has a deposit of $100,000, the tax paid annually would $2,500, the equivalent of 10 per cent. on the capital stock of the bank. The effect would be to drive out of business a large number of financial institutions. To construe the law so as to have that effect would be to adjudge that the Constitutional Convention and legislatures intended to destroy much needed financial institutions, or that they heedlessly enacted a law without considering the consequences to flow from its execution. We are unwilling to adjudge in effect that the Constitutional Convention or the legislature ever had such a purpose or was so inconsiderate of the consequences of their acts. Suppose that the national banks can not be made to pay taxes on their cash, notes, bills of exchange, etc., but only on their shares of stock, surplus fund and real estate, and State banks and trust companies should attempt to do business under the proposed scheme of taxation, what would be the relative effect on these financial institutions? It can be best illustrated by taking a national bank with a like capital stock of a State Bank to which we have referred, to wit, $25,000 actual value, with a deposit account of $100,000. If the rate is $2 on each $100 of valuation, it would pay $500 taxes, while the State Bank would pay $2,500, exactly five times as much as would the National Bank. This would be the effect if both banks were located on the same street in the same city. It would require but little consideration of the question to reach the conclusion that national banks would not long have competitors doing business under charters granted by the State. With the Constitution of the State, the decisions of this court and legislative history of the State before it, the legislature solved the problem of taxation of banks, by requiring them to pay taxes on the shares of the capital stock, on their surplus fund, undivided profits, real estate and franchises, and by requiring the depositors to pay on their deposits. It is in effect urged that the requirements of the

Constitution are not complied with when the depositor is required to list for taxation the money he has on deposit, because in law the relation of debtor and creditor is sustained between the bank and the depositor, and that a deposit when made becomes the property of the bank. The courts so hold in adjudging the rights between the parties in the settlement of the bank's affairs, or in passing upon the question involving the rights of the bank, its depositor and third persons. However, that does not prevent the legislature from regulating how the bank and its depositor shall share the burden of taxation on the fund created by their respective contributions. When it has done so, it has not violated the rule requiring uniformity and equality in taxation. Two striking examples of what the legislature can do with reference to the listing of property for taxation, etc., may be given. The statute makes the distiller liable for the taxes on whisky owned either by a resident or nonresident of the State, though it is actually in the custody of the United States Government. The national banking act provides that shares of stock in national banks shall be assessed for taxation. Of course they belong to the shareholders, and neither the corporation nor its officers have any interest in them. Notwithstanding that neither the corporation nor its officers owned the shares of stock, the legislature required certain officers of the bank to list them for taxation and to pay the tax thereon with the funds of the bank. This court sustained the validity of the act imposing a tax on whisky, and the act for the assessment and payment of the taxes on the shares of stock in the national banks. Besides, the Supreme Court of the United States has held acts similar to the last named act, valid. If it is competent for the legislature to enact the statutes referred to, and we think it is, it is equally so for it to preserve for taxation the fund contributed by the shareholders, accumulations on it, and the value of the franchise, and likewise preserve the deposits for taxation and make the bank pay on its contributions, etc., and the depositors on their contributions, instead of requiring the bank to pay on the assets acquired by the use of the moneys so contributed by both. The question involved is not a new one to this court. It thoroughly considered the question of the taxation of banks in the State in Deposit Bank of Owensboro v. Daviess County, 103 Ky., 214, where the court said: "The banks are not required to pay tax on the money deposited with them by their customers, or on assets which represent it. Owing to the particular character of the business which they conduct, they are quasi trustees of their depositors, and, under the law, the depositors are required to pay the tax on the money so deposited. The bank should be required to pay tax on the shares of capital stock, on their surplus funds, undivided profits, franchises and their real estate."

Many banks have been organized in the State since the decision of the court, and banking business has been adjusted to the conditions imposed thereby. We adhere to the conclusion that "banks are not required to pay taxes on the money deposited with them by their customers or assets which represent it, * * * and that under the law, the depositors are required to pay the tax on the money so deposited."

Having reached this conclusion, it necessarily follows that the bank, as quasi trustee or bailee or otherwise, is not under a duty to list the property sought to be assessed by these proceedings; hence, neither can be maintained.

The judgment is affirmed.

CITY OF LOUISVILLE v. GAST, &c.

(Filed June 18, 1904.)

1. Ordinances—Enacting two ordinances at same time—Validity—Under Kentucky Statutes, section 2777, providing "that no ordinance shall be passed until it shall have been read in full in each board, and free discussion allowed thereon, and no ordinance shall pass both boards on the same day, and no ordinance shall embrace more than one subject, which shall be expressed in its title," we should hesitate to hold, in the absence of an express statutory declaration on the question, that an ordinance was void for the reason that it was one of two ordinances which were passed by the council at the same time, relating to the same subject, there being no objection thereto by any member of the council.

2. Apportionment warrant—Work done as required—Failure of property owner to object—While there may be some doubt as to the validity of an ordinance where there were two ordinances passed by the council at the same time, relating to the same subject, yet under Kentucky Statutes, section 2834, providing that no error in the proceedings of the general council shall exempt from payment for work done on public ways, after the work has been done as required by either the ordinance or contract, where work has been done on a public way according to such ordinance or contract, without objection by the property owner whose property has thereby been benefitted, it is too late for him to object to the payment of the apportionment warrant and the enforcement of the lien therefor, after receiving the benefit of the work without objection.

H. L. Stone for City of Louisville.

Lane & Harrison for J. H. Brand.

Wm. Furlong, DuRelle & McHenry for Gast & Gosnell.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

This record presents the sole question as to whether or not the general council of cities of the first class have the power to pass two or more separate and distinct ordinances for original construction of public highways at the same time, there being no objection thereto by any member. The statutory law regulating the subject in hand is contained in the following sections of the Kentucky Statutes:

"Section 2777. No ordinance shall be passed until it shall have been read in full in each board and free discussion allowed thereon, and no ordinance shall pass both boards on the same day. No ordinance shall embrace more than one subject, and that shall be expressed in its title. No ordinance shall be altered or amended in any way except by repealing it.

"Section 2826. No public way shall be opened, narrowed, closed, or constructed, and no sidewalk shall be constructed or reconstructed, and no public wells or cisterns shall be dug and walled, except by ordinance recommended by the board of public works.

"Section 2834. * * * Payments (of apportionate warrants) may be enforced upon the property bound therefor by proceedings in court; and no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract." * * *

There is no inhibition in the statute against the final passage of two or more ordinances at the same time, and by the same vote, although the legislative requirement as to the passage of ordinances is set forth with minute particularity in the statutes above quoted. It will be observed that no ordinance for the original construction of public highways can be enacted, except upon the recommendation of the board of public works (section 2826); that it shall not be passed until it shall have been read in full in each board, and free discussion allowed thereon; nor shall it pass both boards on the same day; that it shall not embrace more than one subject, and that shall be expressed in its title; that it shall not be altered or amended in any way, except by repealing it (section 2777); and if it be for an original improvement, it shall not pass both boards of the general council at the same meeting, and at least two weeks shall elapse between its passage from one board to the other. (Section 2834.)

With the leigslative will in regard to the passage of ordinances expressed with such minute particularity, it is inconceivable that, if it was intended that two or more ordinances should not be grouped together and passed by one vote, this prohibition would not have been expressly enacted.

In McQuillin on the Law of Municipal Ordinances, section 116, it is said: "The council generally acts by vote. In the absence of express provision, the vote may be given in any form which clearly expresses the will of the members. It may be by ballot, by resolution, by the adoption of a verbal motion or in any other manner. 'A vote is but the expression of the will of a voter; and whether the formula to give expression to such law be a ballot or viva voce, the result is the same; either is a vote.' Departure from the form prescribed for corporate action, as in the passage of an ordinance, will not affect the validity of such action unless the charter or governing law makes such formality vital, as by declaring the action or ordinance void unless the form prescribed be followed." In the case of Wright v. Forrestal, 61 Wis., 849, on this subject it was said: "Nor do we think the fact that the resolution was voted upon at the same time a vote was taken upon other resolutions vitiates the vote, and that, therefore, the resolution was never adopted by the council. All who have any knowledge of the proceedings of legislative bodies know that the practice adopted by the common council of the city of Milwaukee is a common practice in both branches of the legislature of this State, and of other States. To hold that this resolution was not adopted by the common council for the reason stated, would invalidate a very considerable part of the acts of our legislature. The practice may not be one to be approved, but we are unable to say that it is not a lawful practice. The statute does not say that a separate vote shall be taken and recorded upon each resolution or act passed by the council, but that 'the vote on the passage of every such resolution shall be taken by yeas and nays, and duly entered in the journal of proceedings.' Here the vote was taken on the resolution in the proper way, and the yeas and nays were entered, etc., as required by law. * * * If it be desirable that a separate vote should be taken upon resolutions of this nature by the common council, it is very easy for the legislature to so expressly direct."

This was said in a case involving the enforcement of a lien for the cost of street improvement. In the absence of an express statutory declaration

prohibiting the passage of ordinances in the manner complained of in this case, we should hesitate to hold the ordinance involved herein void upon the ground contended for by appellees. But we do not mean to be understood as holding that, if a member objects, two or more ordinances may be lawfully voted on at one and the same time. But we are not required to rest this case wholly upon the foregoing principles; by section 2834, it is expressly provided that "no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract."

Substantially, the question involved here arose in the case of Broadway Baptist Church, &c. v. McAtee, &c., 8 Bush, 508. In that case it was said: "It may well be doubted whether the general council did not err in failing to give the property owners an opportunity of having the improvement made by private contract. But the ordinance under which the work was done was a matter of public record, and every citizen or property holder to be affected had constructive notice of its adoption, and from the time the contractor commenced work it may be assumed that the appellants had actual notice, not only of the ordinance, but of the contract under which the work was being done. It does not appear that either of them labored under any legal disability."

If it was their intention to rely upon this alleged error as a defense to the claims the contractor would have against them for the assessments provided for by the ordinance to pay the cost of the improvement, it was their duty to have notified them of such intention. Under the circumstances it is peculiarly proper that the provision of the charter, to the effect that "no error in the proceedings of the general council shall exempt from payment after the work is done as required by ordinance or contract," should be applied to them. By failing to speak when it was their duty to do so, they must be held to have waived the right, intended to be secured to them by the charter, of making the improvements for the cost of which they were bound, by private contract

"We are of opinion that ordinances providing for the construction or reconstruction of public ways at the cost of property owners are not embraced by the provisions of the sixty-seventh section of the charter. But if they were, the error in failing to vote upon the ordinance under which this improvement was made, on two different days, is one which comes within the curative provision of section 12, just referred to. Ordinances providing for the improvement of streets, under the peculiar provisions of the charter of Louisville, are not void merely because the general council fails to follow strictly its delegated powers. Under the general rule of construction, the authority delegated to municipal corporations is to be strictly construed, and must be closely pursued. (Citing authorities.) But the sovereign power that delegates this authority may, when it sees proper, change or abrogate this rule of construction. So far as the improvement of public ways in Louisville and the assessment of taxaton to pay the cost thereof are concerned, this rule is abrogated, and a differnt one prescribed by the provision in question."

The law which this opinion construed was in all material respects the same as that under which the question at bar arose. The very end to be

obtained by the enactment, that "no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract," was the prevention of such questions as the one presented by this record. In order that the citizens and property owners may be fully advised as to the passage of ordinances, it is provided by section 2773, Kentucky Statutes, that "each board shall keep a correct journal of its proceedings, and immediately after the adjournment of each session the proceedings thereof shall be published once in one English and one German daily paper printed in the city and having the largest permanent circulation in said city," and by section 2774, "All ordinances shall be published in like manner as the proceedings of the general council." These provisions are carried into effect at great expense, and are manifestly for the protection of those to be affected by municipal legislation, and they cast upon the citizen the duty of keeping himself advised as to the proceedings of the municipal legislature to object to legislation adverse to his interest, and to point out irregularities and deviations from statutory requirements before they have been put in force. And this is especially true of the enforcement of ordinances for the original construction of public ways.

It was clearly the intention of the legislature, if property owners failed to object to the enforcement of an ordinance for the improvement of public ways in front of their property before the work was done by the contractor, to shut off all irregularity in the preliminary steps as a defense to his demand for payment after he has performed his work according to the terms of the ordinance and the contract. This being true, as the work had been done according to the terms of the ordinance and contract, the answer of appellees presented no defense to the cause of action set up in the petition of appellant Gast, and both his, and the city's demurrers should have been sustained.

Wherefore, the judgment, both as to the city and to Jacob Gast, is reversed, with directions to sustain the demurrers to the answer, and for further proceedings consistent herewith.

PHILLIPS v. PHILLIPS, EX'OR.

(Filed June 18, 1904—Not to be reported).

J. M. Roberson for appellants.

T. L. Edelen for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Burnam.

We are asked in the petition for rehearing to extend the opinion so as to show that the judgment was not reversed as to those tracts of land which were bought by strangers to the record. We think this sufficiently appears from the original opinion. Tract number seven was bought by J. M. York and Tom Williamson, and two tracts of land were bought by J. M. York, James Hatcher, James Sowards and R. A. Heilliar. As to these tracts the judgment was not reversed.

WEISINGER, &c. v. McDONALD, &c.

(Filed June 18, 1904—Not to be reported.)

Robt. Harding for appellants.

R. P. Jacobs and Wm. Herndon for appellees.

Appeal from Boyle Circuit Court.

Judge Settle delivered the following response to petition for rehearing:

The question is made by the petition for rehearing that W. H. Kinnaird, administrator of Lucile Weisinger, deceased, is not a party to this appeal. We find on page 30 of the record an order which dismissed him as a party to the action, and this order was of course entered by the lower court before the appeal was taken. We were led to think him a party to the appeal as his name appears as a party in the statement filed with the record, naming the parties to the appeal. It is, however, not material to the decision of the appeal by this court that he should have been a party to the record. Appellants, upon the ground that Mary A. McDonald had illegally received and converted the proceeds of her infant daughter's real estate, to which they were entitled, no matter by whom paid to her, had the right to sue her alone to recover it, or to dismiss others whom they had sued with her, and seek a recovery against her alone. The judgment and opinion of this court can not of course affect Kinnaird as he was dismissed from the case in the court below.

A careful examination of the petition for rehearing has failed to indicate to our minds any error in the conclusions expressed in the opinion herein. Wherefore, the opinion is modified to the extent of declaring that it does not apply to Kinnaird, and the petition for rehearing is overruled.

WEBER v. GARDNER.

(Filed June 20, 1904—Not to be reported.)

W. T. Burch for appellant.

Samuel Avritt for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Judge Settle delivered the following modification of opinion in response to petition for modification:

The opinion in this case directs the lower court, in the event the appellant shall fail to bring before the court the holders of liens upon the property in controversy by proper pleading, that they may assert such liens, that the court should again enter the judgment appealed from and reversed and "dismiss her petition."

The latter expression "dismiss her petition" was inadvertently written and improper, and that expression is withdrawn, and the opinion to that extent modified.

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COURT OF APPEALS OF KENTUCKY.

CRALLE v. JACKSON, &c.

(Filed June 18, 1904—Not to be reported.)

Wills—Construction—Vested title to land—Void limitation thereon—By the will of Emma V. Bland she provides as follows: "I give and bequeath to my daughter, Virginia Wise Bland, all my real estate wherever located, but it is my will that my husband, Patrick H. Bland, shall enjoy one-third, and my said daughter the other two-thirds of the rents, profits and income, from all my real estate, after the taxes, insurance, and other expenses on the property are all paid, and after the death of my said husband, I give, bequeath, and devise to my said daughter, all of my real estate wherever located absolutely, to do with as she likes. However, if my said daughter should die before my husband without a will or bodily heirs, then it is my will that my said husband take all of my real estate to sell, rent, or do with as he so desires. However, should my daughter die leaving heirs, it is my wish that my said husband shall enjoy the whole of the rents, profits and income from all my real estate, but that the real estate shall return to my said daughter's heirs after my said husband's death." Held—That by the terms of this will the testatrix has vested her daughter, Virginia Wise Bland, with an absolute fee-simple estate in all of her real estate subject to a charge in favor of her father of one-third of the net income. Under well recognized rules of construction the subsequent limitation attempted to be placed thereon is void, and the fee remains in the daughter subject to the claim of the father to one-third of the profits of the estate during his life. We are, therefore, of the opinion that a deed by Virginia Wise Bland and her husband, and her father, Patrick H. Bland, passes to the purchaser a complete fee-simple title to the land.

O'Neal & O'Neal for appellant.

C. H. Shield for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice Burnam.

This action was brought by appellees against the appellant to enforce a written agreement on his part to purchase and pay for a piece of real estate in the city of Louisville. The appellant admits the contract and avers a

willingness to comply therewith, provided the deed tendered him by the appellees conveys a good title to the property. The decision of the question involves a construction of the will of Emma V. Bland, deceased, which reads as follows:

"I, Emma V. Bland, of Louisville, Jefferson county, Kentucky, being of sound mind and disposing memory, do hereby make this my last will and testament:

"I hereby give and bequeath to my daughter, Virginia Wise Bland, all of my personal property whatsoever.

"I also give and bequeath to my said daughter all of my real estate, wherever located; but it is my will that my husband, Patrick H. Bland, shall enjoy one-third, and my said daughter the other two-thirds of the rents, profits and income from all my real estate, after the taxes, insurance and other expenses on the property are all paid, and after the death of my said husband, I give, bequeath and devise to my said daughter all of my real estate wherever located, absolutely, and to do with as she likes. However, if my said daughter should die before my said husband, without a will or bodily heirs, then it is my will that my said husband take all of my real estate to sell, rent or do with as he so desires. However, should my said daughter die leaving heirs, it is my wish that my said husband shall enjoy the whole of the rents, profits and income from all my real estate, but that the real estate shall return to my said daughter's heirs after my said husband's death. I hereby appoint my husband, Patrick H. Bland, my executor without bond.

"Witness my hand this 9th day of February, 1898.

(Signed) "EMMA V. BLAND."

This will was written by testatrix, and is somewhat remarkable in its contradictions. The first paragraph thereof vests the daughter with an absolute fee simple estate. That is qualified in the next paragraph by a provision that the husband shall be entitled to one third the net profits and income thereof during his life. This is followed by another paragraph in which the daughter is given all of the real estate owned by testatrix, wherever located, absolutely, to do with as she likes. Up to this point, we think it clear that the will vests Virginia Wise Bland with an absolute fee-simple title to all of the real estate, subject to a charge in favor of her father of one-third of the net income. The next paragraph provides that if the daughter should die before the husband, without having disposed of the property by will or leaving bodily heirs, that the husband should take the real estate with power to sell, rent, or do with as he desires. In the next paragraph, it is provided that should the daughter die, leaving heirs, before her father, that he should enjoy the income of the real estate during his life and at his death it should return to the daughter's heirs. We think the word "heirs," as used in the will, mean children, and would ordinarily be construed as words of purchase. But, as testatrix, in the first paragraph of her will, has vested Virginia Wise Bland with an absolute fee-simple estate, under well recognized rules of construction the subsequent limitation attempted to be placed thereon is void, and the fee remains in the daughter subject to the claim of her father to one-third the profits of the estate during his life. We are, therefore, of the opinion that the deed executed by

ginia Wise Bland Jackson and her husband, and by Patrick H. Bland, ses to the purchaser the complete fee-simple title. We are supported in conclusion by numerous decisions of this court, and other well recog- ed authorities.

Ball v. Hancock's Adm'r, 82 Ky., 113, this court said: "It has often held that a devise, gift or grant, generally or indefinitely with the er of disposition or absolute alienation, carries a fee unless the first er is vested with the life estate only, and the power of disposition is exed to the remainder."

he opinion in that case cites, with approval, 4 Kent's Commentaries, ion 319, in which the author says: "A devise of an estate generally and finitely with power of disposition over it, carries the fee."

nd also the case of Jackson v. Robbins, 16 Johnson, 588. In that case will devised: "All his real and personal estate whatsoever unto his , Sarah, to hold the same to her, her executors, administrators, and gns, but in case of her death without giving, devising and bequeathing vill, or otherwise selling or assigning the said estate, or any part thereof, he devised all such estate, or all such parts thereof as should so re- n unsold, undevised or unbequeathed, unto his daughter, Catherine r."

is limitation over in this will was declared void, Judge Kent saying: e power conferred upon the wife was an attribute of ownership and ed with it a fee. The limitation over must be either a remainder or xecutory devise, and it is impossible that it should be either. No re- nder can be limited upon an estate in fee."

Caleb v. Field, &c., 9 Dana, 347, this court held that a simple devise of nrestricted power of disposition, implied an absolute gift in fee. Jar- on Wills, page 666 "A right in the first devisee to dispose of the estate sed at his pleasure and not a mere power of specifying who may take, unts to an unqualified gift."

Ramsdell v. Ramsdell, 21 Me., 288, the court said: "It has become a ed rule of law that if the devisee or legatee have the right to dispose of roperty at pleasure, the devise over is inoperative."

McCallister v. Bethel, 97 Ky., 1, the devise was in trust for Joseph allister, and after his death to his children, if he had any, but if he none, that it should pass to any person Joseph might devise it to. ph died intestate and without children; it was decided that at his death and passed by descent to his heirs at law. The opinion in that case : "The distinguishing feature between a life estate with the power of osition, and an estate where the fee passes to the immediate devisee, ect to be divested upon the happening of a contingency, is that when state for life expressly given and the power of disposition not exercised he life tenant, all his interest in the estate ceases at his death; but n the fee is given in the first instance, as in this case, and the contin- y upon which the title is to be divested or restricted never happens, at the death of the person holding the fee, the estate devised passes by ent to his heirs at law if not disposed of by will, and the attempt to t the power of disposition by will only becomes nugatory."

is rule of construction was followed in Barth v. Barth, 18 Ky. Law

Rep., 840. Clay v. Chenault, 21 Ky. Law Rep., 1485; Ray v. Spears, 23 Ky. Law Rep., 1334; Cox v. Anderson, 24 Ky. Law Rep., 721; Humphrey v. Potter, 24 Ky. Law Rep., 1264, and is in conformity with the public policy as announced in section 2342 of the Kentucky Statutes.

Judgment affirmed

FUQUA v. COMMONWEALTH.

(Filed June 18, 1904.)

1. Homicidal—Cross-examination of Commonwealth's witness—Improper criticism by trial court—Abuse of discretion—On the trial of a defendant on a charge of murder, where a witness for the Commonwealth had undergone a searching and exhaustive cross-examination, the court remarked: "I think this examination has gone far enough, it is immaterial any way." While we think it was not error for the court to rule that the corss-examination on that point had gone far enough, we question the propriety of the after declaration "that the question or matter was immaterial." A trial court should always be careful not to give expression to views not intended for, or proper to be heard by, the jury. Section 598, Civil Code, which is applicable to trials in criminal cases, provides that "the court shall exercise a reasonable control over the mode of interrogation so as to make it rapid, distinct, as little annoying to the witness, and as effective for the extraction of the truth as may be, but subject to this control the parties may put such legal and pertinent questions as they may see fit." Under this section the discretion conferred upon trial courts is broad and should not be interfered with by a revisory court, unless its abuse has been made manifest. We have been unable to see in this instance anything in the record that leads us to believe the statement made by the court was prejudicial to appellant.

2. Testimony of a witness who has since died—Competency of official stenographer's notes—Section 4648, Kentucky Statutes, provides "that the testimony of any witness taken by the official stenographer in any court shall constitute a part of the record of the case, and may, in the discretion of the presiding judge, be used in any subsequent trial of the same case between the same parties where the testimony of such witness can not be procured, which fact must be made to appear satisfactorily to the court by the affidavit of the party desiring to use the same, or by his attorney; provided, that in criminal cases such testimony shall be so used only upon the consent of the defendant." We are of the opinion that this section was not intended to apply, and does not apply to a witness who is dead when his testimony, taken by the stenographer on a former trial, is offered to be used as evidence in a subsequent trial of the same case between the same parties, but applies alone to the testimony of living witnesses so taken and offered to be used, and whose presence and oral testimony can not be procured for use in the subsequent trial.

3. Same—It is admitted that William Davis testified on the first trial of appellant, and that he died before the second and last trial, and that his testimony on the first trial was correctly taken by the official stenographer, and was transcribed and duly certified by him and made a part of the record. As the stenographer, if familiar with the testimony given by Davis at the previous trial, might from mere recollection, have detailed it to the jury, we know of no reason why he should not have been premitted to read it from the official transcript made by him from stenographic notes taken by him at the time Davis testified. Manifestly it was and is more accurate

than the memory of any human witness who may have heard Davis testify. It will do no violence to the appellant's rights to hold that the transcript of Davis' testimony read to the jury was competent evidence, and we so hold.

Thos. E. Moss and R. L. Greene for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Settle.

This is an appeal from the judgment of the McCracken Circuit Court, entered upon the verdict of a jury finding the appellant, Lon Fuqua, guilty of the murder of George Gray, and fixing his punishment at confinement in the penitentiary for life.

The indictment in the case charged Spot Polk and appellant with the murder—the former as principal, and the latter as aider and abettor. Separate trials were had, resulting in the same verdict as to each defendant. Appellant obtained in this court a reversal of the judgment of conviction upon the first trial, (Fuqua v. Commonwealth, 24 Ky. Law Rep., 2205.) and this appeal is from the second judgment of conviction.

The following statement of facts will serve to illustrate the manner of the homicide and the appellant's connection herewith. On the night of Sunday, December 19, 1901, the appellant, Spot Polk, Ida Gray, George Gray, the victim of the homicide, and others, were at the house of Fordy Simpkins, in the city of Paducah. George Gray left the company and went to the house of Sidney Hawkins. After he left Polk claimed to have discovered that he had lost $10, and was told by Ida Gray, who though of the same name was not related to George Gray; that the latter had stolen or taken it. Thereupon Polk, in company with appellant, left the Simpkins house in search of George Gray, first going to the house of George's sister, whom they found in bed, and by whom they were informed that George Gray was not in the house. Not satisfied of the truth of her statement, Polk entered and searched the house for George Gray, but, failing to find him, remarked to appellant, Fuqua, who was in hiding behind a tree in the yard, "he is not here." The two then left and went together to the house of Sidney Hawkins, where they found George Gray, who was at once accused by Polk of stealing his money. Gray said, "what money," and Polk replied, "Lon (meaning appellant), said you had my money." Gray said, "Lon is a liar, I have not got your money." He then put on his shoes, and said he would go with them and prove that he did not get Polk's money. Thereupon he, Polk, and appellant returned to the home of the Simpkins woman. Upon reaching the house of the Simpkins woman, Polk presented a pistol at Gray, saying, "give me my money." Gray said, "I didn't get your money, you can shoot me if you wish." Gray then said to appellant, "did you say I got that money?" Appellant replied, "I said I believed it," and further, "Ida said you got it." Gray applied an opprobrious epithet to appellant, who said: "If you say that again I will hit you." The epithet was repeated by Gray, and appellant then struck him. Gray returned the blow, went out of the house and got some bricks, which he started to throw at appellant, but was persuaded not to do so.

Later, George Gray left the Simpkins house and did not return. Appel-

lant and Polk remained there all night and on the morning following (Monday) both were drunk. They left the house of the Simpkins woman that morning, and while walking near Bennett's saloon met the wife of Polk, who besought him to go home with her, but appellant urged him not to do so, but to enter Bennett's saloon. They did go to the saloon, upon entering which they saw George Gray sitting in the back room on a log near the stove. Gray, addressing Polk, at once said "Hello, Spot." Appellant, according to the testimony of Gray, taken later as a dying declaration, said: "Shoot the son of a bitch." Polk said nothing, but pulled out his pistol and began to shoot at Gray. Two shots were fired by him at Gray in the saloon, one of which took effect in Gray's back near the right lung. He ran out of the saloon, and was pursued by Polk, accompanied by appellant. Two more shots were fired at Gray by Polk as he fled down the street, and after this last shot was fired, appellant took the pistol of Polk, removed the empty shells, and the two went away together.

About twenty minutes after the shooting appellant, in reply to an inquiry from the wife of Polk as to the cause of the shooting, said: "The son of a bitch stole $10 from Spot. If he had rather die than give it up, let him die."

The evidence introduced by the appellant, especially his own testimony, was in many respects contradictory of that of the Commonwealth. But a careful examination of the record will, we think, show the facts of the homicide to be in substance, as above stated. In view of the facts, criticism of the verdict of the jury would, in our opinion, be unwarranted. Thirteen grounds for a new trial were filed by appellant in the court below. But we will consider only such of them as are urged in the brief of counsel for a reversal. It is insisted for appellant that the lower court, by interrupting the cross-examination of the first witness when introduced, and in saying, "I think this cross-examination has gone far enough, it is immaterial, any way," erred to the prejudice of appellant. An examination of the entire testimony of the witness in question will show that the cross-examination was searching and exhaustive. The question which seemed to have caused the interruption by the court was in regard to a matter which had been fully brought out. The information it sought had been freely testified to, in view of which, the question was, we think, unnecessary, but it can hardly be said that it was in relation to a matter that was immaterial.

We think it was not error for the court to rule that the cross-examination on that point had gone far enough. But we question the propriety of the after declaration of the court to the effect that the question was immaterial. A trial court should always be careful not to give expression to views not intended for or proper to be heard by the jury, as ordinarily his word goes further with them than anything that may be said by counsel. Much depends upon the manner of making a statement. A thing that is harmless in itself may be made harmful by the manner in which it is stated. We are, however, unable to find in this instance anything in the record that leads us to believe that the statement upon the part of the court, of which complaint is made, was prejudicial to the appellant.

Section 593, Civil Code, which is also applicable to trials in criminal cases, provides that "the court shall exercise a reasonable control over the mode of interrogation, so as to make it rapid, distinct, as little annoying to the

ness, and as effective for the extraction of truth as may be; but, subject this control, the parties may put such legal and pertinent questions as y may see fit." * * *

The discretion conferred upon trial courts by the section supra is broad l should not be interfered with by a court of revisory power unless its se is made manifest. (Dean v. Commonwealth, 25 Ky. Law Rep., 1876.)

t is also contended that the court erred in permitting the stenographic ort of the evidence of William Davis to be read to the jury. This contenn is based upon section 4643, Kentucky Statutes, which is as follows: he testimony of any witness or witnesses taken by said (stenographic) reter in any court, or decision as aforesaid, shall constitute a part of the ord of the case and may, in the discretion of the presiding judge, be used any subsequent trial of the same case, between the same parties, where testimony of such witness or witnesses can not be procured, which fact st be made to appear satisfactorily to the court by affidavit of the party iring to use the same, or his attorney: Provided, that in criminal cases h testimony shall be so used only upon the consent of the defendant."

Ve are of opinion that the section of the statutes supra was not intended apply, and does not apply, to a witness who is dead when his testimony en by the official stenographer on a former trial, is offered to be used as dence in a subsequent trial of the same case between the same parties, that it applies alone to the testimony of living witnesses so taken, and ered to be used, and whose presence and oral testimony can not be proed for use in the subsequent trial.

t is admitted that the witness, Wm. Davis, testified in the first trial of ellant, and that he died before the second and last trial. It appears m the sworn statements of the stenographic reporter that the testimony Davis, the reading of which is complained of, was correctly taken down him stenographically at the first trial of appellant, and afterwards transbed upon a tpyewriter, and that the testimony thus taken was duly certi- by him officially and made a part of the record of the first trial of aplant. Why, then, should it not have been read as evidence upon the trial appellant? It has long been the law that in a subsequent trial of the ne case between the same parties, it is competent to prove or reproduce, the oral statements of others, the testimony upon a former trial of one ose death occurred after the giving of such testimony, and before the subuent trial. (Thomas v. Commonwealth, 14 Ky. Law Rep., 288; Walkup Commonwealth, 14 Ky. Law Rep., 887.) The reason of the law for recoging the admissibility of the testimony of a witness since deceased, is that was given under the solemnity of an oath and with an opportunity for ss-examination.

n Rice on Evidence, section 224, it is said: "The evidence of a witness ce deceased, on a former trial of the same case, may be proven on a subuent trial. His deposition then taken may be introduced either by the ate or by the accused. Such proof does not violate defendant's constitunal right to 'meet the witness face to face.' And his testimony then ven may be proved, if necessary, by the testimony of one who was present d heard it, who may state its substance, if unable to state its words. The t that a witness on such previous trial, who is still living is absent from

the State, or beyond the territorial jurisdiction of the court, is not generally ground for the admission of his previous testimony." * * *

Where the witness is deceased, the authorities hold, in uniform accord, that proof of his testimony upon a second trial is admissible. This rule is bottomed upon necessity, and its aim is to prevent the defeat of justice. Upon the other hand, to admit proof of the testimony of an absent living witness given upon a former trial, would be to dignify secondary evidence, and to disregard that provision of the Constitution which guarantees to the defendant the right to be confronted by the witnesses. Hence the necessity for the enactment of the statute, which makes the transcript of the stenographers' report admissible as evidence in a civil action, under certain conditions, to prove the testimony of an absent living witness made in a previous trial in the same case, and between the same parties; such evidence not to be used, however, in a criminal case, except with the consent of the defendant. The only feature of this question that remains to be considered is as to the admissibility of the transcript of the official stenographer which was used in this case.

As the stenographer, if familiar with the testimony given by Davis at the previous trial might, from mere recollection, have detailed it to the jury, we know of no reason why he should not have been permitted to read it from the transcript made from the stenographic notes taken by him at the time Davis testified. Manifestly, it was and is more accurate than the memory of any human witness who may have heard Davis testify. On this subject we are not without authority. In Rice on Evidence, page 355, we find this statement of the law: "What a witness, since dead, has sworn upon a trial between the same parties, may be given in evidence either from the judge's notes, or from notes that have been taken by any other person who will swear to their accuracy, or the former evidence may be proved by any person who will swear from his memory to its having been given."

It will do no violence to the appellant's rights to hold that the transcript of Davis' testimony, read to the jury, was competent evidence, and we so hold. It is also contended by counsel for appellant that the trial court erred in admitting proof of the dying statement of George Gray. It is sufficient to say that this court on the former appeal held, and we now hold, that the statements of Gray which were admitted in evidence as dying declarations were competent. The evidence clearly shows they were made in extremis, and when the declarant had no hope or expectation of recovery, but believed that his dissolution was at hand. But it was also held on the former appeal, and we now hold, that the paper purporting to contain the dying declaration of Gray could not be read to the jury, as it was not read to or signed by him; but that the witnesses who heard what was said by the deceased on that subject might testify in regard thereto, and that the witness who wrote down the words might refresh his recollection by a reference to the memorandum made by him, in testifying to what was said on that subject by the deceased.

We gather from the record that the opinion of this court was adhered to by the trial court; that the paper referred to was simply used by Cross, who wrote it, to refresh his recollection, and we do not think that the fact that Cross or the Commonwealth's attorney once or twice incidentally referred

to the paper as the dying declaration of Gray, though such references do not appear of record, was prejudicial to the appellant. Nor can we see that any part of the testimony of Cross was incompetent. The instructions seem to be proper in all respects; at any rate, there is no criticism of them to be found in the able and admirably written brief of counsel. We are unable to find in the record any ground of reversal.

Wherefore, the judgment is affirmed.

Whole court sitting.

CITY OF LOUISVILLE v. McATEER, &c.

SAME v. LOUISVILLE WATER CO.

(Filed June 18, 1904—Not to be reported.)

Taxation of water company—The question for decision in this case is, whether the property of the Louisville Water Co. is liable for taxation by the city. The court holds that it is, as follows:

First. Section 171 of the Constitution requires that "taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws." Section 170 provides that "there shall be exempt from taxation public property used for public purposes." "The express mention of one thing implies the exclusion of another." Although the stock of the water company is owned by the city and the property is used in supplying the citizens with water, the waterworks are not "used for public purposes" within the meaning of section 170, and by section 171 property owned by or on behalf of the public, but "not used for public purposes" is not exempt.

Second. Section 4020, Kentucky Statutes, provides: "All real and personal estate of persons residing in the State, and all corporations organized under laws of this State, whether the property be in or out of the State, including intangible property which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempted from taxation by the Constitution." Section 2980, Kentucky Statutes, provides: "Each city shall raise a revenue from ad valorem taxes and a poll tax, and license fees, and to that end the common council of each city is hereby authorized and empowered to provide each year by ordinance, for the assessment of all real and personal estate within the corporate limit thereof, subject to taxation, for State purposes, and shall levy an ad valorem tax on same," etc. By ordinances duly adopted for each of the years in question, the city levied an ad valorem tax upon "all lands, improvements, personalty and franchises subject to taxation in the city of Louisville." These ordinances were comprehensive enough to embrace the property of the Louisville Water Co. if they would cover the property of any corporation.

Third. So long as the water company maintains a separate corporate existence, owning its corporate property and exercising its franchise, it ought to be managed and maintained as a separate concern, dealing at arm's length with the city on business principles, as other corporations in which the city owns an interest deals with it. No inequality nor injustice to the taxpayers can then occur from the city's operating this private corporation for the benefit mainly of those who can pay for its service.

Fourth. In this suit the city should credit upon appellee's tax bills, the reasonable price of the water it has used for the year for which the tax is

being asserted and for which it may have paid. The basis of this credit should be upon just such terms as the court may find from evidence, if the parties can not agree upon it. Credit should be given in the city's tax bills for each years water rent so as to avoid penalties and interest, so far as such water rents may go to extinguish the annual bills.

Henry L. Stone for appellant.

Burnett & Burnett, Kohn, Baird & Spindle and R. L. Greene for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge O'Rear.

The question for decision in this case is whether the property of the Louisville Water Co. is liable for taxation by the city. For five years before the beginning of these suits the water company had not been assessed on any of its property for taxation for city purposes. It claims that its property is exempt from city taxation because the city owns all its stock, or did own all but one or two shares for the years in question. The Louisville Water Co. is a corporation created by an act of the legislature, approved March 6, 1854. Its location, and that of most of its property, is within the city of Louisville. Its business is to furnish water to the citizens of Louisville and vicinity, for which it charges rates based upon the quantity of water used. Many years ago the city, by authority conferred by the legislature and exercised by the city council, subscribed and otherwise acquired the great majority of the capital stock of the corporation, and now owns all of the stock. This stock is owned by the sinking fund commissioners of the city. The water company owes a large bonded debt, secured by mortgage on its plant. The income of the water company is used to pay the expenses of operating and maintaining the plant, then to pay the interest on its bonded debt, and then to provide a sinking fund for the ultimate payment of its debt. Rates to consumers are fixed so as to meet these fixed charges. No dividends are paid on the stock. The plan is and has been to operate the plant so as to place the price of water to consumers at the lowest possible figure. As the net income increases, rates are lowered. The contention of the water company in these cases is, that as the city owns all the stock, it in effect owns the plant; that to tax the plant is to tax the city, which it must pay by levying and collecting other taxes from its taxpayers, thus doing the absurd thing of going to the trouble and expense of taking money from one pocket to put it in the other.

It is not true in law that the owner of all the stock of a corporation owns the property of the corporation. (Dartmoth College v. Woodward, 4 Wheat, 518; Fietsam v. Hay, 22 Ill., 293; 3 Am. State Rep., 492; People v. Watertown, 1 Hill, N. Y., 616; State v. Standard Oil Co., 49 Ohio St., 137, 34 Am. St. Rep., 541.)

Even if there was not the weight of authority for the last statement, the city would scarcely want to take the full effect of its contention; for if it did, then it would follow that the company's debt was the city's debt; adding the bonded debt of the water company of about one and one-half millions to the city's other authorized debt might operate to invalidate some of its recent bond issues. If upon a foreclosure of the mortgage upon the water plant it was insufficient to pay the bonded debt, the city would not care to

e bound for the balance because it happened to own all the debtor corpora-
on's stock.

There is another fallacy in appellee's position: This is not an effort to tax
ne capital stock or shares of the water company. If it were, then the ques-
on would be here whether the city could tax its own property for its own
ses. There is a marked distinction, though, between taxing the property
a corporation, and taxing its shares of stock. (Cook on Stock and Stock-
olders, sections 7, 567; Bank of Commerce v. Tennessee, 161 U. S., 146;
ennessee v. Whitworth, 117 U. S., 129.) Cases from other jurisdictions are
ted as authority for the proposition that a municipality can not tax its
wn property for city purposes. Strictly these cases are made to turn upon
ne legislative intent, as, in our opinion, this one must also turn. It is
enerally held that unless expressly authorized or directed by statute, it
ill not be considered that a municipality was authorized or required to list
s own property for taxation for its own purposes.

If it be conceded that taxing the plant of the water company, all the
ares of which are owned by the city, is indirectly a taxing by the city of
s own property, it brings us directly to consider the source of appellants'
ower and the extent of its duty to tax alike all property within its jurisdic-
on.

Section 171 of the Constitution of this State requires that taxes "shall be
niform upon all property subject to taxation within the territorial limits
the authority levying the tax, and all taxes shall be levied and collected
general laws."

Section 170 of the same instrument creates and limits the exemptions from
xation. It provides: "There shall be exempt from taxation public property
sed for public purposes." This is the only reference to property owned by
municipality. Property owned by or on behalf of the public, but not used
r public purposes, is not exempt. "The express mention of one thing im-
lies the exclusion of another" That the water company, if owned by the
ty, is public property, is not questioned. But, although its stock is owned
the city, and the property is used in supplying the citizens water, the
aterworks are not "used for public purposes," within the meaning of sec-
on 170, supra, and are subject to taxation for State and county purposes.
City of Louisville v. Commonwealth, 1 Duv., 295; Negley, Sheriff v. City of
enderson, 21 Ky. Law Rep., 1394; Same v. Same, 22 Ky. Law Rep., 912;
lark, Sheriff v. Louisville Water Co., 90 Ky., 522.) In the case last cited this
ourt said, in speaking of the dual character of a city's government, and of
roperty owned by it: "A municipal corporation has a double character. In
ne it acts strictly in its governmental capacity. In the other for the profit or
onvenience of its citizens. Considered in the latter light, it occupies the at-
tude of a private corporation merely, while in the former it is an arm of the
tate government, or a part of its political power. It is an imperium in
nperio. The property necessary to the exercise of those duties which are
rictly governmental is exempt from taxation, but this is not so of that
hich is held by the municipality for the comfort of its citizens, individually
collectively, or for money-making purposes merely."

Following the requirement of section 171 of the Constitution, which de-
nes property subject to taxation for State purposes, the statute is (section

4020, Kentucky Statutes): "All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempted from taxation by the Constitution."

Louisville, a city of the first class, gets its authority for levying and collecting taxes under section 2980, Kentucky Statutes, in which is this provision: "Each city shall raise a revenue from ad valorem taxes, and a poll tax and license fees, and to that end the common council of each city is hereby authorized and empowered to provide each year, by ordinance, for the assessment of all real and personal estate within the corporate limits thereof subject to taxation for State purposes, and shall levy an ad valorem tax on same, not exceeding," etc.

By ordinances duly adopted for each of the years in question, the city levied an ad valorem tax upon "all lands, improvements, personalty and franchises subject to taxation in the city of Louisville."

These ordinances were comprehensive enough to embrace the property of the Louisville Water Co., if it would cover the property of any corporation subject to taxation within the city. It was not necessary to set out each piece of property, or the names of the owners, in the levy ordinance. The office of that ordinance was to fix the rate of taxation. Its subjects had already been fixed by the statute and the Constitution.

Thus we find an express authority for the city's levying this tax. It is made as clear as language could make it, without enumerating the particular property, or its owners. We might leave the case with this statement. But counsel have laid such earnest stress upon the proposition that the act of collecting this tax would be a foolish enterprise, taxing the city's property to support the city government, and, therefore, presumably not within the contemplation of the constitutional convention or the legislature in enacting the provisions above quoted, that we will notice briefly why the convention who framed the Constitution may have employed both the language and the thought we find in the exemption clause quoted from section 170, with the full purpose of having it applied as is here done. Probably the most prominent feature of the present Constitution is its effort to equalize the burdens of government upon all who enjoy its privileges. Class legislation, and special exemptions and rights which amount to that, are strictly forbidden, and guarded against. To grant the exemption claimed by appellee, even if we could by implication enlarge the exemption clause of the Constitution, would of itself work an unjust discrimination in favor of some and against others of the citizens of Louisville who are taxpayers.

It has already been noticed that the water company maintains a separate corporate existence, as if the city owned none of its stock. Only those who consume its water pay for it. Many thousands of citizens who are taxpayers do not patronize the water company at all, but depend for their water supply on private wells and cisterns, or upon the public wells. If the water company is compelled to pay a municipal tax, it must collect the money with which to pay it, not by taxation, but from its water rates—from its

ustomers. This will result in those who use that water paying a slightly ncreased rate for it. It may be well supposed that many manufacturing oncerns, the owners of improved property, and the wealthy generally, are atrons of the water company. If the water company were not compelled o pay taxes to the city. it would need just that much less revenue from its ustomers. If this were all, it would not be so bad, though it could scarcely e said that it is just to tax everybody to buy a water plant which less than ll have the whole benefit of. But that is not all. For, the city is com-elled to raise annually by ad valorem taxation so much money to support ts fire department, its public parks, its schools, and its government gen-rally. If one class of property escapes taxation, to the extent of its value ll other classes that are taxed must bear the additional burden. Therefore, f appellee water company is not taxed by the city, an equivalent in the axes it would pay must be paid by other property and citizens. So that hose who do not, by reason of the location or nature of their property or or other cause, patronize the water company, have to pay an additional tax o maintain the city government, in order that those who do patronize the vater company may have cheap water; that would amount to the taking of ne person's property or the benefit of another. If the water company pays axes as other corporations are compelled to do, their sum will be appor-ioned among the various funds, e. g., a certain per cent. for school purposes, o much for police, and so on Thereby those who get the benefit of the vaterworks will contribute to it in rates, in the proportion they use the vater, enabling it to pay all its fixed charges, including taxes. If water vas furnished to everybody alike, by the city, as it does police and fire pro-ection, and the use of its streets, parks and schools, it would be just and roper that the waterworks should be maintained by general taxation, as re the public agencies and institutions named. In that event it would be ruly an idle thing for the city to collect taxes from its water company. The line of thought just presented brings us to this further proposition: If t were not contemplated that a city's property not used for public purposes, ut used as a private corporation, was not to be taxed by the city, on the round that the city would be thereby indirectly taxing itself, and that uch a thing is not to be thought of, then it would follow that if the city wned less than all the capital stock of any corporation within its limits, it hould not tax that corporation; at least, to the extent that it owned stock n it. This would result in the city's not taxing the gas company if it owns tock in it, as it doubtless does. And if its sinking fund commissioners ave invested part of the sinking fund in the stock of a bank within the ity, or in city railway stock, the property of those concerns ought not to e taxed, at least to the extent of the citys' stock. It is a historical fact hat certain of the State's sinking funds have for many years been invested n the shares of certain banks and other corporations in this State. It has ot been urged that on that account those institutions were exempt from tate taxes to any extent. The reason is obvious. Its application and the nalogy to the case in hand are equally clear.

The record discloses that for many years prior to the period of the default, ppellee water company had paid taxes to the city, and charged the city ontract rates for water furnished its various departments. The last con-

tract does not seem to have been renewed, although some of the departments, notably the city schools and park board have been paying their water rates to the water company as heretofore. So long as the water company maintains a separate corporate existence, owning its corporate property and exercising its franchises, it ought to be managed and maintained as a separate concern, dealing at arm's length with the city on business principles as other corporations in which the city owns an interest, deal with it. No inequality among, nor injustice to the taxpayers can then occur from the city's operating this private corporation for the benefit, mainly, of those who can pay for its service.

In this suit the city should credit upon appellee's tax bills the reasonable price of the water it has used for the years for which the tax is being asserted, and for which it may not have paid. The basis of this credit should be upon just such terms as the court may find from evidence, if the parties can not agree upon it. Credit should be given on the city's tax bills for each year's water rents so as to avoid penalties and interest, so far as such water rents may go to extinguish the annual bills.

For the reasons indicated the judgment of the circuit court in the suit against McAteer, &c., refusing the mandamus against the board of equalization to compel them to pass upon the assessment of the water company's property as returned by the assessor, and the judgment of the circuit court in the franchise tax case, dismissing the city's petition, are each reversed, and they are remanded for proceedings consistent herewith.

Whole court sitting.

Judges Paynter and Hobson dissenting.

CARPENTER, &c. v. TOWN OF CENTRAL COVINGTON.

(Filed June 18, 1904.)

1. Taxation—Special act—Road district—Turnpikes — Construction —Indebtedness—Fiscal court—Authority—Where a special act was passed in 1890, creating a road district in Kenton county, which was not to be operative in certain towns therein, and providing for the issuing of bonds to pay for the building of turnpikes therein, the bonds to be paid by taxation, one-half by the taxpayers owning property within one mile of the pike, and the other half by the balance of the county outside of the exempted towns, the fiscal court of Kenton county, under the present Constitution and Statutes, has the right to levy a tax on the respective districts named in the act, to pay said indebtedness.

2. Uniform taxation—Separate tax on each district—The fiscal court has no right to refuse to levy a separate tax on the road district for its half of the indebtedness, and instead, levy the whole sum on the county outside of the exempted towns, where, by the act, one-half of the burden should have been borne by the road district in which the turnpike was built. The requirement of section 171 of the Constitution means, that all taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax.

3. Levy—Specifications—Purpose — Territory—Constitutionality—The authorities in levying the tax must specify the purpose for which it is levied; and when only a special district is liable for the tax, the levy should be so made as to indicate the territory on which it is to be made. In this way

inct levies may be made by the same municipal authorities on different
ricts, when necessary to meet their obligations, and there is nothing in
Constitution forbidding this to be done.

Same—Bonds—The fact that under Kentucky Statutes, section 914, new
ds have been issued by the Kenton county authorities for the old bonds
t were issued under the act of 1890, payable in thirty years, does not in-
idate the new bonds, and the taxes authorized by the act of 1890, must
evied on the districts named in said act to pay the new bonds.

Extending town boundary—Effect on territory admitted—Since the
ption of the present Constitution, the town of Central Covington which
xempt from paying the turnpike tax by the act of 1890, has extended its
its under Kentucky Statutes, section 3664, taking in the property of the
ellants which lay outside of any of the road districts, but within Kenton
nty, and appellants claim that as the town had annexed them and they
e required to pay town taxes, the town must assume their liability for
turnpike tax. Held—That the town of Central Covington was expressly
mpted by the act of 1890 from its operation; and when appellant's prop-
y was annexed to said town it became a part thereof for all purposes,
l, as to all liabilities thereafter created, stood just like the rest of the
n. It is not liable, therefore, to taxation for the construction of a pike
dertaken after the annexation, although it is liable for taxation for all
se undertaken before its annexation. The territory annexed, being unin-
porated territory, the town of Central Covington assumed no obligation
annexing it under the statute.

A. G. Simrall, R. B. Holmes and Sydney Arthur for appellants.

O. P. Schmidt for town of Central Covington.

W. H. Mackoy, R. B. Holmes and F. M. Tracy for Kenton County.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

By an act of May 13, 1890, the general assembly made all of Kenton county
tside of the cities of Covington, Central Covington, West Covington and
dlow, a district for the construction of turnpikes. The provisions of the
t were not operative within the limits of the cities named, but applied to
the rest of the county. The act allowed the creation of a road district
the construction of a turnpike road to extend on each side one mile
m the proposed road. It required the road and district benefited to be
rveyed, and the persons owning property therein to be ascertained. When
e cost of construction was determined, the board of county commissioners
s required to issue ten bonds of the county of equal amounts for the
gregate cost of the pike, payable in one, two, three, four, five, six, seven,
ght, nine and ten years respectively, to be sold for not less than par, and
e proceeds to be applied to pay for the construction of the road. The
unty commissioners were required annually for ten years to levy a tax on
property in the road district liable for assessment for State taxation,
fficient to pay one-half of the bond and one-half of the interest on the
nds due the following year. They were also required to levy annually for
n years a tax upon all the property in Kenton county outside of the cities
med, sufficient to pay the other half of the bonds as they fell due and the
terest on the bonds. After the act went into effect a number of turnpikes
ere built in Kenton county under its provisions, and bonds to pay for them

were issued and sold as provided in the act. Subsequent to this, and after the new Constitution took effect, the town of Central Covington, extended its limits under section 3664, Kentucky Statutes, taking in appellants' property which lay outside of any of the road districts, but within Kenton county, and outside of the cities excepted from the operation of the act. Appellants then brought this suit against the town of Central Covington upon the idea that, as the town had annexed them and they were required to pay town taxes, the town must assume their liability for the turnpike tax. The question turns upon the proper construction of the statute, which is as follows: "The judgment shall, when entered, be certified to the legislative board of the city, who may thereupon annex to or strike from the city or town the territory described in the judgment, and such territory shall become, or cease to become, as the case amy be, a part of the town. But the persons owning the territory so annexed, nor the territory, shall be liable for any indebtedness of said town created prior to said annexation, nor shall any town assess or collect taxes on said property in said territory to pay any part of said indebtedness or liability." (Section 3666, Kentucky Statutes.)

"If any incorporated town be annexed to another, the town annexing the territory of another shall be bound for all debts and liabilities, and shall be the owner of all the corporate property, franchises and rights of such municipal corporation." (Section 3667, Kentucky Statutes.)

As the town has the option whether or not it will annex the territory sought to be taken in, it is provided that such territory shall not be liable for the payment of any indebtedness or liability created prior to the annexation; for it would be unjust to allow a town to create a debt and after it had received the benefit of the expenditure, annexed other territory against its consent and thus impose on it a liability for indebtedness already incurred. It is also provided that if an incorporated town be annexed to another, the town so annexing the other shall be bound for all its debts and liabilities and shall be the owner of all its corporate property. But this provision only applies where the existence of one corporation is merged in the other, and as the annexing town has the option to annex or not, it may not take in the other town where it is unwilling to assume its liabilities. This provision has no application where unincorporated territory is taken in by annexation. It only applies to the corporate debts and corporate property of "such municipal corporation" where one corporation is taken into another. The territory annexed in this case was unincorporated, and, therefore, the town of Central Covington assumed no obligation in annexing it under the statute. But it is insisted that the statute is in conflict with section 171 of the Constitution. This brings us to the second point raised in the case which will now be considered, in determining the meaning of section 171 of the Constitution.

After the present Constitution took effect, the county authorities of Kenton county, on the idea that all taxes levied by them must be uniform within the territorial limits of their authority, ceased to levy any taxes on the road districts in which the turnpikes were built, and levied the entire tax on the county of Kenton outside of the cities named. This placed upon appellants' property, which was not within any of the road districts, the

ntire burden of the tax to pay the bonds; whereas by the act of 1890, under vhich the debt was created, one-half of the burden should have been borne by the road district in which the turnpike was built. Appellants complain of this increase of their burdens and it is insisted for appellees that section 171 of the Constitution required the county authorities to follow the plan they pursued. That section is as follows: "The general assembly shall provide by law an annual tax which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

It is reasonably clear from the Constitution that it was not intended by its makers to affect in any way indebtedness already incurred, or obligations already assumed by any of the municipalities of the State. In section 158, limiting the indebtedness of municipal corporations there is this proviso: "Provided any city, town, county, taxing district or other municipality may contract an indebtedness in excess of such limitation when the same has been authorized under laws in force prior to the adoption of this Constitution, or when necessary for the completion of and payment for a public improvement undertaken and not completed and paid for at the time of the adoption of this Constitution."

By section 2 of the schedule all obligations and other instruments entered into before the adoption of the Constitution to the State or any subdivision thereof, and all actions and causes of action, except as therein provided, shall continue and remain unaffected by the adoption of the Constitution. The act of May 13, 1890, had been submitted to the people and had been put into operation by a majority vote. By it, as shown, one-half the liability was placed on the road district and one half on the county district. There is nothing in the Constitution evincing a purpose to shift the obligation of one district to the other; on the contrary, it carefully takes away from the officers of municipalities the power to incur liabilities beyond the income or revenue of each year, without a vote of the people; and under its provisions the county of Kenton could not, without popular consent, assume the liability of the road districts. Among other things, section 157 provides: "No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amonut exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same."

But aside from all this, the requirement of section 171 that taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, has no such meaning as supposed. In the case before us if the act of 1890 had directed that the bonds of the road district should be issued for one-half the cost of the pike, and the bonds of the

county for the other half; that the county commissioners should make a levy on the taxable property of the road district to meet its bonds; and that they should make a similar levy on the property of the county to meet its bonds: the case would not be in substance different from that presented; for the obligation of the road district to pay one-half the debt is just as clear as if different bonds in fact had been issued. The road district is created by the act a quasi corporation and as such owed one-half the debt. The fact that the bonds were all issued in the name of the county was a mere matter of form, not affecting the substance of the transaction. If several districts of a county become indebted and issue bonds, a tax may be levied on these districts to pay the debt which they owe, although a similar tax is not levied on other parts of the county which do not owe the debt. The reason is that only property in these districts is subject to taxation for the purposes of these debts and the constitutional requirement is only that taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax. In levying such a tax the county authorities act as the representatives of the people within the district which created the debt and the tax is uniform on all of them and on all property subject to taxation within the limits of the district. When, therefore, a town boundary is contracted the town authorities may still levy a tax on the old boundary for the debts created and at the same time levy in addition other taxes for current expenses and the like on the boundary left within the town. In the same way when a town boundary is extended tax to pay the existing indebtedness must be levied upon the old boundary. In other words, taxes for a specific purpose may be levied on the property which is taxable for that purpose and must be uniform throughout the district which is liable for the tax. But there is nothing in the Constitution to require that a municipality as a whole must levy taxes on the property of its entire territory to pay a debt for which the property in only one district of it is legally taxable. In section 180 of the Constitution it is provided: "Every act enacted by the general assembly, and every ordinance and resolution passed by any county, city, town or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied; and no tax levied and collected for one purpose shall ever be devoted to another purpose."

The purpose of this provision is to protect the people in such states of case as above indicated. The authorities levying the tax must specify the purpose for which it is levied, and when only a special district is liable for the tax, the levy should be so made as to indicate the territory on which it is levied. In this way distinct levies may be made by the same municipal authorities on different districts when necessary to meet their obligations, and there is nothing in the Constitution forbidding this to be done. (Board of Education v. Louisville, &c., Ry. Co., 23 Ky. Law Rep., 376; Chambers v. Adair, 23 Ky. Law Rep., 373.)

We, therefore, conclude that the statute above quoted as to the liabilities of the town when territory is annexed is constitutional, and that the course pursued by the Kenton county authorities in levying the tax to pay the bonds entirely on the county district, was unauthorized. The act of May 13, 1890, is still in force. In O'Mahoney v. Bullock, 97 Ky., 774, this court had

fore it the question whether a similar local act of May 8, 1890, for the ben-
it of Fayette county was in force, and it was held that the act was not re-
aled by the new Constitution, or by the acts passed in 1892, 1893 and 1894.
Pierce v Mason County, 99 Ky., 357, the same question was presented as
a similar act in force in Mason county, and it was again held that such
cal legislation was still in force. In that case the court said: "In order
at no inconvenience might arise by reason of the alterations and amend-
ents of the law by that instrument, it was deemed proper to provide that
e Constitution left in force all laws of the Commonwealth with which it
as not inconsistent. This provision, instead of emphasizing the alleged
licy of hostility to existing special legislation, expressly continued it in
rce unless inconsistent with the Constitution; and when it is admitted or
comes manifest that a local or special act is not inconsistent with the
nstitution, and has not been repealed by a general law, the question is
ttled and the law stands. The positive mandate is against local and
ecial legislation in the future, and, even if we concede that the Constitu-
on breathes a spirit of hostility to past legislation of that class, it is ex-
essly continued in force until repealed in the manner we have heretofore
inted out."

The only legislation on the subject since these decisions were rendered is
e "act to provide free turnpike and gravel roads," approved March 17,
96, the last section of which contains these words: "This act shall not re-
al any local act or acts for any county or counties in this Commonwealth
hich have been heretofore passed in aid of free turnpikes, but shall be an
dition thereto." (Acts 1896, page 46.)

The legislature thus plainly left in force all local acts on the subject. In
chardson v. Boske, 23 Ky. Law Rep., 1209, and the other cases following
we had before us different statutory provisions, and it was held that the
w legislation repealed the old provisions; but that conclusion can not be
stained here as the old legislation is expressly left in force. But the act
May 8, 1890, expressly excepted out of its operation the town of Central
vington, and when appellants' property was annexed to the town it
ame a part of the town for all purposes, and as to all liabilities there-
er created stood just like the rest of the town. It is not liable, therefore,
taxation for the construction of a pike undertaken after the annexation,
hough it is liable to taxation for all those undertaken before its annexa-
n. The annexation of the territory to the town did not affect its existing
bilities, but by its annexation it was taken into a municipality in which
act of 1890 was not operative and, therefore, it is not subject, under that
, to taxation where no liability had attached before its annexation. After
annexation to the town it must pay taxes for municipal purposes and it
not thereafter be made liable for improvements subsequently under-
en in the county district under an act which is not operative as to it.

Section 914, Kentucky Statutes, provides: "Whenever any county, under
s heretofore enacted, has issued bonds for turnpike road purposes, such
nty may issue bonds in lieu thereof to mature in not more than thirty
rs after their date, and bearing interest at not greater rate than such
nds already issued; and any new bonds hereafter issued by any county for
h purposes under such laws may be made to mature in like manner and
r such interest.

"Taxes authorized by such laws heretofore enacted may be levied and collected as may be necessary to pay bonds or interest thereon issued as provided in this act. But this act shall not affect any law under which bonds for turnpike purposes are authorized to be issued, having a longer time than thirty years from their dates to mature."

After the passage of this statute the Kenton county authorities issued bonds under it, payable in thirty years, and took in the bonds issued under the act of 1890. It is insisted that this was unauthorized. But the bonds issued under the act of 1890 had been issued by Kenton county and were county bonds within the meaning of the statute quoted. We, therefore, conclude that the new bonds are valid, but that taxes authorized by the act of 189) must be levied and collected to pay the new bonds. The only purpose of the statute was to authorize bonds issued for a longer time. The second clause evinces a clear purpose not to change the burden of taxation in any way. (Catlettsburg v. Self, 25 Ky. Law Rep., 164.)

The board of commissioners of Kenton county have been abolished and their duties have been imposed upon the fiscal court. The fiscal court may, therefore, make such levies or perform such duties as the board of commissioners might have made or performed under the original act. The appellants have not been guilty of laches barring them of relief in equity. In so far as they have paid taxes they are without remedy, but each year's tax is a separate cause of action and the payment of the tax for one year does not bar the right to contest that for another year. The court should ascertain on final hearing how much of the taxes sued for, appellants should pay. In the condition of affairs they are not required to make a tender of any amount, as they can not know how much they are required to tender. A man is not required to make a tender in a case of this sort in order to obtain an injunction where he is unable to know how much he owes.

The judgment dismissing the petition as to the town of Central Covington is affirmed, but the judgment in favor of Kenton county is reversed, and on the return of the case to the circuit court the sheriff of the county and the members of the fiscal court will be made defendants to the action by an amended petition to be filed by the plaintiffs, and the court will, on final hearing enter such orders and judgments as will direct the officers in the discharge of their duties, and ascertain and determine how much of the taxes in controversy plaintiff should pay under the principles above indicated, and require the money paid to the sheriff.

WHEATLEY v. COMMONWEALTH.

(Filed June 18, 1904—Not to be reported.)

1. Homicide—Instructions—Malice—Shooting at one and killing another—Where the defendant in shooting at D., with whom he was engaged in a difficulty, but missed D. and killed W., who was a bystander, an instruction telling the jury that in order to find the defendant guilty of murder it was necessary for them to believe that appellant had malice toward and shot at W., was erroneous.

2. Same—Willful or intentional killing—Where, in an indictment against defendant for killing W., who was a bystander, and was killed by a shot in-

tended for D., it was a prejudicial error in the instruction of the court, to require the jury to find that appellant shot at and killed W. in a sudden affray with him, or as the result of sudden heat and passion entertained by appellant toward W., whereas the sudden heat and passion, if any, which superinduced the shooting was entertained toward D. for whom the ball was intended that killed W. This instruction was further erroneous in that it omitted to tell the jury that in order to convict appellant of voluntary manslaughter, the killing must have been willful or intentional; that is, appellant must have purposely shot at D. when he fired the shot that killed W. and by killing W. he is liable to the same extent as though he had killed D.

3. Self-defense—Where appellant admits that he began the difficulty with D. by throwing a rock at him, and denies that he shot at D., or at all, or that he had a pistol, there is nothing upon which to base an instruction for self-defense and none should have been given.

Irwin & Irwin and R. L. Stith for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Hardin Circuit Circuit Court.

Opinion of the court by Judge Settle.

Appellant was indicted in the court below for the murder of Wallace Wintersmith, but upon being tried he was convicted of voluntary manslaughter, and his punishment fixed, by verdict of the jury and judgment of the court, at confinement in the penitentiary for twenty-one years. From that judgment this appeal is prosecuted.

Only two of the numerous grounds for a new trial urged by appellant in the court below are now relied on by his counsel for a reversal, viz.: First, that the court erred in the instructions given the jury; second, in failing to give an instruction upon the law of self-defense. In determining the soundness or unsoundness of these contentions, recourse must be had to the evidence adduced at the trial. The evidence conduces to show that appellant began a difficulty on the streets of Elizabethtown with one Gus Dowell by throwing a rock at him. Appellant himself admits that fact, and one witness testified to having heard appellant make a threat against Dowell, on a previous occasion. According to the evidence the shooting and killing of Wintersmith occurred immediately following the throwing of the rock by appellant at Dowell. As to whether the shooting was done by appellant or Dowell the evidence was conflicting, that of the Commonwealth conducing to prove that the shooting was done by appellant. Upon the other hand the evidence introduced by appellant, including his own testimony, tends to show that it was done by Dowell. But the contention of the Commonwealth that the shooting was done altogether by appellant and at Dowell is supported by the greater number of witnesses. There is no doubt from the evidence that one of the shots fired on that occasion struck and killed Wintersmith, a disinterested and unoffending party who was on his way from a "merry-go-round" that was being operated in the neighborhood. He was shot from the left side and behind, the ball ranging forward, and was at the time not far from a line between Dowell and appellant, who were about forty-five feet apart. The position of Wintersmith, about which there is no dispute, as well as the manner in which the bullet entered his body, made it

impossible for Dowell, who was in front of him, to have shot him. It does not appear from the evidence that either appellant or Dowell had anything against Wintersmith, and the only reason that can be assigned for his being shot, is that appellant in the dark (it was then night) either mistook him for Dowell, or in attempting to shoot the latter missed him, and by accident shot and killed Wintersmith.

From the foregoing facts it is manifest that appellant was not entitled to an instruction upon the law of self-defense. Such an instruction is never proper in the total absence of testimony upon which to base it. In this case there is absolutely no evidence tending to show that appellant acted in self-defense. In fact he denies that he shot at Dowell, or at all, or that he had on that occasion a pistol, and moreover, admits that he began the difficulty with Dowell by throwing a rock at him. There is no evidence conducing in any degree to show that after thus beginning the difficulty with Dowell, appellant, in good faith, or otherwise, abandoned or withdrew therefrom, or that after such withdrawal the difficulty was renewed by Dowell. Under no other state of case could appellant, after bringing on the difficulty, have availed himself of the right of self-defense.

We do not regard Morris v. Commonwealth, 20 Ky. Law Rep., 408, relied on by counsel for appellant, as an authority in point. It is true the Morris case was reversed because of the failure of the trial court to give an instruction on the law of self-defense, but an examination of that case will show that the facts are wholly unlike those of the case at bar. In that case, Philpot, after beginning a difficulty with Bundy, shot and killed him, in doing which Morris, who was the son-in-law of Bundy, according to the evidence of the Commonwealth, shot Philpot, who thereafter died of the wound.

The testimony of Morris and his witnesses tended to show that after Philpot shot Bundy, he turned and fired at Morris, who then attempted to shoot Philpot, but his pistol snapped and he did not do so, and that Philpot was in fact shot by Bundy after he was mortally wounded by Philpot. Upon the facts thus shown it was said by this court: "From the testimony of the appellant and his witnesses the defendant had a right to shoot Philpot in his own necessary defense. Defendant's testimony to the effect that he did not shoot Philpot does not deprive him of the right to have the jury instructed upon the question of his right to shoot Philpot in defense of Bundy. The jury might have believed the testimony introduced by the Commonwealth, that the appellant did fire the shot, and they might have further believed from the testimony in the case that he shot to save the life of Bundy, or in his own self defense. The evidence introduced by himself, independent of his testimony, is sufficient to require the court to give an instruction to the jury upon the question of his right to shoot to save the life of Bundy and in his self-defense."

We apprehend that no case can be found in which it has been held by a court of last resort that it is proper to give the defendant the benefit of the law of self-defense, upon such a state of facts as are found in this case. Of the instructions given by the trial court, No. 1 advised the jury as to the state of facts that would authorize them to find the appellant guilty of murder. It is, however, incorrect in so far as it told the jury that in order

to find appellant guilty of murder it was necessary for them to believe from the evidence, beyond a reasonable doubt, that he had malice toward, and shot at Wallace Wintersmith. There was nothing in the evidence conducing to show that appellant entertained either malice or anger toward Wintersmith, or that he shot at or intended to shoot him. Upon the contrary, if the shooting was the result of malice, Dowell was the person for whom he entertained the malice, and at whom he shot. But if in shooting at Dowell appellant missed him and shot and killed Wintersmith, the killing of the latter under such circumstances, if done with malice toward Dowell, and not in self-defense, was murder.

We would not be willing to reverse the judgment of the lower court for the error in the foregoing instruction alone, for it is apparent that it was not prejudicial to the appellant, as the jury did not find him guilty of murder as authorized by that instruction, but of voluntary manslaughter. We are of opinion, however, that instruction No. 2, which told the jury in what state of case they might find appellant guilty of voluntary manslaughter, was not only erroneous but prejudicial as well. Under this instruction, in order to make the killing of Wintersmith voluntary manslaughter, the jury were required to believe what the evidence shows was not true: that is that appellant shot at and killed Wintersmith in a sudden affray with him or as the result of sudden heat and passion entertained by appellant toward him. Whereas, the sudden heat and passion of appellant, if any such, superinduced the shooting, was entertained toward Dowell, for whom the ball that was received by Wintersmith was intended. This instruction contained a further prejudicial error, in that it omitted to tell the jury that in order to convict the appellant of voluntary manslaughter, the homicide must have been willful, or intentional. For to constitute that crime in this case, appellant must have willfully, that is, purposely, shot at Dowell, when he fired at him the shot that killed Wintersmith. Manifestly it is true that if appellant unlawfully and willfully, in a sudden affray, or in sudden heat and passion and not in his necessary or apparently necessary self-defense, shot at Dowell, but the shot intended for him hit and killed Wintersmith, he would be just as guilty of voluntary manslaughter as if he had shot and killed Dowell.

Voluntary manslaughter is "the unlawful, intentional killing of another without malice." (4 Blackstone, 192.)

In Montgomery v. Commonwealth, this court, in an opinion by Chief Justice Burnam, handed down June 14, 1904, (ante, 856), said: "It is essential to the commission of voluntary manslaughter that the homicide should have been intentionally committed." * * *

Instructions 3 and 4 seem to be correct. But in lieu of instructions 1 and 2, the lower court upon a retrial should give the following: If the jury believe from the evidence beyond a reasonable doubt, that the defendant, Wes. Wheatley, in Hardin county, and before the finding of the indictment, did unlawfully, willfully and feloniously, not in his necessary or apparently necessary self-defense, shoot at Gus Dowell with a pistol loaded with powder and leaden balls, but that the ball or balls so shot at said Dowell did miss him, and instead then and there strike and kill Wallace Wintersmith, they should find defendant guilty—that is guilty of murder, if they believe

from the evidence beyond a reasonable doubt that the shooting was done with malice aforethought. Or of voluntary manslaughter if they believe from the evidence beyond a reasonable doubt that it was done in a sudden affray, or in sudden heat and passion, and without previous malice.

If they find the defendant guilty of murder, the jury should fix his punishment at death or confinement in the penitentiary for life, in their discretion. But if they find him guilty of voluntary manslaughter, they should fix his punishment at confinement in the penitentiary not less than two, nor more than twenty-one years, in their discretion.

For the reasons indicated the judgment is reversed and cause remanded, with directions to the lower court to grant appellant a new trial, and for further proceedings consistent with the opinion.

Whole court sitting.

WILKERSON v. PHILLIPS, SUR. PART., &c.

(Filed June 18, 1904.)

1. Attachment—Interest of debtor in estate of decedent—Proceeding on nulla bona—Sufficiency of endorsement on summons and attachment—Lien created—In an action by a creditor against a debtor upon a return of nulla bona, alleging that a certain relative of the debtor had died, leaving him one of her next of kin and entitled by inheritance to a certain portion of her property, and that no personal representative had been appointed to administer the estate, and that in addition to the interest which the debtor took by inheritance, decedent held certain moneys and bonds to which the debtor was now entitled, and prayed for a judgment against him, and that he be restrained from disposing of any interest held by him in decedent's estate, and calling on him to answer and show what property or interest he had in the estate of said decedent. Summons and attachment were issued endorsed as follows: "The object of this action is to garnishee any funds or property in the estate, or possession of the estate of Mrs. C. B. McClure, deceased, belonging to R. L. McClure, and to restrain you and the personal representative of said decedent from paying over same to R. L. McClure, or any one for him, and to restrain him from disposing of same until the further order of the Warren Circuit Court." Copies of which were served on the debtor and also on the administrator who qualified after the filing of the petition. Held—That as against a subsequent attaching creditor the plaintiff in the first action was entitled to a prior lien on the interest of the debtor in the estate of said decedent, as the petition plainly recites that the purpose of the suit was to subject the interest of the debtor, R. L. McClure, in the estate of the decedent, Mrs. C. B. McClure. What that interest actually was, required a settlement of the estate of the decedent, and when this was ascertained the equitable lien of the plaintiff attached thereto.

J. G. Covington and J. B. Grider for appellant.

W. B. Gaines and Samuel D. Hines for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Burnam.

The issue in this case is the priority of liens between two attaching creditors of R. L. McClure. On the 5th day of September, 1902, the appellee, as surviving partner of H. C. Hines & Co., brought her action in the War-

rent Circuit Court against R. L. McClure, upon a return of nulla bona. After reciting her judgment and return of nulla bona endorsed on the execution which issued thereon, she alleged that on the —— day of September, 1902, Mrs. C. B. McClure had died a resident of Warren county, the owner of certain property, leaving the defendant, R. L. McClure, one of her next of kin and entitled by inheritance to a certain portion of the property; and that no personal representative had been appointed to administer the estate; that in addition to the interest which R. L. McClure took by inheritance, decedent held the possession of certain moneys, and bonds, to which he was now entitled, and prayed for a judgment against him, and that he be restrained from disposing of any interest held by him in decedent's estate, or any money or other property held by her or in her possession at the time of her death, and he was called upon to answer and show what property or interest he had in the estate of decedent. Summons and attachment issued, upon which were endorsed these words: "The object of this action is to garnishee any funds or property in the estate or possession of the estate of Mrs. C. B. McClure, deceased, belonging to R. L. McClure, and to restrain you and the personal representative of said decedent from paying over same to R. L. McClure, or any one for him and to restrain him from disposing of same until further order of the Warren Circuit Court."

Copies of these processes were served on R. L. McClure, and also upon J. C. Sims. R. L. McClure failed to answer, but on the 6th of October, 1902, James C. Sims filed an answer, in which he stated that he was not, at the time the order of attachment was served upon him, the personal representative of Mrs. C. B. McClure, but that he had in his hands $118.25, which belonged to the estate. On the 26th of November, 1903, he filed an additional answer, in which he stated that on the 16th of October, 1902, he had been duly appointed and had qualified as administrator of the estate of Mrs. C. B. McClure, deceased, and that he had in his hands due to the defendant, R. L. McClure, from the estate of Mrs. C. B. McClure, $537.13, as shown by his settlement as administrator on the 20th of October, 1902. The appellant, James H. Wilkerson, on the 20th of October, 1902, after J. C. Sims had been appointed and qualified as administrator of Mrs. C. B. McClure, filed his petition in equity in the Warren Circuit Court against R. L. McClure and J. C. Sims, administrator, to enforce the payment of four promissory notes executed to him by R. L. McClure for $250 each, and at the same time took out a general attachment against the interest of R. L. McClure in the estate of Mrs. C. B. McClure, which was served upon R. L. McClure and Sims, as administrator. J. C. Sims filed an answer in the suit of Wilkerson v. R. L. McClure, similar to that filed in the action of Mrs. Phillips. The cases were consolidated by order of the circuit court and heard together, and a judgment rendered giving Mrs. Phillips a prior lien upon the interest of R. L. McClure, and Wilkerson has appealed, and asks a reversal of the judgment of the lower court upon the ground that the interest of R. L. McClure in the estate of C. B. McClure sought to be subjected by the appellee, Phillips, was not described in the petition, with sufficient accuracy and certainty as to create a lis pendens lien upon the funds sought to be subjected.

As a general proposition, the doctrine of notice by lis pendens only extends to equitable suits which involve the title to land, or which are brought

to establish an equitable estate, interest or right in land, or to enforce a lien, incumbrance or charge thereon; and does not extend to suits concerning personal property, as there is no necessity for invoking the rule in such litigation under ordinary circumstances. (Pomeroy's Equity Jurisprudence, sections 635 and 636.) But this court in a number of opinions has recognized the right of a creditor by petition in equity to subject a known and described equity and hold this remedy is unaffected by sections 439 and 442 of the Civil Code. In Parsons v. Meyburg, &c., 62 Ky., 207, the court said: "It seems to this court that the provision of the Code regulating proceedings and attachment on bills of discovery and subjection of property after the return of 'no property' on an execution, do not apply to a petition in equity for the subjection of an equity known and described, or for enforcing an equitable lien. Any such proceeding in rem operates as a lien without a formal attachment. And consequently, the pre-existing law authorizing and regulating such proceedings is not inconsistent with the modern law regulating attachments. Wherefore, the common law lien of the appellees, who first sued in rem, was superior to the subsequent attachment lien of appellants."

This case was followed by Murphy, &c. v. Cochran's Trustee, 80 Ky., 289, in which it was said: "In an action on a return of no property, where the proceeding is to subject property specifically described, no attachment levy is necessary to give a lien as against the defendant in the action. The lien is an incident to such a proceeding in equity, and independent of the Code.

"Section 442 of the Code was not intended to interfere with such liens, but to enlarge the power of a court of equity in the subjection of property to the satisfaction of an ascertained debt, where a proceeding for discovery is necessary. In such case a general attachment may be issued, the levy of which will create a lien; or a lien may be created by the service of a summons, with the object of the action indorsed thereon, on the person holding or controlling the defendant's property. In this case the main object of the action being to subject the property in controversy, and it being sufficiently described in order to identification, an equitable lien was created as against the debtor by the filing of the petition and service of summons."

It is not necessary that the petition should describe specifically each bond, note or chose in action in which the estate is invested. The averments of the bill must, however, be so definite that any one on reading it, can learn what property was intended to be made the subject of the litigation.

In this case the petition plainly recites that the purpose of the suit was to subject the interest of R. L. McClure in the estate of Mrs. C. B. McClure, deceased. What that interest actually was, required a settlement of the estate of decedent, and when this was ascertained, the equitable lien of appellee attached thereto. As the judgment of the chancellor is in conformity with this view, it is affirmed.

MULLINS v. MULLINS.

(Filed June 18, 1904—Not to be reported).

Motion to supply record--Action submitted—Jurisdiction of court—This court has no jurisdiction upon the motion of a party to the record to set aside an order of submission of a case in order that certain affidavits may

iled, for the purpose of showing that processes were issued and executed
n the appellants in this case, in a former suit, but which are not copied
the record. If, as a matter of fact, the alleged missing papers were
a part of the record, their omisson should be shown and supplied by a
eeding in the Letcher Circuit Court.

. P. Lincoln for appellant.

ager & Stewart and R. L. Greene for appellee.

peal from Letcher Circuit Court.

inion of the court by Chief Justice Burnam.

esrs. Hager & Stewart, claiming to represent the grantee of the lands
ted by the appeal herein, although not a party to this proceeding, were
nitted as amicus curia to file a brief herein. They now ask the court to
side the submission of the case and permit them to file certain affidavits
e present and former clerk of the Letcher Circuit Court, and of D. D.
ds, for the purpose of showing that processes were issued and executed
the appellants in this case in a former suit, but which are not copied
the record. If, as a matter of fact, the alleged missing papers were ever a
of the record, their omission should be shown and supplied by a pro-
ing in the Letcher Circuit Court. This court has no jurisdicion to take
steps even if the motion were made by a party to the record.
r reason indicated the motion to file the affidavits is overruled.

SIMS, &c., BY, &c. v. SKINNER'S EX'OR, &c.

(Filed June 18, 1904.)

lls—Construction—Devise to daughter and her children—On January
897, Richard E. Skinner made his will as follows: "I give and bequeath
y daughter, Ida A. Skinner Sims, and her children, all of my property,
personal and mixed." At the date of the will, testator was a widower
Mrs. Sims was his only child, and she then had but one child. At his
she had four living children aged eight, six, four and two years. He
eal estate worth $30,000 and personalty worth $20,000. In an action for
struction of the will, the chancellor held that Mrs. Sims took a life
e in all the property, with remainder to her children living at the time
e death of the testator, and such other afterborn children as she might
after have, with the right in her to receive the rents and profits from
state devised. Held—That this judgment is correct and is affirmed.

rman Morris for appellants.

L. Stone for appellees.

peal from Jefferson Circuit Court, Chancery Branch, Second Division.

inion of the court by Chief Justice Burnam.

is action was brought by the appellees, H. H Sims, executor of the
of Richard E. Skinner, and his wife, Ida A. Sims, against the appel-
, Eugene Everett Sims, Harry Bruce Sims, Raymond Sims and Otis
, infant children of the appellees, H. H. and Ida Sims, to obtain a con-
tion of the will of Richard Skinner, deceased, the father of Mrs. Sims,

which was duly probated by the Jefferson County Court on the 26th of January, 1904. The will reads as follows:

"January 25, 1897.

"I, Richard E Skinner, of the county of Jefferson, State of Kentucky, being of sound mind and disposing memory, do make my last will and testament in manner and form following: After all my just debts and funeral expenses have been paid, I give and bequeath to my daughter, Ida A. Skinner Sims, and her children, all of my property, real, personal and mixed. I appoint H. H. Sims sole executor of this my last will and testament without bond as I have confidence in him.

"This is in my own handwriting, and needs no witness. In testimony whereof I hereunto set my hand and seal, and publish and decree this to be my last will and testament.

"This January 25th, in the year of our Lord, one thousand, eight hundred and ninety-seven.

(Signed) "RICHARD E. SKINNER."

It is alleged in the petition that testator, at the date of the will, and also at the time of his death, was a widower; and that the plaintiff, Mrs. Sims, was his only child; that at the death of testator and the probate of his will, she had four living children, aged respectively eight, six, four and two years; that the estate left by testator consisted of real estate situated in Jefferson county of the value of about $30,000, and personal estate of the value of about $20,000; that Mrs. Sims at the date of the will in January, 1897, was a young married woman with one child. It is also alleged that under the will, the plaintiff, Mrs. Ida Sims, took an estate for life in all the property of testator, with remainder in fee to her children, and asked that the court might so adjudge. A guardian ad litem was appointed to represent the infant defendants, who filed a general demurrer to the petition, which was overruled, and it was adjudged by the chancellor that Mrs. Sims took a life estate in all the property disposed of by the will, with remainder to her children living at the time of the death of testator, and such other afterborn children as she might thereafter have, with right in Mrs. Sims during her life to receive the rents, income and profits from the estate devised. The guardian ad litem has brought the case up for review, and insists that it was the intention of testator to devise his estate to his daughter and, her four children living at the time of his death, jointly.

In Koenig, &c. v. Craft, &c., 9 Ky. Law Rep., 945, a testator devised all of his estate to "his wife and her only child's sole use and benefit." These words were held to vest a life estate in the wife, with remainder to the child. In that case this court said: "While gifts and conveyances to a wife and child, under the ordinary rule would create a joint tenancy, the courts in the construction of such instruments, when executed by the husband to the wife and children, are always inclined to consider the instrument as creating an estate for life in the wife, with remainder to the child; and where there is any language used in the instrument from which an inference of such intention appears, the chancellor will decline to follow the ordinary rule making them joint tenants."

In Mefford v. Dougherty, 89 Ky., 58, the testator devised to his "son and to his children, the heirs of his body," a tract of land; and it was decided that the son took a life estate and his children a remainder. In Mitchell v.

on, 88 Ky., 125, the devise was to "my daughter and her bodily
" It was held that the words "bodily heirs," were used in the sense
dren, and that testator's daughter took a life estate, with remainder
children. In Adams v. Adams, 20 Ky. Law Rep., 655, the devise was
y daughter, Martha Jane Adams, and her children in their exclusive
' It was held that it was the intention of testator to give the whole
to his daughter for life, and at her death to her children. The court
"This seems to be the trend of modern decisions on the use of the
here involved. If a joint estate is given, the quantity of interest each
will remain uncertain and shift on the birth of each afterborn child.
such case the devise opens up for the benefit of all the children,
er in existence at the time the will speaks or not. It is hardly to be
ed that testator intended to create such an estate. Moreover, the
had in mind the restriction of his bounty to his daughter and her
en exclusively—a result more nearly accomplished by the construction
d, than by an immediate division of the estate."
le ordinarily, gifts and conveyances to a mother and her children, or a
and his, would create a joint tenancy, the decisions of this court
above have established a different rule of construction for gifts from
er to his daughter and her children, or to a son and his children, or
husband to a wife and children. The reason for the difference is
ly stated in the case of Adams v. Adams, quoted supra, and its wis-
is very strikingly exemplified in the case at bar. At the date of the
controversy Mrs. Sims had only one child, while at the date of its pro-
, she had four. If testator had died immediately after the execution of
ill, his daughter would have taken an undivided half of his estate,
if she had taken at the date of its probation, her interest would be re-
to one-fifth, and might, in the event of afterborn children, be still
er reduced. It would be well nigh impossible, under any other rule of
ruction, to effectuate the intention of a father or husband to provide
daughter or wife and living and afterborn children alike.
gment affirmed.

GALLOWAY, &c. v. DURHAM.

(Filed June 18, 1904.)

ls—Construction—Devise of land without leaving any at death of devi-
The seventh clause of the will of George C. Brooks is as follows: "That
e balance of my property, real, personal and mixed, go to my sister,
Brooks; and that she have same; but should she die without issue
eave any of the property at her death, given by this will, then in that
my sister, Sallie Galloway, and her children have said property."
—That the testator intended to invest his sister, Susan Brooks, now
Durham, with the right to appropriate the entire estate which passed
under said clause, if she so desired, and the power to sell and convey
his purpose is necessarily inferred, and she thereby became invested
the fee, and with full power to convey a fee-simple title.

L. Greene and H. C. Martin for appellants.

M. Payton for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was brought in the Hart Circuit Court for a construction of the seventh clause of the will of George C. Brooks, which is as follows: "That all the balance of my property, real, personal and mixed, go to my sister, Susan Brooks; and that she have same; but should she die without issue and leave any of the property at her death, given her by this will, then in that event, my sister, Sallie Galloway, and her children have said property."

After the probation of the will, Susan Brooks was married to J. R. Durham, and it is her contention that she takes an absolute fee-simple title in the real estate, with power to sell and convey a perfect title. The defendants in their answer, claim that plaintiff's interest in the property was a defeasible fee, subject to be defeated by her death without issue. It was adjudged by the lower court that plaintiff was the owner in fee simple of the several tracts of land, which she took under the will; and that she had the right to sell and convey a fee-simple title thereto; and that defendants, Sallie Galloway and her children, took no vested interest in remainder thereunder, and they have appealed. The decision of the question arising upon the appeal, turns upon the meaning which is to be given to the words: "But should she die without issue and leave any property at her death given her by this will, then, in that event, my sister, Sallie Galloway, and her children have said property." Whilst the clause of the will under consideration does not, in express terms confer upon appellee the power to sell and convey the real estate therein devised, this follows by necessary implication, if we are to attach any meaning to the words, "leave any of the property at her death given by this will." And it is a well settled rule of construction of wills that an estate may pass by mere implication without any express words to direct its course. (2 Blackstone's Com., 381.)

"Necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator, can not be supposed." (1 Vess & B., 468.)

We, therefore, conclude that testator intended to invest the apppellee with the right, if she saw fit to appropriate the entire state which passed to her under the 7th clause of his will, if she so desired; and the power to sell and convey for this purpose is necessarily inferred. This being true, it follows, under numerous decisions of this court, that appellee became thereby invested with the fee and with full power to convey a fee simple title. This question is fully considered and discussed in Barth v. Barth, 18 Ky. Law Rep., 840; Clay v. Chenault, 21 Ky. Law Rep., 1485; Ray v. Spears' Ex'or, 23 Ky. Law Rep., 1838; Cox v. Anderson's Adm'r, 24 Ky. Law Rep., 721; Humphrey v. Potter, &c., 24 Ky. Law Rep., 1264. And these decisions are in conformity with the public policy of the State as announced in section 2342 of the Kentucky Statutes.

For reasons indicated the judgment is affirmed.

HAMILTON, JR. v. YOUNG.

(Filed June 18, 1904—Not to be reported.)

tion contest—Official returns—Mutilated ballots—Unguarded ballot —Custody of interested official—Presumptions—James A. Hamilton, nd John H. Young were rival candidates for circuit clerk of Metcalfe y at the November election, 1903. On the face of the returns Hamil- ad 49 majority and was given the certificate of election. Young con- , and by a count of the ballots he was declared elected by the judge of rcuit court, and from this judgment Hamilton has appealed. The evi- shows that at the close of polls in each precinct in the county, the on officers, without adjournment or separation, opened the ballot , counted the ballots therein, made tally sheets of the count, and an- ed the result of the vote of the precinct from their count of the bal- and duly signed same in duplicate, and delivered the counted ballots the ballot boxes and stub book to proper officials. Under the issues nted by the pleadings and evidence, the returns of only two precincts volved. The election officers were not furnished with the large linen opes required by the statute, and the counted ballots in these precincts not inclosed, sealed, or otherwise protected, but were insecurely ed in bundles with a string, and in that condition, with the tally s, locked in the ballot box with the stub books and delivered by the ffs of the election to the county clerk. The locks on the boxes were spring locks, some of which were unlocked with small trunk keys and ffice keys. The boxes were made of wood and tin, the tin tacked to the with small tacks easily drawn, and the top raised or removed. They not kept in the vault by the clerk, but in his office, exposed and acces- to evily disposed persons. The county clerk and his deputy both had y wagered on the election of contestant. Lights were seen in the 's office at night, as late as 2 o'clock in the morning, before the boxes inspected by the court. Three slats were broken out of one of the ow shutters and a pane of glass taken from the window through which could enter the office. The ballots, when opened, were in bad con- n. The court made a change in one precinct of twenty three votes and een in the other. The gain allowed was from ballots in which the il mark had apparently been made under the rooster and in the square site contestant's name under the log cabin, the effect of which was to t the vote for the Democratic ticket, except for circuit clerk; as to h office the vote would go to the opposing candidate. The stencil marks he squares opposite the contestant's name in the controverted ballots, made with different colored ink from those under the rooster. Held— there being no proof or even suspicion that the precinct election officers l either negligently or corruptly, and it being manifest that the ballots not guarded with that "zealous care which will contravene all sus- n of substitution or change," they do not present that presumption as eir integrity that will entitle them to overthrow the official returns certificate received by the appellant; and the lower court should have dged the appellant entitled to the office.

sil Richardson, W. L. Porter, Rollins Hurt, M. O. Scott, R. L. Greene, I. Beauchamp, J. W. Kinnaird and Baird & Richardson for appellant.

o. T. Duff, John C. Hutchinson, John W. Compton, Jas. A. Con- J. Rogers Beauchamp and Hazelrigg, Chenault & Hazelrigg for appellee.

peal from Metcalfe Circuit Court.

Opinion of the court by Judge Settle.

The appellant, James A. Hamilton, Jr., and the appellee, John H. Young, were rival candidates at the November election, 1903, for the office of circuit court clerk in the county of Metcalfe, the former being the nominee of the Democratic, and the latter of the Republican party.

Upon the face of the returns made by the officers of election in the various voting precincts, the board of the election commissioners found and declared appellant duly elected to the office in question, by a majority of 49 votes, and gave him a certificate to that effect. Whereupon appellee, denying appellant's right to the office and claiming his own election thereto, entered a contest therefor by the institution of this action in the Metcalfe Circuit Court. The trial of the contest in the circuit court resulted in a judgment declaring appellee elected to the office in controversy by a majority of twenty-five votes. Of that judgment appellant complains and the case is now before us for review and final adjudication.

The vote upon the face of the official returns was as follows:

No. 1. Edmonton Precinct, for Hamilton	180	
For Young		149
No. 2. East Fork Precinct, for Hamilton	118	
For Young		68
No. 3. Randolph Precinct, for Hamilton	140	
For Young		110
No. 4. Lafayette Precinct, for Hamilton	165	
For Young		171
No. 5. Sulphur Well Precinct, for Hamilton	189	
For Young		84
No. 6. Antioch Precinct, for Hamilton	148	
For Young		138
No. 7. Summer Shade Precinct, for Hamilton	103	
For Young		174
No. 8. Cleveland Precinct, for Hamilton	69	
For Young		140
No. 9. Moore's Spring Precinct, for Hamilton	66	
For Young		100
Total for Hamilton	1,123	
Total for Young		1,074
Majority for Hamilton	49	

It is conclusively shown by the evidence that the election officers of each precinct, as soon as the polls closed, without adjournment or separation, immediately opened the ballot boxes, counted the ballots therein, made tally sheets of the count and announced, by one of the judges of the election in front of each voting room, the result of the election in the precinct. And that, thereupon, the officers in each precinct made out from and by their count of the ballots, returns thereof on the inside of the cover of the stub books, duly signed the same, made and signed duplicates thereof, and duly delivered the same, together with the counted ballots, ballot boxes and stub books to the proper officials. Waiving the technical objection made to the averments of the petition, which are alleged to be insufficient "to constitute

a specific charge that would apprise the opposite party of its nature, and that would enable him to prepare a defense," we will at once proceed to the consideration of what we regard the most important question in the case, viz.: Were the ballots which were admitted by the lower court as evidence, so kept and preserved as to manifest their integrity and entitle them to overcome the returns of the election officers, and the certificate issued to appellant by the election commissioners?

In McCrary on Elections, section 471, it is said: "When, as is the case in several States, the statute provides a mode of preserving the identical ballots cast at an election, for the purpose of being used as evidence in the case of a contest, such statute, and particularly those provisions which provide for the safe keeping of such ballots, must be followed with great care. The danger that the ballots may be tampered with after the count is made known, especially if the vote is very close, is so great that no opportunity for such tampering can be permitted; such ballots in order to be received in evidence, must have remained in the custody of the proper officers of the law from the time of the original official count until they are produced before the proper court or officer; and if it appears that they have been handled by unauthorized persons, or that they have been left in an exposed or improper place, they can not be offered to overcome the official count."

In Bailey v. Hurst, 24 Ky. Law Rep., 508, this court, in an opinion by Judge Hobson, announced the following rule on this subject: "The certificate of the officers of election is prima facie correct, and the presumption of the proper discharge of official duty in counting the votes, is not overthrown by the ballots if, when they are produced, it appears that they have been tampered with."

Although the general rule is that the ballots themselves are the best evidence of the number of votes cast, and for whom cast, yet this rule can have no application to a case where the ballots have been tampered with after they were deposited in the ballot box. In such a case the value of the ballots as evidence is almost totally destroyed, and the returns made by the officers of election presiding at the polls, may become better evidence than the ballots."

In Edwards v. Logan, 24 Ky. Law Rep. 1099, it was also said by this court in an opinion by Judge O'Rear: "The rule may be stated to be, that when the ballots are preserved so that their integrity is assured, they can be counted during a contest, and they are undoubtedly better evidence of the vote cast than the returns, and should prevail where there is a difference. (Hughes v. Holman, 23 Oregon, 481; Owens v. State, 54 Texas, 500; People v. Holden, 28 Cal., 123). But before a recount of the ballots should be allowed to rebut the presumption of the correctness of the official returns, it should be proved satisfactorily that the ballot had not been tampered with since the election, and that those offered in evidence are the identical ones cast. On this point, it was said in the case of People v. Holden, 28 Cal., 123. We must presume that the officers of election honestly performed their duty in the premises; that they did not mutilate any of the ballots, but, on the contrary, strung them in the condition in which they were found in the ballot box on the thread, and sent them in that condition to the clerk's

office. The same presumption exists in relation to their custody by the clerk. * * *

"The presumption of integrity of the ballots can not attach, however, until it is first shown that they came from the officer whose duty it is, by law, to have and preserve them, and that they are apparently in the condition of preservation prescribed by the statute. When that much is shown, the legal presumption as to their integrity attaches. On the contrary, however, if it be shown either that they have been tampered with, or that access has been afforded to them to persons unauthorized by law, then the burden shifts, and it thereupon becomes the duty of the person offering and relying upon such ballots, to prove affirmatively, not only that they are the identical ballots cast in the election, but that they have not been mutilated, changed or tampered with."

In Albert v. Twohig, 55 Neb., 563, it was said "that although the ballots cast constitute the primary evidence to determine the right of the respective parties, it must appear, however, that they have been preserved substantially in the manner and by the officers prescribed by the statutes. If they have been placed in a position to be tampered with by interested parties, the burden of proof is on the party offering them in evidence to show that they are in the same condition as when sealed by the several election boards. And in the absence of such proof, it was held that the ballots were properly rejected as evidence." (People v. Livingstone, 79 N. Y., 288; Cooley's Constitutional Limitations, 625; People v. Sakett, 14 Mich., 320; People v. Cicott, 16 Mich., 283; Powell v. Holman, 50 Ark., 94; Hudson v. Soloman, 19 Kan., 177; Hartman v. Young, 17 Ore., 150; McCrary on Elections, 475.)

From the foregoing authorities, and numerous others that might be cited, it is manifest that where it is made to appear that the ballots have been changed, or so exposed as to afford opportunity to be tampered with, or left in the custody of an officer or other person, so personally interested in the result of the election as to be subjected to the temptation or inducement to tamper with them, they lose their presumptive integrity and are no longer to be accepted in a contest or judicial inquiry as to the result of an election. And especially is this true if the boxes in which they were kept were so insecure as to render them capable of being readily opened or entered.

Under the issues presented by the pleadings and evidence, only the returns from two precincts—East Fork and Randolph—appear to be involved. It is admitted that the county clerk did not furnish to the election officers for use in the election, large linen adjustable envelopes, as required by the statute, or envelopes of any kind, though he furnished them at the election of the previous year. Consequently the ballots cast in these precincts, though counted and the result duly certified by the election officers at the close of the polls, were not enclosed, sealed or otherwise protected or identified, but only insecurely fastened in bundles with a string, and in that condition with the tally sheets, locked in the ballot boxes, together with the stub books containing the certificate of election, and delivered by the sheriffs of the election to the county clerk in his office.

It further appears from the evidence that the county clerk through his deputy, purchased for the ballot boxes cheap spring locks, some of which could be and were unlocked with small trunk keys and postoffice keys, and

t as many as two of them were unlocked with the same key. The elec-
n officers of East Fork and Randolph precincts (one or more of them)
tified that they applied the keys to different locks and unlocked as many
two locks with the same key. The clerk and his deputy were unable to
te whether or not more than one key for each lock was purchased by
m with the locks, or if more than one key for each lock was purchased,
at became of the extra ones. It is also shown by the evidence that the
llot boxes in which the ballots were kept, are part wood and part tin
he top half being tin, and the remainder being wood.

The tin is tacked to the wood with small tacks, which can be drawn with-
t difficulty and the top raised or removed. It further appears from the
idence that the boxes containing the ballots were not kept in the vault of
e county clerk's office where the circuit judge, as he testified, advised the
rk to keep them, and where they would have been secure, but were kept
m the time of their delivery to the clerk until the recount in the office,
exposed as to be seen of all persons entering the office, and where they
re accessible to any evily-disposed person who might effect an entrance
to the office in the night time for the purpose of tampering with or chang-
g the ballots. It was admitted by the county clerk that he had wagered
0 that appellee, in his race with appellant, would "get the most votes,"
d his deputy also admitted that he too had made a wager of $25 that appellee
uld get more votes than appellant. It also appears that the sheriff of the
unty, the jailer and ex-jailer had bet $50 each that appellee would get
ore votes than appellant. The bets of the clerk and his deputy were made
fore the ballot boxes, ballots and other paraphernalia for holding the elec-
n, were furnished the election officers, and before the locks for the ballot
xes were purchased. The evidence shows that the office of the county
rk is situated on the first floor of the courthouse, and is used as a public
ssway to the court room. It has four openings, two doors and two win-
ws—one door opens into the courthouse yard and one into the court room.
om the court room a stairway leads up to a hallway above, which extends
rough the entire second story of the building, and which stairway is used
a public passway by the public to another stairway furnishing an exit to
e courthouse yard. The two windows of the clerk's office are about three
et from the ground, with a double sash to each window, are elevated and
wered by cords and weights. There are shutters to the windows made of
ne slats. From a shutter of one widow three slats were missing near the
ttom of the window. Near the top of the lower sash of the same window
pane of glass was absent when the ballot boxes were received by the county
erk.

It is shown by the evidence that while the ballot boxes were in the clerk's
fice, and before the recount of the vote in the court below, it would have
en easy for one desiring to get to the ballot boxes to effect an entrance to
e clerk's office through the window from which the slats and pane of
lass were missing. It is also in proof that Edmonton, the county seat of
etcalfe county, is a small town of only about 250 inhabitants; that it is
nguarded, its streets unlighted, and that its courthouse is situated more
an 200 feet from any other building and surrounded by a dense grove of
ees. The evidence shows that at night, and when the shutters of the court

room and county clerk's office are closed, lights therein can not be seen by persons passing along the streets of the town, except through the opening in the shutters of the clerk's office window where the slats are missing. Judge Kinnaird, B. B. Pursley, Thomas Slinker, Wm. Poore and Edgar Jesse testified that on Thursday night after the election they saw at different hours of the night, lights in the courthouse, county judges office and county clerk's office, that in the county judge's office, as late as midnight, and in the county clerk's office as early as nine at night and late as two o'clock the following morning. No evidence was offered by appellee to explain the presence or purpose of these lights. He did, however, introduce evidence which tended to impeach Poore and to show that his companions, Slinker and Jesse, were drunk on the night in question.

The singular and unexplained omissions of official duty upon the part of the county clerk, and his wagers upon appellee as a candidate, not only serve to fasten upon him in large measure the blame for any irregularities that may have occurred in the returns made by the officers of the election, but also to manifest his interest in the result of the election. It appears from the evidence that when the ballots of the East Fork and Randolph Precincts were recounted from the boxes by the lower court they were, to use the language of some of the witnesses, in "bad condition, considerably crumpled up." The one strand of strings with which each bundle was tied was not tight enough to draw the ends of the ballots together, and the stencil marks upon them could be seen without breaking or removing the string thereon. The gain in votes allowed appellee in the count made by the court was from ballots in which the stencil mark had apparently been made under the rooster, the democratic device, and in the square opposite the name of appellee; the effect of such a marking of the ballot being of course to count the vote for the entire Democratic ticket, except the candidate for circuit clerk, as to which office the vote would go to the candidate therefor upon the Republican ticket. It further appears that the ballots that contained such vote as were thus received by appellee, were found and taken from the top of the bundle of ballots. In other words, the loss of votes to appellant, and the gain to appellee was from ballots taken from the tops of the bundles in the two precincts of East Fork and Randolph.

The election officers in their testimony, and by their certificates made at the close of the polls on the day of the election, state that the straight Democratic ticket received 103 votes in East Fork Precinct, and 136 in Randolph Precinct. By the recount of the court it is made to appear that the election officers overlooked one-fourth, or twenty-three stencil marks in the squares opposite appellee's name in East Fork, and fourteen in Randolph Precinct, and the ballots show that no stencil marks were overlooked by the officers in any other race on any other ticket. This fact, together with the further fact that there is no proof or even suspicion that the election officers acted either negligently or corruptly, is sufficient to create a strong presumption, if indeed it is not conclusive proof, that the additional stencil marks found on the recount are to quote the language of counsel, the product of fraud on the part of either interested parties or corrupt partisans. The weight of the evidence conduces to show that the stencil marks in the squares opposite appellee's name on the ballots in controversy, were made with different ink

o those appearing under the Democratic device on the same ballot. Those nder the Democratic device were made of black ink; opposite appellee's ame they were of blue or purple color like that of Arnold's jug ink.

The manner in which the ballots were examined and counted by the elec-on officers in the East Fork and Randolph Precincts as testified to by hem shows, as we think, that it could hardly have been possible that they mitted to count for appellee thirty-seven, or any number of votes to which e was entitled. Moreover, the count was made in the presence of inspectors epresenting the contending parties and candidates, and it is not likely that ney would have overlooked such loss of votes to one candidate. From the oregoing facts it is manifest that the ballots in this case were not only not uarded or preserved by the county clerk with that "zealous care which will ntravene all suspicion of substitution or change," but that they were so xposed as to have afforded an opportunity to be tampered with, and to such extent, that they were apparently tampered with before the recount by e court. Tested by the rule announced in the authorities, supra, the bal-ts do not present that presumption as to their integrity, that will entitle em to overthrow the official returns and certificate received by appellant.

It appears that the circuit court was in session when the petition was filed appellee inaugurating this contest, and that on the day following the ing thereof the judge of the circuit court, by request of the parties, opened d counted the ballots, and made the results of such count a matter of cord; but it is expressly stated in the order in regard thereto that "the urt was not asked to and did not pass upon the legality of any ballot."

The evident purpose of such counting of the ballots was merely to preserve e ballots intact as they then appeared. The appellant had not then filed s answer, or otherwise made known his defense. We fail to see how such tion by the court can be relied on by appellee as an estoppel. As a matter fact, it was not so treated by the lower court, as the issues were there-ter formed by the filing of the answer and other necessary pleadings, the oof was taken, and the trial upon the pleadings and proof resulted in all spects as if the first recount had not been made.

We think the questions herein passed upon decisive of the case, and hence ve not thought it necessary to consider others that have been attempted be raised in the record. Upon the whole record we are of opinion that e lower court should have adjudged appellant, instead of appellee, entitled the office in controversy.

Wherefore, to the end that appellant may yet be declared elected and ad-dged entitled to the office of circuit court clerk of Metcalfe county, the dgment is reversed and cause remanded for that purpose and for further oceedings consistent with this opinion.

HUGHES, &c. v. BENT, &c.

(Filed June 20, 1904.)

1. Will — Construction — Vesting of title — Immediate possession — Estate ld by trustee — Secret trust — Mary L. Johnson, deceased, owned at her ath a one undivided sixth interest in a lot on Fourth street in the city of ouisville, and the question in this case is, whether under her will, said

interest was disposed of, and if so, whether by the terms of her will, such an estate in possession was thereby vested in her four grandchildren as would authorize a court to decree a sale thereof upon the petition of some of the joint owners of the entire lot against the others, under subsection 2, section 490, Civil Code, providing for a sale of such property "if the estate be in possession, and the property can not be divided without materially impairing its value," so as to pass a good title to the purchaser at such sale. The will of Mrs. Johnson, after making certain specific devises, made the following bequest: "The remainder of everything I possess I leave as a sacred trust to my daughter, Mary C. Wooldridge, and know that she will faithfully carry out my wishes regarding it." The sacred trust referred to was contained in a separate paper which was held to be a part of the will and which is as follows: "I want Chamie (Mrs. Wooldridge) to keep two pews in Christ's Church as long as her father lives, just as I have done, and I want one of them kept in his name. I want her to give $100 yearly to the 'Home of the Innocents,' in her father's name, as long as he lives. I want her to use for her father's personal support, such part of the income from what I leave, as in her judgment shall seem fit, but she is to be the sole judge of how much, or how little, or whether any shall be applied in this way. I want her to care for my old servant, Emma Wright, when she shall become unfit for work, either from age or infirmity. The balance of the income I want her to use for the education of my four grandchildren. At the death of her father I want the principal put in trust for my four grandchildren. Chamie may invest any part of my estate as she shall see fit." Held—That exclusive of the specific bequests to Mrs. Wooldridge in her own right, the will devises all of the estate of the testatrix to Mrs. Wooldridge in trust for her four grandchildren, subject to the charge for the payment of the annual contribution to the Home of the Innocents, the pew rent, the support of Mrs. Wooldridge's father, and Emma Wright, and the education of the four grandchildren.

2. Charges upon property—The fact that the charges upon the property may consume it all, can not alter the character of the title, or obstruct its regular transmission according to the expressed intention of the testatrix.

3. Duties as trustee—After undertaking to discharge the duties required of her by the will as trustee, Mrs. Wooldridge can not be heard to deny the trust.

4. Beneficial interest—Title—Possession—Under the will Mrs. Wooldridge is to take no beneficial interest in any part of her mother's estate, except the property specifically devised to her. All the remainder of the estate being devised in trust to the grandchildren, the title thereto vested in them immediately upon the death of the testatrix, subject to the charges thereon named in the will, and is a vested estate in possession. The possession of the trustee is the possession of the cestui que trust, and there can be no doubt that the infants were, in the meaning of subsection 2 of section 490 of the Civil Code, in possession of the real estate equally with their co-tenants; and, therefore, the chancellor had jurisdiction to decree the sale of the property, and the exceptions to the report of sale by the purchaser were properly overruled.

C. M. Lindsay, W. W. & J. R. Watts for appellant.

E. L. McDonald for Wooldridge.

Kohn, Baird & Spindle for Louisville City National Bank

Alex. G. Barrett and J. W. Barr, Jr. for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Settle.

This is an appeal by the purchaser at a judicial sale from an order overruling his exceptions and confirming the report of sale.

The action is under section 490, subsection 2, Civil Code, and was brought by some of the joint owners against the others, to obtain a decree for the sale of lot 236 Fourth street, in the city of Louisville, and for division of the proceeds, because the property could not be divided without materially impairing its value. The property had formerly been held in trust for Mrs. Fannie S. Bailey, and at her death descended to her four living sisters, and the descendants of her deceased brother and sister, they becoming invested as tenants in common in fee with the entire legal and equitable title. Mrs. Mary L. Johnson was one of the living sisters of Mrs. Bailey, who after her death, became the owner of an undivided one-sixth part of the property in fee simple. After thus acquiring the interest in the real estate by the death of her sister, Mrs. Bailey, Mrs. Johnson herself died testate. Her will, which was duly admitted to probate by the Jefferson County Court, is as follows:

"Louisville, Ky., January 26, 1898.

"I, Mary Lawrence Johnson, do make this my last will and testament, revoking all others. In view of the fact that my daughter, Mary C. Woolridge, will inherit a large estate left me by my father and mother, I bequeath to her the small sum of $500.

"I make this explanation in the beginning, that my will may not be considered unjust or peculiar. I leave to my daughter, Mary C. Woolridge, my carriage and horses, and the entire contents of my house, during her life. At her death to be divided equally between my grandchildren. To each one of my four grandchildren, Powhatan Johnson Woolridge, Annie May Woolridge, Mary Tyler Woolridge and Charles E. Johnson Woolridge, I give and bequeath thirty shares of stock in the Columbia Finance and Trust Co. At the death of any one of the four (being unmarried) his or her shares to go to the surviving brothers and sisters. The remainder of everything that I possess I leave as a sacred trust to my daughter, Mary C. Woolridge, and know that she will faithfully carry out my wishes regarding it. I desire that no inventory to taken of my effects."

By a short writing on the same paper with the will, but appearing below the signature of the testatrix to that instrument, the daughter, Mrs. Woolridge, was appointed executrix of the will. This writing was also signed by the testatrix. Below this writing, and also on the same paper, is another, signed by the husband, in which he approved the provisions of the will, and consented to the making thereof by the wife.

The "sacred trust" referred to in the will is contained in a separate paper over the signature of the testatrix written at the time of the writing of the will, and is as follows: "I want Chamie (Mrs. Woolridge) to keep two pews in Christ's Church as long as her father shall live, just as I have done, and I want one of them kept in his name. I want her to give $100 yearly to the Home of the Innocents, in her father's name, as long as he lives. I want her to use for her father's personal support, such part of the income from

which I leave as in her judgment shall seem fit, but she to be the sole judge of how much, or how little, or whether any, shall be applied in this way.

"I want her to care for my old servant, Emma Wright, when she shall become unfit for work, either from age or infirmities. The balance of the income I want her to use for the education of my four grandchildren. At the death of her father, I want the principal put in trust for my four grandchildren. Chamie may sell and invest any part of my estate as she shall see fit."

The real estate in question is a part of that disposed of by the residuary clause of the will, and it is insisted for the purchaser that the "sacred trust" mentioned by the will is a secret yet enforcible trust, and that such part of the income during the life of Charles F. Johnson as is not exhausted by the charges for pew rents, Home of the Innocents, support of Charles F. Johnson, and Emma Wright, and education of the four grandchildren, is not disposed of, and as to such surplus income there is a resulting trust in favor of the heir at law, Mary C. Woolridge, during her father's life; that by the direction of the sacred trust, to put the whole in trust for the four grandchildren at Charles F. Johnson's death, they are given an estate in remainder, and that this estate in remainder of the infants is not an estate in possession; therefore, the court, under the decision in Dineen v. Hall, 23 Ky. Law Rep., 1615, has no jurisdiction to sell the property under the section of the Code, supra.

Our construction of the will is that exclusive of the specific bequests to Mrs. Woolridge in her own right, it devises all of the estate of the testatrix, to Mrs. Woolridge in trust for the four grandchildren, subject to a charge for the payment of the annual contribution to the Home of the Innocents, the pew rent, the support of Charles F. Johnson and Emma Wright, and the education of the grandchildren. The fact that the charges upon the property may consume it all, can not alter the character of the title, or obstruct its regular transmission according to the expressed intention of the testatrix.

In Bowling v. Dobyns, Adm'r, 5 Dana, 441, it is said in an opinion by Judge Ewing: "Whether a devise is made to an executor for the payment of debts, or a power to sell for that purpose, or a charge is otherwise imposed on the estate for that object, or other special objects, it has been construed as a charge merely, and not as an impediment to the devise or descent of the fees or freehold."

The fact that the will itself declares that the property referred to therein as the "remainder of everything I possess," was left to Mrs. Woolridge as a sacred trust, show that there was an agreement or understanding between her and her mother as to the nature and scope of the trust, and the identification of the separate paper containing the provision of the trust, leaves no doubt as to the identity of the beneficiaries, or of their interest in the estate devised, and makes it proper to treat the paper as a part of the will, and to seek its aid in construing that instrument. After undertaking to discharge the duties required of her by the will as trustee, we do not think Mrs. Woolridge can be heard to deny the trust.

We do not regard Dineen v. Hall, supra, as authority in point. In that case it was held that it was not proper to decree the sale of real estate under section 490, subsection 2, Civil Code, in which a father owned a life estate

tenant by the curtesy and his infant children, the remainder, as they ere not joint owners of the property in the meaning of the section of the ode, supra, the possession being in the father for life to the exclusion of e infant during that period. (Malone, &c. v. Conn., &c., 95 Ky., 93.)

In the case at bar the interest of the infant is not an interest in remainr, but a fee simple, with the legal title, it is true, in the trustee, their other, subject to certain charges put upon the property by the provisions of e will. The language of the will clearly indicates that Mrs. Woolridge is take no beneficial interest in any part of her mother's estate except the 00 and articles of personal property therein specifically bequeathed to her. All the remainder" of everything the testatrix possessed, went to Mrs. Woolidge under the provision of the will creating the trust. So even if the inrest taken by the grandchildren is, as argued by one of the counsel, only equitable fee simple, it vested immediately upon the death of the testaix subject to the charges upon the estate named in the will, and in any ent was and is a vested interest in possession. The fact that the trustee as in this case authority under the will to sell the trust property and reest the proceeds as her judgment may dictate, even without the aid or pervision of a court of equity, does not destroy the trust, though it will lieve the purchaser of such property of looking to the reinvestment of the oceeds. The possession of the trustee is that of the cestuis que trust. here can, therefore, be no doubt that the infants were, in the meaning of bsection 2 of section 490 of the Code, in possession of the real estate, purased by appellant equally with their co-tenants at the time of the sale.

We are of opinion that jurisdiction to sell for indivisibility exists in this se and that appellant can not be disturbed in his possession. It follows, erefore, that the chancellor properly overruled his exceptions, and conmed the report of sale.

Wherefore, the judgment is affirmed.

Whole court sitting.

LOUISVILLE & NASHVILLE R. R. CO. v. LOGSDON'S ADM'R.

(Filed June 20, 1904.)

1. Railroads—Killing of child straying on railroad track—Presence not nticipated and not discovered—Liability of defendant—Where the evidence ows that a child under three years of age, whose parents resided in a house ar the railroad track, wandered out on the track about 160 yards from the ouse, and was run over and killed by a passing freight train at a point on e track where its presence was not anticipated and was not discovered by e trainmen until the engine was within sixty or seventy feet of it, and it as impossible then to save it, the company is not liable for causing its ath, and a peremptory instruction should have been given by the court to e jury to find for the defendant.

2. Trespassers—Lookout—Discovery of peril—In towns or cities, or where, om any reason, the presence of persons on the track should be anticipated, is the duty of railroad men to keep a lookout in front of moving trains; t at other points of the road they are under no obligation to keep a lookt for trespassers on the track, but only to use all reasonable care to prent injury to them after their peril is discovered. The reason of this rule not that the person injured is guilty of contributory negligence in placing

himself in danger, but the rule rests on the ground that the railroad company owes him no duty until his peril is discovered.

3. Infants—Neither an infant under three years of age, nor an idiot, can be held liable for a trespass or for contributory negligence. If either strays on the premises of another and gets hurt, no blame attaches to him, but if while there and at a place where the presence of strangers is not anticipated, he gets hurt, the owner of the place is not responsible for the injury when he does not know of the danger in time to avoid it by the exercise of ordinary care, after the peril is discovered.

4. Breach of duty—A railroad company has the exclusive possession of its right of way and stands just as the owner of any other premises so far as strangers coming on it are concerned. At ordinary places along the track the presence of persons on the right of way is not to be anitcipated, therefore, no lookout for them need be maintained. Every action for negligence rests on a breach of duty. If there has been no duty broken there has been no wrong and there can be no recovery.

4. Same—An infant, three years old, or an idiot can no more recover than an adult, unless there has been a breach of duty on the part of the defendant, and he can no more complain than an adult, that a lookout was not kept at a place where the presence of persons was not to be anticipated.

Benjamin D. Warfield, Posten & Moorman and Edward W. Hines for appellant.

S. M. Payton for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Hobson.

Appellee's intestate, an infant under three years of age, was struck and killed by one of appellant's freight trains, and this action was instituted by the administrator to recover for his death, resulting in a verdict and judgment in his favor for $1,200. The only question we deem it necessary to consider on the appeal is, whether the evidence warranted a recovery. The facts shown are as follows:

The infant was the child of a section hand of appellant, whose house stood beside the railroad track and within thirty feet of it. Just before the child was killed the father went across the railroad and up it about 250 yards to a spring for a bucket of water. When he left the house the child was in the rear of the house playing with some brick, its mother being in the yard behind the house at work. While the father was gone, the child wandered out of the house and upon the railroad track, where he was run over and killed by a passing freight train, about 160 yards from the house. A hoop, which was his favorite plaything, was found near his body, with blood on it. The house was out in the country and the child was not on or near a public crossing. The proof for the appellee showed that no warning from either bell or whistle was given by the trainmen until the stop signal was sounded, and this was about the time the child was struck. The place of the accident could be seen from the direction of the approaching train for a distance of 450 yards, and it may be concluded from the evidence that those in charge of the train could, by the exercise of ordinary care, have seen the child if he was on the track, or very near it, in time to stop the train before striking him. No witness for appellee saw the child after he left the house

d before he was killed. But it is insisted that it may be inferred from e evidence that the child was following his father up the railroad track, lling his hoop when he was struck. The court refused to give the jury a remptory instruction to find for the defendant on the plaintiffs' evidence, d the defendant's testimony was then introduced. The engineer stated at as the train approached the point where the child was killed, it was on curve, his position being on the outer line of the curve so that the loco- otive obstructed his view, and he did not see the child at all. The fire- an who was on the other side of the engine, said he was firing the locomo- ve as the curve was rounded, and when he finished that and looked ahead, saw the boy sixty or seventy feet ahead of the engine and at once gave e alarm to the engineer, who immediately reversed the engine and stopped e train as soon as it could be done, but too late to save the child. The nductor was in the caboose at the rear of the train, but could not see from s position the track in front of the locomotive, and none of the brakemen ere on the lookout.

It is conceded that under the repeated adjudications of this court, there uld be no recovery for the death of an adult under the proof. But it is sisted that a different rule applies to a child of such tender years. The idence is not sufficient to show that the trainmen in fact saw the child in ne to have saved him. The only ground for recovery is, that if they had en on the lookout and had exercised proper care, they might have seen him time to stop the train before striking him. In towns or cities, or where, r any reason the presence of persons on the track should be anticipated, is the duty of railroad men to keep a lookout in front of moving trains; t at other parts of the road they are under no obligation to keep a lookout r trespassers on the track, but only to use all reasonable care to prevent jury to them after their peril is discovered. The reason for the rule is not at the person injured is guilty of contributory negligence in placing himself the track or in a place of danger. The rule rests on the ground that the ilroad company owes him no duty until his peril is discovered. If the ild and his father, in the case before us, had been together on the track and th had been killed, there could have been no recovery for the death of e father, and it is hard to see why a different rule should apply to the ild, if the company was not under obligation to anticipate the presence of her on the track or to maintain a lookout for persons at that point. hile there is some conflict in the cases on the question, the decisions of is court are uniform in holding that the case of a child stands just as that a grown person in cases of this character. In Given's Adm'r v. Ken- cky Central R. R. Co., 12 Ky. Law Rep., 950, a child nine years old was lled by a train, when no signal of its movement was given. The court in scussing the duties of the trainmen, said: "They are not required to pre- me that any one will trespass upon the exclusive right of way of the com- ny, and they are, therefore, not bound to be on the lookout for trespass- s, but only to avoid injury to them, if possible, when their presence and sibility to danger become known. This rule applies in the case of a child st as it does in that of a grown person. If those operating a train were quired to look out and guard against danger to children trespassing upon e track, then this would necessarily afford an opportunity to see all other

persons who might be upon it and in danger. Undoubtedly a greater degree of care is required of them as to children not old enough to be aware of the danger, than as to grown persons, when they have been once discovered upon or near the track; but until their presence is known, the rule applies equally to both. An exception to the rule exists, however, where a train is passing through a town or city and where people are likely to cross the track at any point, and are known to be in the habit of doing so by those operating the train. In such a case there is constant danger to life; and out of regard for it, those in charge of a train must look out for persons who may be upon the track, and give such notice of its approach and movements, and so regulate its speed as is likely to warn them of danger, and enable them to get out of the way."

In McDermott v. Kentucky Central R. R. Co., 93 Ky., 408, a boy eight years old was hurt in the same way, and in answer to the argument that no lookout was maintained, the court said: "And the fact that such trespasser is an infant does not affect the legal rights of the company, because signals of an approaching engine must be given and oversight of the tracks exercised uniformly and habitually, or not at all, and for the protection and safety of all trespassers or none."

In L. & N. R. R. v. Webb, 99 Ky., 348, the question was again made, and the court said: "The well-settled rule in such cases is, that a child is required to exercise only such a degree of discretion and care as may be reasonably expected of children of his age and intelligence in any given circumstances of danger; but the mere immature age of the person injured, can not be allowed to have the effect to raise a duty where none otherwise existed."

This question was again presented, after a change in the membership of the court, in Becker v. L. & N. R. R. Co., 110 Ky., 474, and the case was allowed to go to the jury only on the question whether the engineer in fact saw the child in time to avoid injuring him after his peril was discovered. It was also since presented in Goodman's Adm'r v. L. & N. R. R. Co., 25 Ky. Law Rep., 1086, and the same rule was adhered to. The court said: "Trains must be run on schedule time, and no duty is imposed upon those in charge to stop or slow up at the appearance upon the track of objects, the nature of which is only discernable upon near approach. If the object seen by Robert Wilkerson had been at a highway crossing, or in the street of a town or city, where the presence of small children might be suspected, a different case would be presented and a different standard of diligence could have been required. Appellee's engineer had no more reason to suppose an infant would be upon their track at the point where the accident in this case occurred than an adult, and owed no higher degree of diligence to them than to an adult."

In Louisville & Frankfort R. R. Co. v. Milton, 53 Ky., 61, decided in the year 1853, it was held that there was no liability on the part of a railroad company for stock killed by its trains, unless the animal destroyed was observed in sufficient time to enable those in charge of the train to avoid the injury by ordinary care. This was followed in Louisville & Frankfort Ry. Co. v. Ballard, 59 Ky., 177, decided in the summer of 1859, and in O'Bannon v. Louisville, &c., R. R. Co., 71 Ky., 349, decided in 1871. It remained

law of the State until changed by the statute declaring railroad com-
es responsible for all cattle negligently injured by them, and making
njury of the stock prima facie evidence of negligence. As to cattle
ing on the track, railroad companies are liable under the statute if or-
ry care is not observed to discover them. But there has been no change
atute as to persons trespassing on the track, and the liability of rail-
s for injuries to persons, whether adult or infant, must depend on com-
law principles; for the statute simply makes them liable for injuries
ttle, and to construe such language to create a liability for injuries to
l children, would be unwarranted. True, a child under seven is con-
ively presumed incapable of crime, but a like prima facie presumption
nds him from seven to fourteen; and if appellant is responsible when
child is under seven, then it would be a question for the jury, if he was
ween seven and fourteen; whether he had sufficient capacity to be re-
sible. Neither an infant under three years old nor an idiot can be held
le for a trespass or charged with contributory negligence. If either of
n strays on the premises of another, no blame attaches to him; but if
le there, and at a place where the presence of strangers is not to be an-
ated, he gets hurt, the owner of the premises is not responsible for his
ry when he does not know of his danger in time to avoid it by the exer-
of ordinary care, after his peril is discovered. He is not chargeable
negligence in not maintaining an outlook; for this is not required if
presence of others is not to be anticipated. If the defendant here were a
ner or a manufacturer, and a three-year-old child had strayed upon the
nises at a point where the presence of others was not to be looked for,
had been run over because he was discovered too late, would it not be
eded that this was simply an unfortunate accident, or would it be
ntained that a recovery should be had because a lookout was not kept?
ilroad company has the exclusive possession of its right of way, and
ds just as the owner of any other premises so far as strangers coming
n it are concerned. At ordinary places along the track the presence of
ons on the right of way is not to be anticipated, and, therefore, no look-
for them need be maintained. Every action for negligence rests on a
ch of duty. If there has been no duty broken, there is no wrong, and
e can be no recovery. An infant three years old, or an idiot can no
e recover than an adult, unless there has been a breach of duty on the
of the defendant; and he can no more complain than an adult that a
out was not kept at a place where the presence of persons was not to be
cipated. If infants were made an exception to the rule, and railroad
panies were required to keep a lookout for them at all places along their
k on account of their helplessness, the same principle would have to be
lied to idiots, lunatics, epileptics, the deaf, the blind, and the like.
his would destroy the rule and make it inconsistent with itself; for if
presence of no persons is to be looked for on the track, the presence of
ons infirm or unable to take care of themselves is not to be anticipated;
the defendant can not be required to guard against a danger which is
to be anticipated by a person of ordinary prudence. The rule announced
his court that the company is not responsible for the injury of an in-
from failure to maintain a lookout where no lookout is required, as the

presence of persons is not to be anticipated, is a necessary corollary of the rule laid down more than fifty years ago and consistently maintained since, until changed by the statute, that the company is not liable for injury to stock because no lookout is kept. The rule so long maintained is under the principle of stare decisis the law of the State. It is also in accord with the weight of American authority. (Morrisey v. Eastern R. R. Co., 30 Am. Rep., 686; Cauley v. Pittsburg, &c., R. R. Co., 40 Am. Rep., 66a; Pennsylvania R. R. Co. v. McMullen, 132 Penn. State, 107; Thomas v. Chicago, &c., R. R. Co., 61 N. W., 967; Matson v. Port Townsend R. R. Co., 37 Pacific, 105; Railway Co. v. Codd, 54 Kan., 558; Alabama Great Southern R. R. Co. v. Moorer, 3 Am. Negligence Reports, 317; Ward v. Southern Pacific R. R. Co., 23 L. R. A., 715; Felton v. Aubrey, 74 Fed. Rep., 350; 2 Shearman & Redfield on Negligence, section 481a., and notes.)

On the facts shown by the plaintiff, the court should have instructed the jury peremptorily to find for the defendant. The former opinion (25 Ky. Law Rep., 1656) is withdrawn.

Judgment reversed and cause remanded for further proceedings consistent herewith.

Whole court sitting.

Judges Nunn and Settle dissent.

CHENAULT, &c. v. QUISENBERRY, &c.

(Filed June 20, 1904—Not to be reported.)

1. Stare decisis—This is the third appeal in this case, and under the doctrine of stare decisis, the former opinions must control the opinion of the court on this appeal.

2. Verdict—Flagrantly excessive—If there should have been a verdict at all for the plaintiff, the sum of $2,000 is palpably and flagrantly against the weight of the testimony, and should be reversed for this, if for no other reason.

3. Imperfect legal title—Prescriptive right—While the appellees evidently feel that they have a strong moral, if not a legal, right to the land, because of the conveyance to their remote vendors and ancestor, yet their chain of title not being perfect, they can only recover by showing a prescriptive right.

4. Possession—Occupancy—Agency—If one was in possession of a certain boundary of land within the 10,000-acre survey, and while thus occupying the certain boundary, acted as agent of the appellees, or of their ancestor, that would not constitute a possession of the part outside of the designated boundary claimed by appellees

5. Possession—One who owns a tract of land can not live upon it and be said to be in the actual possession of another tract, claimed by another, by simply acting as the agent for the latter in keeping off trespassers, etc. Such acts do not constitute the actual possession of land.

W. S. Pryor, J. B. White and Hazelrigg & Chenault for appellants.

D. L. Pendleton, T. L. Edelen and J. C. Lykins for appellees.

Appeal from Wolf Circuit Court.

Opinion of the court by Judge Paynter.

This is the third appeal from judgments of the lower court. (Chenault,

&c. v. Quisenberry, &c., 19 Ky. Law Rep., 1682; Chenault, &c. v. Quisenberry, &c., 21 Ky. Law Rep., 1771.) Under the doctrine of stare decisis the former opinions must control the opinion of the court on this appeal. The jury returned a verdict for the plaintiff for $2,000 damages.

If there should have been a verdict at all for the plaintiff, the amount is palpably and flagrantly against the weight of the testimony. It must have been based largely upon the testimony of J. H. Stamper and another witness who went upon the land and estimated the value of the timber which had been cut within the past three previous years. This estimate was made after Daniels had cut large quantities of timber under a contract which was approved by the appellee and pursuant to an order of court. The proceeds of the timber thus cut was paid to the receiver of the court to await the judgment of the court. The testimony of the appellants showed that they had cut timber off the land of not greater value than $100 to $150. One witness introduced by the appellees testified that the logs taken off by Chenault, were of the value of $600 to $700.

It is evident that the jury's verdict was for the timber which had been taken off by Daniels under the order of the court and the proceeds of which are in the custody of the court. If for no other reason the judgment should be reversed, because it is flagrantly against the weight of the evidence on the question of damages.

In the first opinion, 19 Ky. Law Rep., 1684, the court said: "We are of the opinion that instruction No. 1 is erroneous, in that it permits a recovery by proof of possession prior to 1855, when the proof shows that F. B. Quisenberry, the ancestor of appellees, deeded all interest he had in the land to John D. Spencer, and there is no proof as to its reconveyance. We are also of the opinion that instruction No. 2 is erroneous. There is no proof that appellees were in the actual possession of this land under the papers referred to, claiming to a mark or natural boundary as represented by the deeds. Title papers may be used to show boundary and extent of possession, but there must be shown an acutal entry and possession under the paper title before they can be so used."

On the last appeal, 21 Ky. Law Rep., 1771, the court, in discussing the conveyance by Quisenberry to John D. Spencer and the alleged reconveyance, said: "It is attempted to show that title to a part of the tract then conveyed was reconveyed to Quisenberry, by showing that a written contract was entered into between Spencer and Quisenberry, and acknowledged and left in the clerk's office, and that the clerk's office was subsequently burned. The evidence of this contract is relied upon by appellees as showing a tenancy in common by Quisenberry and Spencer, from which it is argued that the evidence of possession by Spencer introduced upon behalf of appellants, inures to the benefit of his co-tenant as a possession by both. We can not concur in this contention. The evidence of the contract, if admissible in the absence of evidence by the custodian of the record of its destruction, shows only that an agreement was made, not for a reconveyance by Spencer of any portion of the land, or of any definite interest in the whole of it, but in effect that there should be a division of the land, Spencer to keep an amount thereof proportionate to the amount of the purchase money already paid by him, and to reconvey the remainder to Quisenberry, the amounts

being left undetermined and to be thereafter agreed upon. This did not make Quisenberry and Spencer tenants in common."

It will be observed that in the first opinion the court in effect said that the evidence of possession prior to 1855 would not authorize a recovery, because Quisenberry, the ancestor of appellees, deeded all the interest he had in the land to John D. Spencer, and there was no proof as to a reconveyance. On the second trial the court admitted the testimony of H. B. Whitaker, which was introduced for the purpose of showing a reconveyance, and in the opinion delivered on the second appeal, the court held that the evidence was not admissible, as no possession had been obtained thereunder. There was no evidence introduced on the last trial which made Whitaker's evidence competent. There was some evidence tending to show that Quisenberry and a son of John D. Spencer, in 1880 made an agreement as to a division line, and that Quisenberry thereafter made an ineffectural effort to get possession of the part which the son agreed he should have. The principal effort which the appellees made to obtain possession of the land, was through the contracts with Alexander and Goolman Spencer and the railroad contractors.

As said, Whitaker's evidence is incompetent; another's testimony to the same effect is likewise incompetent.

In the opinion delivered on the second appeal the court held that the writings evidencing these contracts were incompetent. It may be, at this point added, that while the court excluded the written evidences of the contract between Quisenberry and the Spencers and the contractors, it admitted oral testimony of them, which of course was even more objectionable. The court in the second opinion held that the possession of John D. Spencer did not inure to the benefit of Quisenberry. While there seems to have been no objection to the introduction as evidence the opinion of this court in Spencer v. Quisenberry, yet it was so erroneous and prejudicial to do so that the court can not forbear to express the opinion that it should not have been done.

The appellees in this case evidently feel that they have a strong moral, if not a legal right to the land, because of the conveyances to their remote vendors and ancestor, yet the chain of title was not perfect and they can only recover by showing a prescriptive right. If one was in possession of a certain boundary within the 10,000-acre survey, and while thus occupying the certain boundary, acted as agent of the appellees or their ancestor, that would not constitute a possession of the part outside of the designated boundary which was claimed by appellees. One who owns a tract of land, can not live upon it and be said to be in the actual possession of another tract of land claimed by another, by simply acting as the agent for the latter in keeping off trespassers, etc. Such acts do not constitute the actual possession of land.

The judgment is reversed for proceedings consistent with this opinion.

HOWARD v. COMMONWEALTH.

(Filed June 20, 1904—Not to be reported.)

Homicide—Unintentional killing—If appellant had reasonable grounds believe and did believe that he was then about to be assaulted and cut by ndall Howard, who was following him with an open knife, he had the ht to use his gun in his necessary self-defense, and if in doing so George ward was shot unintentionally, defendant should be acquitted, and the y should have been so instructed.

Byrd & Howard for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Magoffin Circuit Court.

Opinion of the court by Judge Nunn.

This case was affirmed by this court May 20, 1904. (25 Ky. Law Rep., 2213.) ppellant has filed a petition for a rehearing. The record is small, but im-rfect. It is difficult to tell the evidence admitted by the lower court from at which was rejected, but upon a reconsideration of the case by the whole urt, we find the following facts in addition to those stated in the former inion:

Appellants' defense was that the discharge of the gun which wounded his cle, was not intended by him, but was accidental, and two witnesses ted facts which tended to show the truth of appellant's contention. This urt is of the opinion that appellant was entitled to an instruction di-cting the jury to acquit him, if they believed from the evidence the ooting and wounding was accidental and unintentional. (13 Ky. Law ep., 313; Montgomery v Commonwealth, ante, 356.) It appears from e record that there was some evidence tending to show that Kendall ward followed appellant from the gate to the house with an open knife his hand, threatening to assault and cut appellant. If appellant had rea-nable grounds to believe, and did believe, that he was then about to be saulted and cut at the hands of Kendall Howard, then, under such cir-mstances, appellant had the right to use his gun in his necessary self-de-nse; and if in doing so George Howard was shot unintentionally, then the ry should acquit. (Bush v. Commonwealth, 78 Ky., 269; Morris v. Com-nwealth, 20 Ky. Law Rep., 403.)

We are of the opinion that the court erred to appellant's prejudice in not ving in substance the instruction indicated.

For these reasons the order affirming this case is set aside, and cause re-rsed for proceedings consistent herewith.

BUTLER v. COMMONWEALTH.

(Filed December 4, 1886—Not to be reported.)

1. Question tending to degrade witness—Cross examination—Discretion of e court—It is necessary to the proper conduct of the public business and e purpose of justice that the trial court should have a right in its discre-on to control the cross examination of a witness on a matter which has a ndency to degrade him.

2. Contradicting one's own witness—Where a party introduces a witness who proves facts against him, he may contradict him by showing that he has, out of court, stated otherwise.

Alpheus Baker for appellant.

P. W. Hardin for appellee.

Appeal from Jefferson Criminal Court.

Opinion of the court by Judge Holt.

This is a conviction for murder. The evidence, although altogether circumstantial, is sufficient to support the verdict.

But two supposed errors of law are presented as ground for a reversal. One is that the accused was not permitted to ask a witness for the State certain questions tending to degrade him.

They were whether he had not when trying to purchase a suit of clothes of a certain merchant, represented himself as the son of a certain man; if he had not been arrested for obtaining them by false pretenses; and if he had not continued the case for a certain time when his father compromised it by paying for them?

Anciently a witness could be compelled to answer a question, although reflecting infamy upon him, but the modern rule exempts him of it will tend either to have such effect or subject him to a penalty.

When the question tends merely to degrade him there is a difference of opinion and it is perhaps yet an open question whether he can be compelled to answer. A distinction has, however, been very properly drawn, as we think, between cases where the testimony is relevant and material to the issue, and where it is only collateral, and asked only by reason of the latitude allowed upon a cross-examination.

Greenleaf says: "Accordingly the better opinion seems to be that where the transaction, to which the witness is interrogated forms any part of the ssue to be tried, the witness will be obliged to give evidence, however strongly it may reflect on his character." (1 Greenleaf on Evidence, section 455.)

In the case now presented however, the evidence was not material to the issue, and related merely to the character of the witness. The tendency of the later authorities is to compel an answer in such a case, but there is not entire accord upon the question. Wharton's Criminal Evidence, section 474, and cases there cited. They appear, however, to agree that the question may be asked, because the witness entitled to the privilege may waive it. (Sodusky, &c. v. McGee, 5 J. J. M, 621; 1 Greenleaf on Evidence, section 460.)

It is not necessary, however, in this instance to pass upon the disputed point to which we have alluded. It is necessary to the proper conduct of the public business and the purposes of justice that the trial court should have a right in its discretion, to control the extent of such a cross-examination. It was so held in Real v. People, 42 N. Y., 270.

In the case now before us the witness was cross-examined at considerable length as to his social and domestic relations. He testified that he had gotten the clothes, was arrested for it and discharged, and that he had not misrepresented himself. There was no avowal as to what the witness would

e stated if the rejected questions had been asked. He had already an-
red them in substance and the court did not abuse its discretion in re-
ng to allow them to be asked.

party jointly indicted with the appellant but not on trial, was intro-
ed as a witness for the Commonwealth. It appears that the attorney for
State was in possession of a written statement, which the witness had
le, as to what he knew of the matters in issue. Among other things it
ed that he had said to the chief of police that "he had the right man,"
ding to the appellant.

is urged that the court improperly allowed the witness to be asked and
nswer whether he had not made use of this expression, and it is further
sted that the entire written statement was improperly introduced as evi-
ce.

appears that the testimony of the witness up to a certain point in his
nination, was not as full as the statement, and the Commonwealth's
rney, holding it in his hand and reading from it, asked him if he had
so stated and if it was not true, to which the witness replied affirma-
ly.

he court expressly told the jury that they must not consider so much of
answer as expressed the opinion that the chief of police had the right
. Not only was this much of the evidence excluded at the time, but the
rt subsequently told the jury that they could not regard it. The written
ement was not introduced as evidence. The attorney for the State
ely used it to refresh the recollection of the witness. Where a party in-
uces a witness, who proves facts against him, he may contradict him
howing that he has, out of court, stated otherwise; and it is true that
re he merely fails to prove what is expected that this can not be done;
this rule does not prevent the witness from being asked if he has not
le certain statements elsewhere, in order to refresh his recollection. It
the more allowable in this case indeed, as it was evident that the wit-
was unwilling to tell what he knew and the sequel so proved. The
tten statement was used merely to refresh the memory of the witness and
his extent its use was not objectionable so far as it was competent testi-
y, and the judgment is affirmed.

STAPLETON v. COMMONWEALTH.

(Filed March 10, 1887—Not to be reported.)

Previous difficulty—Excuse for killing—Apparent danger—Where ac-
ed, in passing the home of deceased, insultingly cried out: "This is the
dog" and crowed, and deceased went out and whipped accused with his
for the insult.—Held, That this fact did not excuse the accused for
ing himself with a pistol and returning and killing deceased when he
in no danger.

Continuance—Discretion of the court—The court did not abuse its dis-
ion in overruling the motion of accused for a continuance based upon
affidavit alleging that deceased had threatened his life, when the evi-
ce clearly shows that accused apprehended no such danger.

. Y. Fitzpatrick and A. H. Howard for appellant.

P. W. Hardin for appellee.

Appeal from Magoffin Circuit Court.

Opinion of the court by Judge Pryor.

The transfer of the case from the Magoffin Criminal Court to the Magoffin Circuit Court, was proper as was held by this court in a similar case of Anderson v. Commonwealth. The instructions were all proper, giving to the accused the full benefit of the plea of self-defense, and no error in the record that we perceive calculated in any manner to prejudice the rights of the accused. That previous difficulties between these parties had produced a state of feeling resulting in the killing of White, is no doubt true, but here the life of the deceased was taken at a time when he was in no danger of bodily harm, and after the fight had terminated. Such is the testimony on the part of the Commonwealth, and while appellant's statement is to the contrary and to some extent corroborated, the jury were the sole judges of the fact and believed what the witness for the Commonwealth stated in regard to the killing, and not the statements of witnesses for the defense.

It is manifest that the accused originated the difficulty on the day the fatal shot was fired. He passed by the home of White, within a few steps of his door and turning his face towards it, cried out, "this is the bull dog" and crowed. A neighbor and relati ve of the deceased was in the house at the time and remarked to the deceased that if he would go out and whip the accused he would pay the costs. To this the deceased assented and made, as the proof shows, an assault on the accused with his fists, getting the better of the fight and chastising the accused for his rude conduct. While this was improper on the part of the deceased, still it did not justify the taking of his life when the accused was in no danger of the slightest bodily harm. He had already been whipped for his insolence and was on his way from the scene of the fight when he returned and shot White with a pistol. There was no excuse or provocation for it except the heat and passion of the accused caused by the fight he had just had with the deceased. The wife of White, when she saw him pass her house says, "there goes the rogue." Whether the accused heard it or not is uncertain. He says that he did, but if so the statement of the woman was no inducement for his conduct. He then had his pistol with him, and had shown it on the same day to others, saying that "he meant business." He presented an affidavit for a continuance to the effect that the deceased had threatened to take his life, and that these threats had been communicated to him. The court overruled his motion, in the exercise of a judicial discretion, the correctness of which is evidenced by the proof before us.

It would not have changed the result and should not, because it is plain that the accused, who now says he expected White would take his life at any time, had no fear of him whatever, or if he had, his effort was to provoke him, that he might shoot him. If the state of fact existed that he expected to prove by Miss Hall, he need not have passed within a few steps of the door of the deceased, crying out here is the bull dog and crowing, as a game cock of the mountains, with a view of challenging his adversary. White could then have shot him from his door-step, and could have taken

life when he assaulted him, but it is apparent that he had no intention
l equally as apparent that the accused apprehended no such danger.
The judgment in our opinion must be affirmed.

McINTIRE v. COMMONWEALTH.

(Filed April 16, 1887—Not to be reported.)

. Indictment—Action of grand jury—Due form of law—Presumption—
ere an indictment is returned with the endorsement "a true bill" there-
signed by the foreman and the names of the witnesses, purporting to
re been examined, written thereon, and presented to the court by the
eman in the presence of the grand jury and filed by the clerk, it must be
en and considered as found and returned in due form of law, and the
rt has no authority to inquire whether twelve jurors concurred in find-
g it or whether the evidence was such as is required by section 111, of the
iminal Code to authorize the finding.

. Re-reference to same grand jury—Necessity for recalling witnesses—Where
indictment has been found, and on motion of the Commonwealth's attor-
y, dismissed and re-referred to the same grand jury, there is no necessity in
alling and re-examining the same witnesses, when the case is re-referred
l a second indictment is found.

3. Robbery—Instructions—In an indictment for robbery, an instruction
at if the jury believe that the property mentioned was feloniously taken
m C. forcibly and against his will, and by putting him in fear is good,
d it is not material to recite in the instruction, the circumstances attend-
g the transaction.

W E. Settle for appellant.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Lewis.

Appellant before the trial moved the court to set aside the indictment
der which he was convicted in this case, upon the ground that the grand
ry found and returned it, without having heard the evidence of those
ose names are written thereon as witnesses; and to sustain his motion
ered to prove by said persons that they were not in fact examined as wit-
sses, in support of the particular indictment. When an indictment, with
e indorsement, "a true bill" thereon signed by the foreman, as required by
ction 119, Criminal Code, and the names of all the witnesses purporting
have been examined written thereon, as required by section 120, is pre-
nted by the foreman in the presence of the grand jury to the court, and
ed with the clerk, as required by section 121, it must be taken and consid-
ed as found and returned in due form of law. And the court has no au-
ority to inquire whether twelve jurors concurred in finding it, as required
section 119; nor whether the evidence before the grand jury was such as
required by section 111, to authorize the finding.

It appears in this case that an indictment against appellant for the same
fense had, on a previous day of the term, been duly returned into court,
it was, on motion of the Commonwealth's attorney dismissed, and the one
nder which appellant was convicted was found upon a re-reference of the
se to the grand jury. So, even if it be conceded, which we think was

never intended, that the court can inquire whether witnesses have been examined before the grand jury, in support of an indictment returned by it, no such omission existed in this case. For having previously examined the witnesses in reference to the offense charged against appellant, there was no necessity or propriety in recalling and re-examining the same witnesses, when the case was re-referred and the second indictment was found.

2d. The offense charged against appellant is robbery, committed, in the language of the indictment, "by then and there putting him (Carroll), the person robbed, in fear of immediate injury to his person, by then and there tieing him with a rope and threatening to hang him," etc.

The instruction given at the instance of the Commonwealth, to which appellant objects, authorizes the jury to convict, if the property mentioned was feloniously taken from Carroll forcibly against his will "and by putting him in fear." It is contended, that as the particular mode in which Carroll was put in fear of immediate injury to his person, is stated in the indictment, the instruction should have been equally as explicit and descriptive on that subject. The jury is, by the instruction required, before finding appellant guilty, to believe beyond a reasonable doubt that the robbery was committed by putting Carroll in fear. That was the essential fact to be established, and it was not material to recite in the instruction all the circumstances attending the transaction. And there is nothing in either of the cases referred to by counsel to the contrary.

Judgment affirmed.

BROWNING v. FIKLIN'S ADM'R.

(Filed December, 19, 1869—Not to be reported.)

Devise—Trust estate—Death of beneficiaries—Sale of property—Purchaser—Remaindermen—It appearing that the property in controversy was devised in trust for the benefit of some negroes who had been slaves, and the aged and infirm beneficiaries were dead, and the property was in such condition as to yield no income, and having been sold under decree of court, the necessity of the trust having ceased to exist, and no one complaining except the purchaser who has been invested with the title, he should be required to comply with the terms of the sale, and if the remaindermen are too young to take their portion of the proceeds, the chanceller will secure it for them.

J. W. Browning for appellant.

J. D. Hunt, R. A. Thornton, Chas. Kerr, C. Suydam Scott, Nelms Bros. and Matt Walton for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor.

In the year 1849, Mrs. Polly Fiklin, of the city of Lexington, by her last will made certain devises of her lands, in trust for the benefit of certain slaves that had been emancipated, the same to be applied to their use and support, and by an express provision of the will, no sale of the realty could be made unless it should become unlawful for free persons of color to remain in the State. The execution of the trust was confided to the late M. C. Johnson, who controlled the property until his death, and since his death

administrator with the will annexed, has been appointed. This trust
been continuing for a long period of time and was created for the rea
that the emancipated negroes were in no conditon to hold it, and by
on of their helplessness, unable to manage it. It is alleged and so ap
s that all the parties in interest are before the court and some of the
eficiaries are the plaintiffs and others the defendants, seeking a sale of
property and the extinguishment of the trust, by reason of the changed
lition of the negro race, and the necessity existing for the conversion
he property into money, that is now yielding but little, if any, income.
aged and infirm negroes are dead, and the purposes of the trust sub
ed, but if this trust is to be perpetuated, as if the condition of the bene
ries had never changed, then the judgment to sell this property or a part
t is erroneous. The will of Mrs. Fiklin was made in view of the in
ity of the negroes, who were the object of her bounty to protect their
ons or property, and for that reason she confided that right to the trus
named in her will. We think under existing laws, the enactment of
ch was not foreseen by the testatrix, with the helpless condition of the
ro removed and all the rights of citizenship given him, the necessity for
trust ceases to exist and if not under the circumstances of this case we
eive no reason why the chancellor could not sell the land, and if any of
remaindermen are too young to take their portion of the proceeds, the
ncellor will secure it for them. At any rate the purchaser, who is the
party complaining, he having refused to pay the purchase money
g invested with title, must comply with the terms of sale. His ex
ions were properly overruled. (Thomas v. Harkins and Wife,, 13 Bush,
)

he judgment is affirmed.

GAINES v. GAINES.

(Filed June 1, 1892—Not to be reported.)

usband and wife—Divorce—Alimony—In this case the wife sued the hus
d for divorce from bed and board and the husband filed a separate action
absolute divorce for abandonment for one year. He owned a large estate
she owned nothing. Her alleged grounds of cruel treatment were not
ained by the evidence, and finding she had no assurance of securing a
t of his estate, she abandoned him and refused to return except upon
dition he secured to her children by a former marriage a stipulated sum
money.—Held, That the abandonment of the wife was without fault of
husband in the meaning of the statute, and the lower court did not err
lismissing her action, and in granting him a decree from the bond of
rimony. The husband paying the costs of the suits.

F. and C. H. Fisk for appellant.

'Hara & Bryan, P. U. Major and A. G. Winston for appellees.

ppeal from Boone Circuit Court.

pinion of the court by Judge Lewis.

he parties to this litigation, Ben. R. and Phoebe E. Gaines, were mar
l March 5, 1878, he being then about 57 years of age, a widower with one

child, W. A. Gaines, about 25 years old, and she a widow about 41 years of age, having four children, Ida, 19; Minnie, 17; Willie, 18, and Lucy 10 years old. He was a wealthy farmer, owning about 1,000 acres of very valuable land, whereon he resided, besides a considerable amount of personal property. She then resided in the State of Missouri, owned very little, if any, property, and immediately after the marriage went to his farm in Boone county, accompanied by her children, who resided with her, and were supported by their step-father until they respectively married, Willie the last to do so, marrying in June, 1888. W. A. Gaines, his son, married in May, 1878, and after residing with his father several months, removed to another place on his land, and has continued there ever since.

July 2, 1889, Phoebe E. Gaines instituted an action against Ben. R. Gaines, for divorce from bed and board and for alimony and support during her natural life out of his estate, alleged by her to be of the value of at least $75,000. She also prayed for an injunction restraining him from selling, conveyng or concealing his property during pendency of the action. The alleged and only statutory ground upon which plaintiff asks the divorce is that almost continuously for six years and continuously for four years before commencement of the action, defendant habitually behaved towards her in such cruel and inhuman manner as to indicate a settled aversion to her and to permanently destroy her peace and happiness.

The action having been submitted for trial, final judgment was rendered at the September term, 1890, of the court, dismissing the petition. But the clerk of the court was directed to tax costs of the action against defendant, the husband, omitting all claims of mileage by witnesses and for attendance by witnesses who were not summoned by subpœna to attend before examiners. The defendant was further ordered to pay fees of plaintiff's attorneys to the amount of $250. An appeal from that judgment was taken by the plaintiff, being granted by the clerk of the Court of Appeals December 10, 1890, when the transcript was filed.

After that judgment was rendered, viz: September 12, 1890, Ben. R. Gaines instituted a distinct action against Phoebe E. Gaines for judgment of divorce from the bond of matrimony and his restoration to the condition of an unmarried man. The alleged ground of divorce asked for in that action was that May, 1889, she, without his fault abandoned him, and had since lived separate and apart from him. The defendant, not denying the abandonment, but alleging in her answer in substance that it was the fault of plaintiff, prayed judgment for alimony and reasonable support from him during her life.

April 25, 1891, final judgment was rendered in that action divorcing plaintiff from defendant as prayed for in his petition, but he was adjudged to pay costs of the action, including a fee of $100 to her attorneys. An appeal from that judgment was granted in the lower court, the transcript having been filed in the office of the clerk of the Court of Appeals, August 15, 1891. The two appeals having been before this court will, in accordance with an agreement between opposing counsel, be heard and decided together. The judgment rendered April 25, 1891, is to the extent it divorced the plaintiff from defendant not only conclusive and irreversible, but operated to prevent further prosecution by appellant of her action for divorce from bed and

board and alimony. Consequently a reversal of the judgment dismissing the action she instituted would not avail her, except to the possible extent of increasing, by mandate of this court, the amount allowed by the lower court for services of her attorney. For as divorce of the wife from bed and board presupposes continued existence of the marital relation, and of her dower right as an incident, it necessarily results that no judgment therefor can be rendered or enforced subsequent to a final judgment in favor of the husband for divorce from the bond of matrimony, which terminates that relation and effectually have right of dower as well as permanent alimony.

The statute in terms authorizes an equitable allowance to the wife out of the estate of her husband on a divorce from the bond of matrimony obtained by her, not when obtained by him. Nevertheless, as heretofore held by this court, she may be entitled to the allowance, not having sufficient estate of her own, if such divorce was improperly granted to him instead of her. Appellant did not, it is true, pray in her answer judgment for divorce of herself from the bond of matrimony, still if the one in his favor was improperly rendered, it should not operate to deprive her of such allowance out of his estate as may be equitable, it being satisfactorily shown she has not sufficient estate of her own. It, therefore, seems to us the simple inquiry is whether the alleged abandonment by her for more than one year before commencement, which constituted the cause of his action, was or was not his fault. For if, as she states, his behavior to her was, for not less than six months before the separation, so cruel and inhuman as to indicate a settled aversion to her or to destroy permanently her peace and happiness, then she did, but he did not have legal cause for divorce, and consequently, though the judgment divorcing him can not now be annulled by the court, she should have an equitable allowance out of his estate, as if the divorce had been obtained by her instead of him.

The pleading to the issue in each of the cases is unnecessarily long, and as might be expected a great deal of the unusually large mass of testimony is both contradictory and irrelevant. But we have had no difficulty in coming to the conclusion that the plaintiff, in the first action signally failed to sustain the ground upon which she asked judgment of divorce from bed and board, and therefore abandonment of her husband was in meaning of the statute not his but her fault. There is no proof of personal violence to her by him, nor threat to do any; nor does it appear he failed to suitably and comfortably support and maintain either her or her four children, while they remained members of his household; and although each one of her children testified as a witness and referred minutely to his conduct and speech from the marriage separation with a manifest inclination to put the most unfavorable construction upon them, they do not state that he ever misused or complained of having them to support. The evidence shows he was easily excited, yet soon molified, and occasionally used rough and profane, but never vulgar language, and some of the witnesses testified he a few times when provoked cursed her, though he certainly was not in the habit of using profane language, if he ever did, about which there is doubt— his common expressions being "dang it," "durn it," sometimes "God damn it." But in every instance when it is proved he used improper language, it was on account of, or connected with her alleged neglect of

some household duty, and although there is proof of several occasions during their married life when he used to her highly improper and rough language, the evidence falls far short of showing that such conduct was either habitual or frequent. So far from such being the case, it is evident he married her, not from sordid motives but from love, and on the whole was as affectionate, patient and just in his treatment of her, as husbands generally are.

Long continued grievances are alleged in her petition, but it seems to us a reasonable explanation of them is, that she became discontented with her lot as a farmer's wife and indisposed to make the best of it, though of her own seeking, especially after all her children had married and gone away, without an assurance or hope of getting part of her husband's estate. She had ample opportunity before marrying him to inform herself of his character and disposition, and of the duties and responsibilities that would rest upon her as wife of a wealthy, yet plain, economical and pushing farmer; for not only had she been for a long time acquainted with him, but the courtship between them was begun at his house while she was a visitor. The specific charge that he used insulting and profane language to her that she could no longer endure, does not seem to us to have been the immediate or controlling cause of the abandonment, for his conduct in that respect, was, according to the proof she attempted to make, not different from or worse than what it had been from the beginning.

Although appellee's son had since his marriage worked on his father's farm as a hand he had been given no land until a short time before the separation, when he purchased and had conveyed to him two small tracts. And that transaction coming to the knowledge of appellee about three weeks before she left, so displeased her that she did not thereafter occupy the same bed with her husband. It further appears that after she left, appellee visited her for the purpose of inducing her to return, and the evidence is satisfactory to us she was willing to do so upon condition he secured to her children out of his estate, a stipulated amount of money, which he declined to do, and even then after she commenced her action for divorce from bed and board, with a view to permanent alimony, without impairing her dower right.

In our opinion, appellant abandoned her husband without his fault, in meaning of the statute, and therefore the lower court did not err either in dismissing her action or granting to appellee a divorce from the bond of matrimony without any allowance to her out of his estate.

We see no reason for an increase of the allowance of $250 to her attorneys, for if there was an unusual amount of labor done by them, appellee has been already taxed heavily and to a considerable extent needlessly.

Judgment in each case affirmed.

MASVILLE & BIG SANDY R. R. CO. v. PELHAM.

(Filed October 27, 1892—Not to be reported.)

Condemnation of land—Verdict—Compromise change of owners—Suit for trespass—Settlement—Parol evidence—Indefinite judgment—The land in controversy was condemned for railroad purposes over 40 years ago, and the

damages fixed at $2,100 and subsequently compromised by the company, paying $1,085 and agreeing to erect certain fencing on the property. Since then the road has changed hands twice and now belongs to the appellant. This suit was brought by appellee for trespass and for the land.—Held, That it was competent to show by parol evidence that the damages had been settled, and, under the circumstances no court would require the surrender of the title or the right to the use for the purposes contemplated, although the judgment or inquest fails to describe the land. A verdict of $650 is set aside on the ground that the instructions are misleading, and not sustained by the evidence.

Wadsworth & Son and Cochran & Son for appellant.

E. L. Worthington, Garrett S. Wall and T. C. Campbell for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Pryor.

This is an action of trespass quare clausum with the defense of likewise tenementum. It appears that so far back as the year 1853, a railroad company organized under a charter granted by the legislature condemned the land of the appellee for railroad purposes and entered upon the premises condemned. The railroad company appealed from the verdict which was $2,100 and subsequently paid $1,085 of that sum on a compromise, by the terms of which it was to erect certain fencing on the premises condemned or along the line of its road. The company failed and the road passed into the hands of the Great Eastern R. R. Co., and in the year 1873 that company undertook to work on the land when the appellee claimed that the damages had not been paid, under the assessment of 1853 and that no work could be done until the money was paid. The engineer said he had been informed the damages had been paid and that if the hands were permitted to go to work and it turned out that the money had not been paid the company would at once make payment. This company worked the road for a time and then suspended, when the road with all its appurtenances, passed to the appellant, the Maysville & Big Sandy R. R. Co., and that company entering on the road within the Pelham boundary and beginning its work, the appellee brought this action for damages. The only issue it seems to us is as to the value of the borrow pit, if not before condemned, and the question as to whether the judgment of condemnation had been satisfied. We think the evidence is not only competent but conclusive as to this issue. The appeal was filed away in 1854 and a payment made exceeding the value of the land taken and fencing built by the company, in execution of the compromise. Chiles, the engineer so states and the circumstances of the filing away of the appeal, the overpayment of the actual value of the land, the erection of the fencing, all transpiring more than forty years, ago seems to us should put the question at rest. But it is contended that the writ or judgment condemning this property is too indefinite, and that a verbal compromise was not sufficient to divest the appellee of title.

The entry was made forty years ago and the land placed in the actual occupancy of the original company. The money had been paid and the road constructed and operated by the second company, and under such circumstances no court would require the surrender of this title or the right to the user for the purposes contemplated by the judgment, although the judg-

ment or inquest may fail to describe the land. The engineer proves that the land in controversy, is the identical land condemned and of this there can be no doubt. The title and possession was protected sufficiently to defeat the action of trespass, and really the only defense is, that the appellant is using more land than was condemned. It was competent to show that the claim for damages had been settled and to show this fact by parol, and the statement of Chiles satisfied the jury that the parties had received all they were entitled to receive—if not satisfied of that fact the verdict would have been for the difference between the sum paid and the amount of the judgment. The verdict was for $650 and this must have been on the idea that the appellants had no right to enter and that the land belonged to the plaintiff. If the company used a borrow pit not condemned, still the damage could not have been as much as this verdict and, therefore, the verdict was the result of instructions that were misleading.

There are only two issues in this case and the trial of one of these issues upon the testimony before us must necessarily have been for the defendant, viz., the issue as to payment or the settlement of the judgment—the other issue was as to the quantity of the land taken by the appellant or those under whom it claims, beyond the actual quantity condemned, and there is but little, if any, testimony to sustain the plaintiff on that issue. The case must, however, go back for a new trial and what may be developed in the next trial, this court has no right to anticipate.

The judgment is reversed and cause remanded with directions to award a new trial and for proceedings consistent with this opinion.

NEWTON v. LEVY.

(Filed January 16, 1892—Not to be reported.)

Purchase of mill—Knowledge of its condition—Hard bargain—Fraud—The appellant purchased a mill at the price of $2,950.00, paid one third down and executed his two notes for $983.33 each for the balance. He paid the first note and made no complaint until suit was brought on the second note, and he now alleges fraud in the sale.—Held, The proof conduces to show that appellant made the purchase with his eyes open. He was at the mill and examined its condition, and while not a miller he must have seen that the building was in a decayed condition. The proof of appellant if uncontradicted makes out a case where he paid too much money for an old mill, and, instead of relying on his own judgment confided in the statement of the appellee, and when all the evidence is considered there is no reason for the interference of the chancellor.

B. L. D. Guffy and Jno. L. Scott for appellant.

Edward W. Hines and W. A. Helm for appellee.

Appeal from Butler Circuit Court.

Opinion of the court by Judge Pryor.

This action to enforce a lien for the purchase money was defended on the ground of fraudulent representations, made by the plaintiff, who was the vendor, as to the condition of the mill and machinery for which the note was executed. That the representations consisted in the statement that the

mill and machinery was in good repair when the building was worthless, nd required in a year after, tearing down and re-building. The charge of raud or misrepresentation is shown by the testimony of several witnesses, ut rebutted by the testimony for the plaintiff. The proof conduces to show hat the appellee examined the building before he purchased it, and from the estimony it must have been apparent to him that the building was worthess and would have to be remodeled in a short time. The proof on the part f the appellee shows he informed the appellant that the mill house would ave to be rebuilt at the time of the sale, and the purchase was in fact made ith that understanding. The appellant purchased one fourth of this propty; one-fourth interest was sold to Cole & Bros; one-fourth to Hudwall nd the remaining one fourth the appellant retained.

The proof is conflicting but conduces to show that the appellant made the urchase with his eyes open. He was at the mill and examined its conition, and while not a miller he could see and must have seen that the uilding was in a decayed condition—in fact he stated to two or more witesses that the building would have to be repaired or a new one built. We hink the testimony establishes the fact that this purchase was a hard barain, nothing more.

The appellant paid one-third of the money down and executed his two notes for $983.33 each. He paid the first note and made no complaint, ntil this lien was sought to be enforced, as to any fraud practiced on him y the appellee. After the issue had been made up, the appellant offered to le an amended answer setting up a fraudulent representation made to him s to the lease of the water power for thirty years and to the ownership f the ground, a fact if it existed he must have known, when his original nswer was filed.

The court below refused its filing and abused no discretion in declining o permit a new issue.

This case was consolidated with an action for the sale of the mill propty, a dissolution of the partnership and a distribution of the assets. The ther partners make no defense, but testify as to the representations made y the appellee to them as to what it would cost to repair the mill buildng. The building stood on the ground and was not hidden from the view f these purchasers; and their proof, if uncontradicted, makes out a case here they paid too much money for an old mill and, instead of relying on heir own judgment, confided in the statement of the appellee, and when all he testimony is considered there is no reason for the interference of the hancellor.

Judgment affirmed.

DAVIDSON, &c. v. HAYDEN, &c.

(Filed January 30, 1897—Not to be reported)

1. Levy of execution—Indemnifying bond—Liability of sureties for the acts of the marshal—The return upon the execution shows that the marshal levied it, not upon a joint interest or partnership property, but upon 4,000 pounds of tobacco belonging to the defendants in the execution. The plaintiff gave an indemnifying bond and required the marshal to sell the property. It cannot now be said by the sureties on the bond that some one had

or claimed a joint interest in the tobacco with the defendants in the execution, and therefore, the officers should have returned the execution with the levy endorsed and not have sold the tobacco. Held—That the sureties having enabled the plaintiff in the execution to enforce his demand on the officer by the execution of the bond, and the officer being damaged in consequence of the seizure and sale of the tobacco, the sureties should be required to pay it.

2. Authority of marshal—Under section 7 of the new charter of the town of Salem (Acts 1889-90, p. 589) we are of the opinion that the marshal had the right to collect the execution under which the sale was made, and the consequent authority to take the indemnifying bond, although the levy was made outside the corporate limits of the town of Salem.

James & James and Bush & Worlen for appellant.

John K. Hendrick for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Paynter.

This action is on an indemnifying bond, executed by the appellants as the sureties of Ben. Shoecraft. An execution was issued by a justice of the peace of Livingston county, on a judgment in favor of Ben. Shoecraft v. J. H. Greenlee and J. A. Barsher. It was placed in the hands of the appellee, Hayden, marshal of the town of Salem, in Livingston county, for collection. He proceeded to levy it on property outside of the corporate limits of Salem, but in Livingston county. The plaintiff in the execution required that the marshal should sell the property under execution, and to indemnify him, executed the indemnifying bond in suit. It turned out that the property sold under the execution was not subject to levy and sale under it, and those owning it brought suit against the appellee and recoverd damages for the wrongful seizure and sale of the property. The return on the execution shows that the marshal levied it, not upon a joint interest or partnership property, but upon 4,000 pounds of tobacco belonging to John Brasher and Henry Greenlee, the defendants in the execution.

The plaintiff demanded a sale of the property and the marshal, having a doubt whether it was subject to the execution, he required indemnifying bond in suit. The conclusive presumption in this case is that the plaintiff in the execution denied that any one was the owner of or had any interest in the property levied on, except the defendants in the execution. Therefore, he gave the indemnifying bond and required the marshal to sell the property levied upon. While the owners may have claimed a joint interest in it with the defendants in the execution, still the plaintiff denied such claim and compelled the marshal to sell it by giving the indemnifying bond.

It can not now be said by the sureties on the bond that some one had or claimed a joint interest in the tobacco, with the defendants in the execution, and that, therefore, the officer should have returned the execution with the levy indorsed, and not have sold the tobacco. The officer could not have done this because the plaintiff in the execution required him to sell it all as the property of his debtors. The appellants enabled the plaintiff in the execution to enforce his demand on the officer by the execution of the bond, and thereby agreeing to "indemnify him against the damages which he may sustain in consequence of the seizure or sale of the property".

This action was brought to compel the appellants to perform their undertaking. The officer was damaged in consequence of the seizure and sale of the property, and the appellants should be required to pay it.

Upon the examination of section 7, of the new charter of the town of Salem (Acts 1889-90, p. 589), we are of the opinion that the marshal had the right to collect the execution under which the sale was made, and the consequent authority to take the indemnifying bond.

The judgment is affirmed.

CITY OF LOUISVILLE v. SELVAGE, &c.

(Filed January 29, 1902—Not to be reported.)

Apportionment warrant—Liability of city for 10 per cent. damages—Costs of former appeal—On the former appeal this court held that Bullitt was liable only for 90 per cent. of the apportionment warrant. Upon the return of the case Bullitt's part was paid and appellees filed an amended petition claiming against appellant city ten per cent. of the warrant, and interest on the whole sum of the apportionment, and also for costs incurred in the case against Bullitt, and the costs paid on the appeal, and judgment was rendered for appellees for the ten per cent. on the apportionment warrant of Bullitt, for interest on the whole amount of the warrant till Bullitt's part was paid, and for $101.05, costs, heretofore incurred.—Held, That there was no error in rendering judgment against appellant city for ten per cent. of the apportionment warrant, which the former opinion held could not be recovered from the property holder, Bullitt; but the court erred in adjudging to appellee, interest on the full amount of the apportionment warrant, or on any amount of the warrant, till the reapportionment by the court under the mandate of this court. The court also erred in adjudging the costs of the former appeal against appellant as that was costs of reapportionment, and, in a case wherein appellant was not a party to the appeal.

H. L. Stone for appellant.

Lane & Harrison for appellee.

Appeal from Jefferson Chancery Court.

Opinion of the court by Judge White.

This is the second appeal of this case. The former appeal was styled Joshua F Bullitt v. Selvage, &c., and the opinion is found in 20 Ky. Law Rep., 599.

The action was originally brought against Bullitt, the City of Louisville and various property owners along the street improved. The first judgment was against Bullitt, for the full amount of the apportionment warrant, against his property. On appeal this court held that he was liable for only ninety per cent. of the warrant and remanded the case for judgment for that sum or proportion of the warrant. Upon return of the case Bullitt's part was paid and appellee filed an amended petition claiming against the appellant city ten per cent. of the warrant, under the former opinion of this court, and also claimed interest on the whole sum of the apportionment warrant and further, claimed judgment for costs incurred in the case against Bullitt and the costs paid on the appeal. Appellant pleaded to the

amended petition. (1) statute of five years limitation, (2) res adjudicata, (3) a denial of liability for either interest or costs.

The action was submitted for judgment on petition and answer. Judgment was rendered for appellees for the ten per cent. on the apportionment warrant of Bullitt, for interest on the whole amount of the warrant till Bullitt's part was paid and for costs, $101.05, heretofore incurred. From that judgment, this appeal is prosecuted.

As it appears from the record, this action was first begun against the city in 1893, there can be no question of limitation as that was less than one year from the execution of the work. The plea of res adjudicata is likewise bad, for it is not alleged, nor does the record show, that the judgment rendered against Bullitt disposed of the case as to the city or denied appellees a right of recovery against the city. There was no adjudication between the appellant city and the appellees. We are of opinion, therefore, that there was no error in rendering judgment against appellant city for ten per cent. of the apportionment warrant, which the former opinion held could not be recovered form the property holder, Bullitt.

The court erred in adjudging to appellee interest on the full amount of the apportionment warrant, or on any amount of the warrant till the reapportionment by the court on the return of the case, under the mandate of this court. Likewise, there was error to adjudge against appellant the costs on the former appeal, as that was costs of reapportionment and in a case wherein appellant was not a party to the appeal. This was expressly decided by this court in Gosnell v. City of Louisville, 20 Ky. Law Rep., 522, and City of Louisville v. Selvage, &c., 21 Ky. Law Rep., 349. In each of these cases the court expressly held that the city was not liable for interest or costs until a reapportionment had been made. These cases were decided under the same law as the present case and is, therefore, binding on us here.

For the errors indicated, the judgment is reversed and cause remanded with directions to render judgment for appellees for ten per cent. of the apportionment warrant with interest from the date of filing the amended petition and for costs subsequently accruing since the reapportionment.

The court delivered the following response to petition for rehearing:

In the petition for rehearing it is insisted that the court has erred in applying the rule as to interest and costs as laid down in Gosnel v. City of Louisville, 20 Ky. Law Rep., 522, and in City of Louisville v. Selvage, 21 Ky. Law Rep., 349.

Counsel insists that the contracts made in those two cases were entered into after the act of July 1, 1893, and as the contract in this case was entered into under the act of April 1, 1886, a different rule must apply. We have examined the records in the two cases cited. The record in the Gosnel case shows that contract was made on April 26, 1894, and so was after the act of July, 1893. But the contract in the Selvage case was made May 18, 1892, which was prior to the act of July, 1893, and was under the act of April 1, 1886, the same as in this case. So it appears that this court has held, under the act of April, 1886, as well as under the act of July, 1893, the city was not liable for interest or costs until the apportionment is corrected. As these two acts are entirely inconsistent we must conclude that the decisions

were made irrespective of the statutory provision. In neither opinion is any reference made to the statute as a reason why there is no liability.

The court said in the Gosnel case, 20 Ky. Law Rep., 522: "Nor should interest upon the whole amount of the contract price be allowed against the city, for, while the rule may seem harsh, the contractor must be assumed to have entered into the contract with his eyes open as to its provisions and their enforcibility." This was followed in the Selvage case. The question does not depend upon the language of either the act of 1886 or of 1898. The rule is the same in either case.

Petition overruled.

JONES' ADM'R v. ILLINOIS CENTRAL R. R. CO, &c.

(Filed February 18, 1902—Not to be reported.)

1. Action for wrongful killing—Qualification of administrator—Residence of Intestate—Pleading—Where an administrator was appointed in C. county and filed suit against the railroad company in L. county for the wrongful killing of his intestate, and after answer was filed by the railroad company denying that the intestate was, at the time of his death a resident of C. county, and that appellant was duly appointed and qualified as his administrator, an amended answer was offered by appellee and rejected, asking that R. be made a party to the action upon the ground that he claimed to have been appointed administrator of the intestate in M. county—Held, That this was error. Appellees were entitled to have the M. county administrator made a party to the action so that, in the event of a judgment in favor of the C. county administrator, the former would be bound thereby.

2. Peremptory instruction—Question for jury—It was error of the court, upon the contention of the testimony, to give a peremptory instruction to the jury to find for appellees, upon the ground that there was no testimony to support the contention that the intestate was at the time of his death, a resident of C. county, in view of the testimony of the widow to the effect that she married the intestate in C. county, and they lived together there and never resided at any other place, and all their household furniture had always been kept there since their marriage; and this, with the conflicting testimony was evidence to go to the jury in support of the jurisdiction assumed by the C. County Court.

Molloy & Utley, J. K. Hendrick and Hazelrigg & Chenault for appellant.

Pirtle & Trabue, P. H. Darby and Wilson & James for appellees.

Appeal from Lyon Circuit Court.

Opinion of the court by Judge DuRelle.

Having been appointed administrator of William Jones, deceased, by the Carlisle County Court, appellant instituted this action in the Lyon Circuit Court to recover of the appellee railroad company and a conductor and engineer of said company in its employ, $10,000 damages for the death of his intestate, alleged to have been caused by the gross negligence of the appellees in making a running switch at Cumberland River, in Lyon county.

The appellee company filed a petition in proper form to transfer the case as to it to the United States Circuit Court for the District of Kentucky,

alleging a separable cause of action as against it. This motion was overruled, and the action of the court seems supported by the cases of Pugh v. C. & O. Ry. Co., 19 Ky. Law Rep., 149; C. & O. R. Co. v. Dixon's Adm'r., 20 Ky. Law Rep., 792; Kane v. City of Indianapolis, 82 F. R., 770.

After the filing of an answer to the merits, in which it was denied that appellant's intestate was, at the time of his death, a resident or citizen of Carlisle county, Kentucky, and that appellant was duly appointed and qualified as his administrator, an amended answer was offered and rejected, asking that F. G. Rudolph be made a party to the action, upon the ground that he claimed to have been appointed by the McCracken County Court, administrator of the same intestate, and as such administrator was seeking to recover damages for the death of said intestate in the same court in which this action was pending. The action of the circuit court in rejecting this amendment was, we think, erroneous. Appellees were entitled to have the McCracken administrator made a party to the action, so that, in the event of a judgment in favor of the Carlisle administrator, the former would be bound thereby.

Upon the conclusion of the testimony the court gave a peremptory instruction in favor of appellees, upon the ground, apparently, that there was no testimony to support the contention that the intestate was, at the time of his death, a resident of Carlisle county. This, we think, was erroneous, in view of the testimony of the widow, whose testimony is to the effect that she married the intestate in Carlisle county, that they lived together there, that they never resided at any other place, and that all of their household furniture had always been kept there since the marriage. And while she also testifies to facts which militate strongly against her theory of her husband's residence, and there is considerable testimony upon the other side in contradiction of it, we think her testimony was evidence to go to the jury in support of the jurisdiction assumed by the Carlisle County Court. (Jacob v. L. & N. R. R. Co., 10 Bush, 263.)

For the reasons given, the judgment is reversed and cause remanded, with and directions to award appellant a new trial, and for further proceedings consistent herewith.

FRANKLIN CIRCUIT COURT.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT v. THE STATE NATIONAL BANK OF FRANKFORT.

SAME v. SAME.

(Entered April 27, 1904.)

Opinion by Judge J. E. Cantrill.

These causes coming on for trial and heard together, by consent, the court

eing advised, and being of opinion that defendant is liable to plaintiff for he taxes sued for, for five years prior to the institution of this suit, upon he assessed value of the shares of its stock ($150,000) for the years 1896 to 900, inclusive, less the assessed value of the real estate of defendant, together with 8 per cent. interest thereon, from the 1st day of October in each ear after said tax became due; and also for the taxes sued for, for the ears 1901, 1902 and 1903, upon the assessed value of its shares ($180,000), less he assessed value of its real estate. (Plaintiff, by leave of court, having led herein a certified statement of the assessed value of defendant's real tate, for the years 1896 to 1903, inclusive, marked "real estate.")

IN CASE NO. 22,916.

It is, therefore, adjudged that the several demurrers of defendant to the etition and amended petitions herein be overruled, and the demurrer of laintiff to the defendant's answer, as amended, be and the same is hereby ustained, and, defendant declining to plead further, it is now ordered and djudged that defendant pay to plaintiff or its attorneys, the following ums for taxes and interest aforesaid (being the city taxes due under the vies for each of said years on the assessed value of the shares of stock $150,-00, less the assessed value of the real estate of defendant).

For the year 1896—$1.45 on $150,000, amounting to the sum of $2,175, with per cent. interest thereon from the 1st day of October, 1900, until paid, —; for the year 1897—$1.45 on $150,000, amounting to the sum of $2,175; with per cent. interest thereon from the 1st day of October, 1900, until paid, $—; or the year 1898—$1.45 on $150,000, amounting to the sum of $2,175, with 8 er cent. interest thereon from the 1st day of October, 1900, until paid, $—; or the year 1899—$1.45 on $148,000, amounting to the sum of $2,146, with 8 per ent. interest thereon from the 1st day of October, 1900, until paid, $—; for he year 1900—$1.45 on $145,000, amounting to the sum of $2,125, with 8 per ent. interest thereon from the first day of October, 1900, until paid, $—; ogether with plaintiff's costs herein expended. To all of which defendant xcepts and prays an appeal to the Court of Appeals, which is granted.

AND IN CASE NO. 23,479.

It is also adjudged that the demurrers of defendant to the petition, as mended, be overruled, and the demurrer of plaintiff to the answer as mended (also considered as filed herein) is hereby sustained; and defend-nt declining to plead further, it is now ordered and adjudged that defend-nt, State National Bank, pay to plaintiffs, or its attorneys, the following ums for taxes and interest sued for, for the years 1901, 1902, 1903, being ity taxes on the assessed value of said shares ($180,000), less the assessed alue of real estate ($5,000), viz.:

For the year 1901—$1,45 on $175,000, $2,537.50, together with 8 per cent. in-erest from October 1, 1901, $—; for the year 1902—$1,70 on $175,000, $2,975,

with 8 per cent. interest from October 1, 1902, $—; for the year 1903, $1.70 on $175,000, $2,975, with 8 per cent. interest from October 1, 1903, $—; together with plaintiff's costs herein expended. To all which defendant excepts and prays an appeal to the Court of Appeals, which is granted.

A copy—Attest:

BEN MARSHALL,
Clerk Franklin Circuit Court.

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COURT OF APPEALS OF KENTUCKY.

WAYLAND, &c. v. BROWNING.

(Filed September 21, 1904—Not to be reported.)

Lands—Passways—Conveyances—Where one for a valuable consideration onveyed to another the right to pass along a strip of land sixteen feet in width, n action brought by others alleging ownership of the land and asking that heir title be quieted, was properly dismissed, the commissioner who conveyed the lands of a decedent under an order of court only conveying to the endor of the claimant in the action a right of passway one pole wide, the ontention of the claimants being that the strip sixteen feet wide passed to hem instead of the mere passway.

H. Clay White for appellants.

C. C. Cram for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Hobson.

On May 28, 1903, T. J. Browning for valuable consideration in writing, onveyed to Raymond Snow the right to pass along a sixteen foot strip of nd lying along the south line of Raymond Snow's lot from the west end f his lot out to the turnpike, Snow agreeing not to obstruct the strip so as o obstruct the passage over it of W. S. or Richard Wayland. The Wayands brought this suit against Browning and Snow, alleging that the sixeen foot strip was their property and praying that their title to it be uieted. The court dismissed their petition and they have appealed. The ights of the parties depend upon the partition of the lands of Indiana Anerson under whom they all claim. In that suit lot No. 4 fell to Matilda nderson under whom Browning claims and lot No. 6 to James Vanarsdall nder whom the Waylands claim. The commissioner's report, so far as aterial, reads as follows:

"Lot No 4 to Matilda Anderson (here follows courses and distances of the ot). Lot No. 6 to James Vanarsdall (here follows courses and distances f the lot) We laid off passway to lot No. 6, from the turnpike road to gure 4 one pole wide and on lot No. 4 along line binding on lot No. 1."

The deeds follow the commissioner's report literally. The claim of the Waylands that they own the sixteen foot strip rests on the idea that not a mere passway was allotted to them, but that the strip of sixteen feet passed to them.

The language of the commissioners' report does not properly bear this construction. The commissioners only laid off a passway. They did not undertake to give to James Vanarsdall any part of lot 4 except a passway one pole wide. The whole of lot 4 was allowed to Matilda Anderson. The only restriction laid upon her title is the statement that they laid off a passway one pole wide for the benefit of lot No. 6, made by the commissioners in the conclusion of their report.

Judgment affirmed.

GARRARD v. BLACKBURN, &c.

(Filed September 21, 1904.)

1. Damages—Pleading—In an action for damages for the wrongful cutting of timber, a judgment for defendants will not be disturbed where the instructions were simple and were not objected to by either of the parties, where there was no demurrer to the answer, and a reply filed putting in issue all the affirmative allegations of the answer. If there was any defect in the answer it was cured by the verdict.

2. Instructions—Where the instructions do not submit the precise issue as made in the pleadings, no objection having been made to them, the verdict of the jury will not be disturbed, no other instructions having been asked and which if given would not have affected the result.

Thos. R. Brown A. J. Garred and Alex Lackey for appellant.

W. D O'Neal R. T. & M. S. Burns for appellees.

Appeal from Lawrence Circuit Court

Opinion of the court by Judge Hobson.

Appellant filed this suit to recover of appellees for certain timber cut as he alleged from his land. The defendants admitted cutting the timber but denied that it was cut from appellants' land The case was submitted to the jury who found for the defendants and judgment having been entered upon the verdict, plaintiff appeals. It is insisted for him that there was a misconception of the pleadings and the case was tried on an issue not made. But our attention is not called to any error of the court in the admission or rejection of evidence, and on reading the transcript we do not find that there was any ruling of the court on this subject to which exception was reserved, that is correct. The instructions given by the court are very simple and were not objected to by either party. There was no demurrer to the answer. Plaintiff filed a reply putting in issue its affirmative allegations and the case was tried on the issues thus made. If there was any defect in the answer it was cured by the verdict.

The plaintiff alleged that he was the owner and in possession of the tract of land bounded by the division line made by Ulysses Garred and D. W. Garred by written agreement made on March 3, 1869, and that D. W. Garred afterwards conveyed the land on his side of the division line to those under

om he claimed; that thereafter Ulysses Garred conveyed to Henry Black rn, under whom defendants claimed, the land lying on their side of the ision line and that the defendants had cut timber within the boundary braced in the deed from D. W. Garred to him. The defendants denied at the lines of plaintiff's land ran as stated in the petition or included y of the timber which they cut. They denied that the plaintiff owned e timber or the land on which the timber grew, or that the timber grew on land inside of the lines of the deed under which plaintiff claims. ey alleged that the timber grew upon land conveyed by Ulysses Garred Henry Blackburn. The plaintiff had set out himself fully the division e made by the Garreds. The answer must be read in connection with the ition, and when so read, aptly made the issue that the timber which de- dants had cut was on their side of this division line.

The affirmative matter in the answer having been denied by the reply the urt properly overruled the motion to enter judgment for the plaintiff twithstanding the verdict for the defendant; for it cannot be said that der the pleadings a judgment could have been entered for the plaintiff. he had introduced no proof. While the instructions of the court did not bmit to the jury the issues precisely as made in the pleadings, they were t objected to.

Plaintiff did not ask on the trial any instructions submitting the case to e jury on any other basis than that given in the instructions of the court, d from a reading of the record we do not see that if the instructions had en worded differently this could have affected the result; for the reason at the jury seem to have passed on the actual location of the dividing line tween the parties and to have found for the defendants on their location the line. While the evidence is conflicting we cannot disturb the verdict the ground that it is palpably against the evidence.

Judgment affirmed.

MASON, &c. v. BYRLEY, &c.

(Filed September 22, 1904.)

1. Duties of canvassing board—Primary elections—In the matter of call- g a primary election to nominate a Republican candidate for Congress in e Eleventh District, the district committee composed of the chairman of e several county committees is the governing authority of the Republican ty in the district, and it is the right and duty of the district committee, er the primary shall have been held, to meet, count the votes as returned m the several counties, ascertain and announce the result and award the ndidate receiving a majority of the votes a certificate, declaring him to be e nominee.

2. Same—Proxies—A canvassing board must be composed of a majority of e members of the district committee, and members of the committee nnot act by proxy, but must in person perform their duties as members the canvassing board, acting under oath previously administered.

3. Same—Must be held in accordance with the statute—Contest—When a nvassing board or committee has performed its work, a recount of the vote them will not be permitted, however erroneous the result reached by em. In such case the wronged candidate must enter a contest for the

nomination and is without other remedy. In this case as the canvassing committee was composed of less than a majority of the entire district committee, its work was invalid.

4. Same—Mandatory injunction—When the district committee have failed as in this case, to meet after the primary for the purpose of canvassing the returns and ascertaining the result, mandatory injunction will lie to compel them to act, it appearing that mandamus will not afford adequate relief.

W. H. Holt for plaintiffs.

W. R. Ramsey and M. H. Rhorer for defendants.

Opinion of the court by Judge Settle.

At a primary election held in the Eleventh Congressional District for the purpose of nominating a Republican candidate for Congress to be voted for at the November election 1904, W. G. Hunter and D. C. Edwards were rival candidates for the nomination, and each of them claims to have received a majority of the votes cast at the primary, and consequently entitled to be declared the nominee. It appears, however, that at a meeting held at Middlesboro, August 17th, 1904, attended by the defendants, eight of whom are chairmen respectively of the county Republican committees of that number of counties of the Eleventh Congrressional District, and three of whom were proxies respectively for the chairmen of the Republican committees of three other counties of that district—a canvass was made or attempted to be made by them of the returns from each of the 19 counties of the district, as the result of which it was decided that the defendant, W. G. Hunter, had received a majority of the votes cast at the primary election and he was thereupon awarded a certificate, declaring him the nominee.

The injunction, the dissolution of which is now sought by the defendants, was issued by the circuit judge at the instance of D. C. Edwards and other plaintiffs. By it the members of the Republican district committee of the Eleventh Congressional District, including such of the defendants as are members of that committee, are commanded to meet at Somerset, Pulaski county, Spetember 21st, 1904, and canvass the votes as returned from each of the counties for the purpose of ascertaining which of the contending candidates is entitled to the nomination, and to issue to the successful party a certificate, declaring him the nominee.

The petition, as amended, charges error in the count as made by the defendants at Middlesboro, denies their authority to act, and charges fraud upon their part in reaching the result declared by them. It is not proper for the case to be decided at this juncture upon its merits. We can only determine whether the facts appearing upon the face of the record authorized the granting of the mandatory injunction. It could have been granted in this case upon but one ground, viz: That the committee which canvassed the votes at Middlesboro, was not legally constituted, and were consequently without authority to act in the premises Fraud or irregularity in conducting an election, certifying the returns, or in the manner of canvassing the vote, ascertaining or certifying the result, cannot be made the subject of inquiry in an action for mandamus or mandatory injunction against the officers, committee, party authorities, charged by law with the duty of merely canvassing the vote and ascertaining and declaring the result. Such matters can be inquired into but it must be done by con-

ting the election as provided by the statute, under which all primary ctions that are held in this State must be conducted. (Ky. Statutes, sec- 3; Henry v. Secrest, 24 Ky. Law Rep., 1505; Steele v. Mead, 98 Ky., 614; ne v. Berry, 96 Ky , 63; Anderson v. Likens, 24 Ky. Law Rep., 1001; pe v. Kenner, 20 Ky. Law Rep., 1343).

Likewise where a canvass of the returns has been made, and the result of election or primary declared by the officers or committee charged by with the performance of that duty, no power exists in such officers or mmittee to make a recount, nor can a chancellor compel them to do so, wever erroneous, or fraudulent the result. In such a case the wronged ndidate must resort to a contest before the proper tribunal for the enforce- nt of his right to the nomination or office in question. (McCreary on ctions, sec. 267.) But if as contended by plaintiffs, the committee which t at Middlesboro, was not legally constituted, it was without power to , therefore, there has been no canvass of the votes, and no ascertainment the result of the primary election, in the Eleventh Congressional Dis- ct. It becomes necessary, therefore, to determine whether the committee s legally constituted. The legislature of this State enacted a statute viding for and regulating the holding, by political parties, of primary elec- ns, for nominating party candidates for office.

n Brown v. Republican Executive Committee, &c., 23 Ky. Law Rep., 1, it was held that a primary election not conducted as prescribed by the tute is unlawful. In Young, &c. v. Beckham, 24 Ky. Law Rep., 2135, it s said, in construing the statute, supra, "When section 1565 says that the icle shall apply to all elections held for the purpose of nominating can- ates for State, county, district or municipal offices, it must have meant t the committee or governing authority of the party, can ascertain and tify the result of the primary held to nominate candidates for such offices, the Secretary of State, because it is provided in section 1653, that the mmittee or governing authority of the party may order a primary elec- n. In addition to that, section 1563 provides that the committee or gov- ing authority in the county or district are empowered to count the votes. * * If the committee or governing authority can call and hold a pri- ry election, the same authority can certify to the Secretary of State the nes of the parties who are entitled to be placed upon the official ballot. * * The committee should follow strictly the provisions of the statute ulating the holding of the primary election; unless this is done the risk aken that they may not be able to have those who are declared to be the ninees, placed upon the ballot at the regular election."

The governing authority in the Eleventh Congressional District is the trict committee, made up of the chairmen of the several Republican com- ttees of the counties composing that district. The primary election ich is the subject of investigation in this case, was called by the district mmittee as thus constituted. It was therefore, the duty of the same com- ttee, following the holding of the election, to meet, canvass the returns de of the votes cast in the primary, ascertain the result, and declare as nominee of the Republican party the person who received the highest mber of votes therein. The presence at the meeting of a majority of the trict committee was necessary to constitute a quorum. It appears that

there were but eight members of the committee present at the Middlesboro meeting. Three other persons, holding the proxies of that number of absent members of the district committee, were also present at the meeting, and acted with the eight members of the committee mentioned, in the work of canvassing the votes returned from the several counties, and in ascertaining the result and in declaring the defendant, Hunter, the nominee. If the three persons thus acting with the eight members of the district committee, were legally empowered by the written proxies received by them of three absent members of the committee, to perform any and all duties that were incumbent upon or might have been properly performed by the principals, if present, it follows that they with the eight members of the committee constituted a majority of the district committee, as there are 19 counties in the district, and therefore, 19 members of the committee. It is insisted for the defendants that the members of the district committee are not officers, but merely agents of a political organization, and that whatever powers they possess may be delegated by them to others. In support of which it is said that members of party committees frequently give proxies under which others are permitted to act for them, and section 4, book of rules of the Republican organizaiton of Kentucky, is cited by counsel as authorizing the use of proxies.

Doubtless the use of proxies is more or less common to all political organizations, but rule 4, of the Republican party book referred to, relates only to members of the State Central Committee, and an examination of the contents of the book in question will show no other rule allowing the use of proxies, except by members of the State Central Committee, as provided by section 4.

The question under consideration is not one of party custom, but of law, for by the enactment of the statute, supra, it was the purpose of the legislature to have primary elections conducted according to law. We must, therefore look to the provisions of the statute to ascertain the duties and powers of those who are to conduct them.

While those who constitute the membership of the governing authority of a political organization are not officers in the technical meaning of that term, the duties required of them by the statute are official in character because they must be performed as therein prescribed, and penalties are provided by the statute for the failure to so perform them.

Thus it is provided in section 1563 that "Before entering upon the discharge of the duties set forth in this article, the committee or governing authority shall be sworn by some officer authorized by law to administer an oath, to faithfully and honestly discharge the duties herein imposed; and the failure upon the part of any member of the committee or governing authority to discharge such duties faithfully and honestly, shall be deemed a misdemeanor, and the person so offending shall, upon indictment and conviction in the circuit court of the county or district, be fined not less than $100, nor more than $500, and be imprisoned in the county jail not less than 60 days and not more than one year."

In Young, &c. v. Beckham, supra, it is said of the above section that "A cursory reading of the section might make an impression upon the reader that this only required that the committee or governing authority should

take this oath when organized to determine a contest, but a more careful reading of the section shows that it must be taken before entering upon the discharge of the duties set forth in this article. Many duties are required to be performed by the committee or governing authority of a party under the article. The article is composed of several sections, in which the various duties are designated." It is conceded that the members of the district committee and proxies by whom the canvass of the vote was made at Middlesboro were only sworn at the time of, or just before the beginning of the work that was there performed by them. The duties required of the district committee in the matter of calling and holding the primary, as well as in ascertaining and declaring the result, are defined by the statute and we do not find in the statute or in the printed rules of the Republican party organization of the State, any provision allowing the members of the district committee to delegate to others, by proxy or otherwise, the performance of the duties with which they alone seem to be entrusted by the statute.

It is, therefore, reasonable to conclude that if it had been contemplated by the legislature, that members of the district committee should delegate to others the performance of the duties required of them by the statute regulating primary elections, a provision to that effect would have been inserted in the statute. The fact that the members of the committee must be sworn to faithfully perform their duties, indicates that they alone must perform them. This construction of the statute is not only reasonable, but will serve to prevent designing persons, under the cover of proxies procured of members of the committee, from creating opportunities for tampering with election returns, or engaging in other like corrupt practices to thwart the will of the people.

In our opinion the proxies from members of the district committee held by the three persons who attended the Middlesboro meeting, conferred upon them no authority to act in the work done or attempted to be done at that meeting, and as there were only eight members of the district committee present, which was less than a majority of the entire committee, it follows that the canvass there made of the votes cast in the primary election was invalid, as was the result then ascertained and declared.

The question is also made that a mandatory injunction does not lie to compel performance of such acts as are required of a canvassing board, and that the only remedy in such cases is by mandamus under chapter 12, title 10, of the Civil Code of Practice. Under the Code of Practice as it was originally adopted, an injunction was only allowed to restrain the defendants from a particular act (Civil Code, secs. 271-272, as originally enacted), but by the Acts of 1894 this was changed, and by section 271 it is provided, "When any mandatory injunction shall be granted, the order or judgment may affirmatively direct the party enjoined to do the act or thing required to be done." And by section 276 it is further provided that the preliminary injunction "may be mandatory in its nature if the case so require."

In High on Injunction, sec. 2, it is said "Injunctions are known as mandatory or preventive according as they command the defendant to do or refrain from doing a particular thing." Further on in the section, after laying down the rule that the remedy by mandatory injunction "is exercised with extreme caution and is confined to cases where courts of law are unable

to afford adequate redress, or where the injury cannot be compensated in damages," it is further said: "And in determining whether to grant relief by way of mandatory injunction, courts of equity will take into consideration the relative convenience and inconvenience which would result to the parties from granting or withholding relief, and will be governed accordingly."

The chancellor will not interfere by injunction where there is an adequate legal remedy, but where there is no adequate legal remedy and the ends of justice require it, he will interfere by injunction to prevent irreparable injury, and by the express provisions of the Code, above quoted, his injunction may be preventive, or if necessary it may be mandatory.

Chapter 4, of title 8, regulating injunctions must be read in connection with chapter 12, of title 10, regulating mandamus. Mandamus is a common law remedy, and if this is adequate the party must proceed by it, but if it is inadequate and there is no other adequate remedy, he may proceed by injunction; for all the provisions of the Code are to be given effect. The foundation of the chancellor's jurisdiction to proceed by injunction is the inadequacy of the legal remedies. It does not depend upon the character of the defendant, or the character of the act sought to be enforced. To hold otherwise would be to restrict the general language of section 276, and to hold that injunctions cannot be granted under it, in all cases to prevent irreparable injury, but only in cases not involving official acts. There may be the same irreparable injury in these cases as where only private acts are involved and the general language of the Code, allowing injunctions, is not to be limited by confining them to actions involving simply private acts. The proceeding must be by mandamus where that is adequate, but where that is inadequate, the extraordinary power of the chancellor may be invoked to compel official action, just as it is often invoked to restrain it.

In the case before us the remedy by mandamus is wholly inadequate, the injury cannot be compensated in damages and unless an injunction is granted, the plaintiff will be left without remedy. It is therefore one of the extreme cases in which remedy by mandatory injunction may be properly allowed. (Henderson County Board of Health v. Ward, Judge, &c., 21 Ky. Law Rep., 1193.)

We deem it unnecessary to discuss the objection to jurisdiction further than to say the object of the action is to compel the district committee to meet, canvass the votes, and ascertain the result, which it is alleged they, or majority of them have failed to do. The cause of action, therefore, grows out of the failure of the committee to perform a manifest legal duty. That failure of duty occurred as much in Laurel county, where this action was instituted as elsewhere. Indeed, the county seat of that county was, in the beginning, selected for the meeting of the committee and the counting of the votes. Laurel county is situated in the 11th Congressional district, the members of the district committee all reside in that district—each committeeman in a county to himself. Whether the members of the district committee be denominated ministerial officers, or agents of a political organization, the duties which they, or a majority of them are alleged to have failed to perform, are statutory, that is such as are prescribed by the statute regulating primary elections, and, therefore, in that sense official duties.

For these reasons we think section 63, sub-section 2, Civil Code, authorized he bringing of the action in Laurel county.

At the request of the judge before whom the motion to dissolve the injunction herein was made, the other judges of the Court of Appeals, except Judge O'Rear, who was absent, heard with him the argument on the motion, with him considered the case, and a majority of them concur in this opinion.

COMMONWEALTH v. KEATHLEY.

(Filed September 23, 1904—Not to be reported.)

Criminal law—Licenses—Where one was indicted for conducting a hotel without a license, the defense that he was sick and unable to look after the business which was entrusted to his clerk, will not avail, and it was error in he lower court to dismiss the indictment. His fine should have been fixed within the limitation prescribed by statute.

W. H. Hester and N. B. Hays for appellant.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge O'Rear.

The circuit court adjudged the dismissal of the indictment in this case, harging the defendant with operating a hotel without a license. This case as tried by consent without a jury. Appellee was conducting a hotel at ulton, a fifth-class city. Being ill, he directed his clerk to apply to the erk of the county court for a license, but because of the failure of the otel clerk to pay the license fee required by statute, the county court clerk id not issue the license. Appellee says he continued to operate the hotel nder the belief that the license tax had been paid; that he continued ill, nable to look after his business for several months, and in consequence inusted it entirely to his clerk. It is confessed that the license was not sued.

Under this state of case the law is that appellee is guilty of a violation of he statute, and the court should have fixed his fine within the limitation escribed by the statute. It was, therefore, error for the circuit court to ave dismissed the indictment.

The judgment is reversed and cause remanded with directions to grant he Commonwealth a new trial.

COMMONWEALTH v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed September 22, 1904—Not to be reported.)

1. Railroads—Indictment—A demurrer was properly sustained to an indictment against a railroad company charging it with the commission of nuisance, where it was uncertain whether the bridge complained of was r the passing of cars or for public travel, and where also there is uncerinty as to the time of the commission of the offense.

2. Same—The statement of the acts constituting an offense must be set t in an indictment in ordinary and concise language and in such manner

as to enable a person of common understanding to know what is intended, and it must be certain as to the party and offense charged, the place and the circumstances under which the offense was committed.

Ed. Daum for appellant.

W. H. Wadsworth and B. D. Warfield for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from an order of the Fleming Circuit Court, sustaining a demurrer to an indictment against the appellee charging it with having committed and maintaining a nuisance by the erection of a bridge and approaches thereto.

By section 124, of the Criminal Code, it is provided that an indictment must be direct and certain as regards, first, the party charged; second, the offense charged; third, the county in which the offense was committed; fourth, the particular circumstances of the offense charged if they be necessary to constitute a complete offense.

Section 122, of the Criminal Code, provides that the statement of the acts constituting an offense must be in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended.

Upon a careful inspection of the indictment it is uncertain whether the bridge complained of was erected across the turnpike for cars to pass over or across the railroad for public travel. We are inclined to the opinion that it was across the railroad for public travel. It is also uncertain as to when the offense was committed, but from the language used it must have been prior to the year 1900.

Taking the indictment as a whole, the facts alleged constituting the offense are not stated in such a manner as to enable a person of common understanding to know what was intended.

Wherefore the judgment of the lower court is affirmed.

BUCKEL, BY, &c. v. SMITH'S ADM'R. &c.

(Filed September 22, 1904—Not to be reported.)

1. Husband and wife—Gifts—A husband who is called upon to account for certain property received from his deceased wife and makes defense on the ground that the property was a gift from his wife, must establish that fact by satisfactory and competent evidence. His own testimony is manifestly incompetent.

2. Same—Proof—The fact that a gift may be made by word of mouth and manual delivery, makes it difficult to negative such a claim, and it is not a safe rule to place the onus upon the heir of a decedent to prove that the possession of the survivor was not a gift.

Morris B. Gifford and A. E. Willson for appellants.

Wm. F. Furlong and John Roberts for appellees.

Appeal from Jefferson Circuit Court, 2d Chancery Division.

Opinion of the court by Judge O'Rear.

R. T. Smith, Jr., is called upon in this case to account to his deceased wife's heir-at-law for certain personal property of hers, alleged to have been received by Smith from her, and which it is claimed he promised to repay to her. This property is embraced in two items. The first is one of $900. Mrs. Smith, before her marriage to R. T. Smith, Jr., was a widow. She owned certain real estate in Louisville. About two months before her marriage to Smith she executed a mortgage upon some of this real estate for $900. What she did with the money is not shown. It is claimed by some of her relations that she loaned it to Smith, but there is no competent evidence of the fact in the record. The court, therefore, properly rejected that claim. The other item is one of $500. Mrs. Smith six days before her death sold some of her real estate for $1,200, and deposited the proceeds to her credit in bank.

She gave to her husband, R. T. Smith, Jr., a check for $500. He says that it was a gift from her to him and that he collected the money on it. The contention of the heir-at law is that it was only a loan. The evidence upon this item is most meagre. Smith testifies that it was a gift, but this testimony is manifestly incompetent. (Sec. 606, Civil Code). Which leaves the matter thus: Mrs. Smith a short while before her death, but so far as the record discloses not in contemplation of that event, sold all her unencumbered real estate for $1,200. She paid out less than $100 on certain indebtedness. She gave her husband a check for $500 unexplained. Her remaining real estate was mortgaged for nearly its value. She had little or no personal property. She had two infant children living, one by her first husband, Buckel, and the other by Smith. Smith's child died within a few months after its mother. In this suit by the Buckel child to compel Smith to account for the $500 of his wife's money, which he had received, and for which the law implied a promise to repay, he interposes the defense that it was given to him by her.

In Long v. Beard, 20 Ky. Law Rep., 1036, this court said: "There can be no doubt that a wife may make a valid gift to her husband of her personal property; but courts of equity examine every such transaction with great caution and with apprehension of some undue influence, but unless such influence is evinced, the gift will be upheld."

But it must be borne in mind that the fact of gift must be established first. Whether it is a voluntary act of the giver is the feature which the court scrutinizes suspiciously. While the act of March 15th, 1894, commonly called the Weissinger Act, enlarges the married women's property rights so as to place married and single women on the same footing in many respects, it does not and cannot change the relation of confidence existing between husband and wife. Trust and affection and unity of interest continue to afford exceptional opportunities for one to have great influence over the other. The very nature of the relation is one of extreme mutual confidence. Its privacy from others, and its intimacy between the parties give to the survivor upon the death of the other an opportunity to claim benefits from the relation, as regards property belonging to the deceased spouse, never contemplated by the parties, and not justified in many instances by the facts.

To place the onus upon the heir-at-law of the deceased, to prove that the possession of the survivor was not a gift, where a gift may be made by word of mouth and manual delivery, would be frequently impossible, and nearly always so. The safer rule is to require the one claiming the gift, to establish that fact by satisfactory and competent evidence. In this no hardship can be worked, because it is easy and simple to make plain always the fact of gift while both parties are alive and present at the transaction.

Judgment reversed and cause remanded for judgment in conformity with this opinion.

ADKINS v. COMMONWEALTH.

(Filed September 21, 1904.)

1. Criminal law—Instructions—Upon the trial of appellant for murder, an instruction was erroneous which makes it appear that the right of appellant to plead self-defense, in bar of the prosecution against him is made to depend upon the belief of the jury as to whether or not the appellant "had other safe and available means without retreating, of avoiding such danger," instead of the reasonable belief of appellant as to the existence of these means.

2. Same—The record in this case shows that appellant was at his home, and this court has often held that one so situated is not bound to retreat, but may maintain his ground and defend himself from unlawful assault.

Mealer & Stealey, J. C. Williams and Tye & Denham for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Barker.

Appellant was indicted by the grand jury of Whitley county, charged with the murder of Samuel Wilson. A trial resulted in his conviction of voluntary manslaughter, and his punishment being fixed at confinement in the penitentiary for a term of twenty-one years.

The parties to the targedy, out of which this prosecution grew, were coal miners, living in Proctor, Whitley county, Ky. Their houses were about seventy-five yards apart, on the same side of the railroad, and fronting it. The killing took place June 13th, 1903, and arose from a previous quarrel about some trivial matter. At the time of the homicide, each party stood in his own yard, and shot at the other with a Winchester rifle. As to who commenced the conflict, the evidence is contradictory. The theory of the Commonwealth is that appellant murdered Wilson in cold blood. That of appellant, that he merely defended his own life from a murderous assault upon him by Wilson. There was some evidence to support the verdict of the jury, and we will not review their finding of the facts.

The conclusion we have reached as to the merit of this appeal, renders it unnecessary to consider any of the errors of the law assigned, except those based upon the third instruction given by the court, which is as follows:

"Although you may believe from the evidence before, you beyond a reasonable doubt, that the defendant, William Adkins, in Whitley county, Ky., shot and killed Samuel Wilson, yet if you further believe from the evidence

that at the time he did so, he (defendant) believed and had reasonable grounds for believing that he was then and there in danger of suffering loss of life or serious harm, at the hands of said Wilson, and shot to protect himself from such danger, real or to him reasonably apparent, you will find him guilty on the ground of self-defense and apparent necessity, unless you further believe from the evidence beyond a reasonable doubt, that he had other safe and available means without retreating, of avoiding such danger; in which latter state of the case he cannot be excused on the ground of self-defense."

The criticism of the foregoing instruction is based entirely upon that part which contains the qualification of the appellant's right to plead self-defense, in bar of the prosecution against him. The first objection is in the use by the court of the expression "beyond a reasonable doubt;" it being urged that this was prejudicial to the rights of appellant. This contention evidently arises from a misunderstanding of the instruction. The rule for the use of the expression "beyond a reasonable doubt" in instructions in criminal cases is that all facts, the establishment of which would be prejudicial to the interest of the defendant, must be believed by the jury beyond a reasonable doubt; whereas, those which, if true, redound to his interest, are required, simply, to be believed. That part of the instruction under consideraiton contains the hypothesis which, if established, rendered the plea of self defense unavailing to appellant; it was, therefore, manifestly to his interest that the jury were required by the court to believe, beyond a reasonable doubt, the facts upon which it was predicated.

The second objection to the instruction under consideration, we think is fatal to it. It will be observed that, by the language used, the right of the appellant to plead self-defense in bar of the prosecution against him, is made to depend upon the belief of the jury as to whether or not appellant "had other safe and available means, without retreating, of avoiding such danger, and not upon the reasonable belief of appellant as to the existence of these means. Appellant was entitled, in the situation in which he was placed, to act according to the appearance of things to him at the time; and his right to defend himself depended upon his own reasonable opinion as to the existence, or non-existence, of safe and available means of avoiding the danger, other than shooting his antagonist, and not upon what the jury might think on this subjcet, sitting coolly in the box with all the facts before them. (Coffman v. Commonwealth, 10 Bush, 495; Radford v. Commonwealth, 9 Ky. Law Rep., 380; Bledsoe v. Commonwealth, 9 Ky. Law Rep., 1002; Estep v. Commonwealth, 86 Ky., 39.)

As this case must be retried, we suggest, for the guidance of the trial court, that there was no necessity of adding to the instruction the qualification under consideration. The record shows that, at the time of the shooting, appellant was at his home, and we have often held that one so situated is not bound to retreat, but may maintain h's ground, and defend his person from unlawful assault, or danger; and while the instruction does exclude the necessity of retreating by appellant, we think that all of it following the word "unless" should have been omitted, and, in lieu thereof, the right of self-defense should have been qualified by instructing the jury, substantially, that, if they believed from all the evidence, to the exclusion of

a reasonable doubt, that the appellant commenced the difficulty between himself and Wilson by, first, unlawfully attacking the latter, in such manner as to make it necessary for him to shoot at appellant, in order to protect his own life or his person from great bodily harm, then the appellant was not entitled to the plea of self-defense.

For the reasons indicated, the judgment is reversed for proceedings consistent with this opinion.

JAMES v. AMES, &c.

(Filed September 22, 1904—Not to be reported.)

1. Master and servant—Where a servant was put to work by appellee's foreman at a joining machine, which though he had had no experience in its operation, performed his work with safety until an employe removed the knives from the machine and inserted some new ones in it, when the machine becoming out of order, following a jerk in the machine, he caught one of his fingers in it and had it cut off. Upon the trial in an action by the servant for damages, he testified that he did not know the machine was improperly adjusted, or whether it could be out of adjustment, and the foreman knew of his ignorance in this particular, but did not inform him. Held—That it was error to peremptorily instruct the jury to find for the defendant.

2. Pleading—The defense in an action for damages, for injuries to a servant by a defective machine, the fact that the plaintiff only alleged that his injuries were caused by reason of a defective machine, where the proof showed that the machine was a new one and in no wise defective, did not authorize the taking of the case from the jury where the defect in pleading was cured by answer and admission of proof as to the improper condition and adjustment of the machine.

Jas. B. Clark for appellant.

Miller & Todd for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Nunn.

The appellant, while in the employment of the appellee, was injured. His injury resulted in the loss of the index finger on the right hand and the injury of two others. This action was brought to recover of defendant damages therefor.

The appellant received his injuries while engaged in operating a machine, in the factory of the appellee, known as a joiner, and it is shown by the proof to have occurred under the following circumstances:

A few days before he was injured, he applied to the foreman of appellee at the factory, for work, stating at the time that he desired a job on the lumber yard. He was informed that no hands were needed on the yard but was told that there were two machines, one a tenant machine and this joiner, that were idle and that he could have employment at one of them. Appellant then informed the foreman that he had no experience in that line of business, and that he was afraid to undertake it.

The foreman explained to him that he could soon learn and he then accepted employment at the tenant machine and was shown how to work it,

t which he performed labor for the balance of that week. On Monday morning he was placed, by the foreman, to work at this jointer. The foreman passed two or three planks across the machine, showing him how to rest his hands upon them to pass the plank over the knives in safety. The ppellant, during that day, performed labor upon that machine with ease nd safety. The foreman did not give any instructions about the mechanism of the machine, the manner in which it should be adjusted or whether r not it could be adjusted. On the next morning he resumed his labor at his jointer and on attempting to move the first plank across the knives, as e had the day before, and when the plank had just about crossed the nives, something instantly jerked the plank back and from under his hands, nd the knives injured his fingers as stated. He was using due care at the ime for his own safety, the piece of timber he was using was as smooth a iece as he had been using the day before and the machine appeared to be n the same condition. The proof also showed that, on the evening before, n employe of the appellee, in the performance of his duty, placed some harp knives in this machine and removed the ones that were in it.

There were two expert witnesses introduced who had performed labor at his kind of a machine for many years, who stated that this machine, when n proper condition and properly adjusted, was a reasonably safe place at hich to labor, but when not in proper condition or properly adjusted was dangerous machine.

This machine was described as being knives fastened to a shaft revolving owards the operator. On the front and back side of these revolving knives here was an adjustible table each of which could be removed up and down y means of a set screw. When properly adjusted the front table should be ightly lower than the back one, and when the back table was lower than should be it was very dangerous to operate it. One of the expert witesses testified that there was no other way in which this injury could have ccurred, except by the back table being too low. The other testified that by ther in that manner or by a hard knot in the plank.

Appellant testified that he did not now that the machine was improperly djusted or whether it could be out of adjustment and that appellee's foreman new of his ignorance in this regard.

At the completion of appellant's evidence, the court gave a peremptory struction to the jury to find for the appellee.

The only question is whether there was any evidence introduced by appellnt sustaining his theory of the case.

It is reasonably certain that the person who placed these knives in this achine on the evening before, left this machine out of condition or adjustent.

Appellee contends that it was the duty of appellant to adjust it to protect imself from such dangers. This rule is correct if applied to one who underands the operation of it, but is not the rule applicable to cases like the ppellant who had had no experience in the operation or management of ch machines. It was the duty of some one in charge for appellee to have nformed him of the dangers incident to the operation of it, and to show im when it was in and out of adjustment, and how to adjust it.

If appellants' evidence was true, appellee was certainly negligent in this regard.

In the case of The United Laundry Co. v. Schilling, &c., 21 Ky. Law Rep., page 1798, the court said: "There was evidence conducing to show that the injury was caused by the imperfect unsteady and unsatisfactory manner in which the machine worked. It would run smoothly for a time, when it would stop and then start up with a jerk, making it dangerous to the fingers and hands of the person feeding it. This danger was not apparent to one who was not advised of it, and the proof conduces to show that the appellee was not so appraised."

In the case of the Standard Oil Co. v. Eiler, &c., 22 Ky. Law Rep., 1642, the court said: "Appellee being a mere green laborer put alone in charge of the machine, uninstructed as to how to unclog it, and ignorant that the burs ran so close to the spout, it was a question for the jury whether, etc. * * * Under such circumstances it was incumbent on him as the managing agent of appellant, when leaving a green boy in charge of the machine, to warn him of the danger and instruct him how to unclog it." (Clay City Lumber and Stave Co. v. Noe, 25 Ky. Law Rep., 668; L. & N. R. R. Co. v. Veach., 20 Ky. Law Rep., 403; L. & N. R. R. Co. v. Bowcock, 21 Ky. Law Rep., 383.)

The appellee says that the pleading did not authorize a recovery on the part of appellant because the appellant only alleged that his injuries were received by reason of a defective machine, while the proof shows that the machine was comparatively a new one and in no wise defective. This was cured by the answer and by the admission of proof, without objection, as to the improper condition and adjustment. The appellee in his answer not only denied that the machine was defective, but also denied that he failed to have the machine in proper condition for the safety of appellant while at work with it. If it be true that appellant did not know when the machine was in proper condition and adjustment, and appellee's foreman knew this fact and failed to inform or advise the appellant of that fact, and how to adjust it, then the leaving it out of adjustment by appellee's foreman was leaving it out of proper condition for this appellant.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

NEW FARMERS & TRADERS BANK v. CROWE, &c.

GERMAN AMERICAN SECURITY CO.'S ASSIGNEE v. SAME.

(Filed September 27, 1904—Not to be reported.)

Note—Held by bank for collection—Assignment of owner for creditors—Set-off by payors—The New Farmers & Traders Bank filed this action on a notee for $444, executed to it by John M. Crowe, and others, dated May 5, 1902, due four months after date. Appellees pleaded as a set off certain bonds held by them against the German American Security Company, which had made an assignment for the benefit of its creditors, alleging its insolvency and ownership of the note, and its formal execution to the bank which had no real interest in it, and alleging that they are now creditors of the security Co. at least to the extent of their bonds according to what they

had paid at the time of the assignment of said company. Held—That as the amount due upon the bonds held by appellees against the Security Company, was, in any view, larger than the amount of the note sued on, the circuit court properly sustained a demurrer to the reply and dismissed plaintiffs' action.

C. M. Finn and P. B. Miller for appellant.

Wilfred Carloo and Drury & Drury for appellees.

Appeal from Union Circuit Court.

Opinion of the court by Judge Hobson.

The New Farmers' & Traders' Bank of Owensboro, filed this suit against appellees, John M. Crowe, J. A. Sutton, and H. N. Lilly, to recover of them on a note of $444, which they had executed, payable to it, dated March 5, 1902, and payable four months after date. They filed an answer in which they pleaded this defense: In the month of January, 1901, a representative of the German American Security Co., of Owensboro, a corporation constituted under the laws of Kentucky, came to them representing that the business of the company was that of selling to investors certain bonds and coupons issued by it, and they then bought from the company twenty-four of its bonds paying them $8.50, on each of the coupons attached to the bonds, there being ten coupons to each bond, making in all 240 coupons. By the bonds it was provided that the defendants were to pay $0.50 per month, on each coupon attached thereto, during a period of sixty months. The agent of the company represented to them that the German American Security Co. was a solvent corporation and would pay the bonds as stipulated. On this assurance they purchased the twenty-four bonds and paid monthly $120. About the 1st of July, 1901, they were approached by Chitman, the General Manager of the German American Security Co. and were offered by him thirty additional bonds. At this date they had paid out on the twenty-four bonds first purchased, the sum of $720, and Chitman agreed to take the note of the defendants for $888, to pay the dues on the old bonds and the dues then accruing on the new bonds, he agreeing to accept the new bonds as collateral security for the loan. Acting upon his assurances that the company was solvent they bought the thirty bonds and paid the dues thereon, up to Sept. 25, 1901, when the company made an assignment for the benefit of its creditors, in debt to them in amount of the bonds. The insolvent condition of the company existed as they alleged at the time the contract was made with them and was known to Chitman at the time. They afterwards paid one half of the debt of $444 and the note sued on was executed for the other half. It is not the property of the bank, but was merely held by the bank for collection for the use and benefit of C. M. Finn, the assignee of the German American Security Co., under its deed of assignment for the benefit of its creditors. They made their answer a cross-petition against Finn as assignee, and pleaded as a set off to the note the amount alleged to be due them by the investment company. Finn filed an answer setting out the terms and conditions of the bonds. The defendants then filed an amended answer to which plaintiff filed a reply. The court sustained the demurrer of the defendant's to the reply and the plaintiff's appeal.

By the rule in force in this State, as the assignee of the German American Security Co., stands in the shoes of his assignor, any defense which could be made against it may be made against him, and a set-off may be allowed, although the debt had not matured at the time the assignment was made. (Ky. Flour Co. v. Merchants' National Bank, 90 Ky., 225.) The case must therefore, be decided as though it had been brought in the name of the German American Security Co., after it became insolvent and ceased to do business, but before it had made an assignment. The note having been executed to the bank merely as a form of executing it to the security company and the bank having no interest in the matter, any defense may be made to the note in the hands of the bank that could have been made to it, if executed directly to the security company. The allegations of fraud contained in the answer are denied and the naked question is whether, when the security company made a general assignment for the benefit of its creditors, holding the note of appellees, they had a cause of action against the security company on the bonds which they could plead as a set-off to the note. It is insisted that the security company owed them nothing until the maturity of the bonds. The question turns upon the proper construction of the bonds

Each of them is as follows: "In consideration of the application for this bond, which is made part hereof, and the payment of fifty (50) cents on each of the coupons attached hereto, which same are made a part hereof, and the further payment of fifty (50) cents on each of the said coupons, on or before the tenth day of each and every month hereafter, for a period of sixty (60) months, the German American Security Company, of Owensboro, Kentucky, hereby agree and promises to pay to ————————————, or order, at its office, in Owensboro, Ky., upon the surrender of this bond with ten (10) coupons attached, the sum of three hundred and forty-eight dollars ($348) with six per centum interest per annum, after maturity until paid; subject to the terms, conditions and privileges endorsed on the back hereof."

The coupons are each exactly alike except the number. Coupon No. 1 is as follows: "Should this coupon be called in for redemption, the German American Security Co., of Owensboro, Ky., will pay to the owner of the certificate of which this coupon is a part, in full settlement for this coupon, thirty-four dollars and eighty cents, or such part thereof, at such times and under such conditions as are provided for in the bond. Void if detached."

The conditions provided for in the bond are:

1st The value of the coupons at stated intervals are set forth in the financial schedule printed on the bond.

2d. The value of the bond is regulated by the number of uncancelled coupons attached thereto.

3d. After the first two monthly premiums have been paid, a sum eqnal to 15 per cent. of the monthly premiums collected shall be placed in the reserve fund and invested for the purpose of paying the bond at maturity.

4th. After the two first monthly premiums have been paid, not less than 50 per cent of the monthly premiums shall be used for redemption purposes as follows: 10 per cent mortuary fund; 15 per cent. cash surrender fund and remainder to a general redemption fund.

5th. The company reserved the right to call in and redeem any of the coupons before maturity.

6th. Coupons not redeemed before, were deemed matured after 60 pre-
iums were paid.

7th. After the death of the holder his representative might continue the
ayment of premiums or accept a paid up bond bearing the same number
f coupons he had paid.

8th. After eighteen premiums were paid, the holder might surrender the
ond and receive the cash surrender value of the attached coupons at a cer-
in rate.

By the financial schedule the value of each coupon was given after two
remiums were paid, by which, when sixty premiums had been paid, the
uaranteed redemption value death benefit was $34.80 and the estimated
edemption value was $52.46. and a similar sum proportionately where a
ss number of premiums had been paid.

It is urged for appellants that the bonds contained no undertaking on the
art of the corporation to pay anything to the holder before maturity, and
hat appellees have no available set-off thereon. Appellants' also rely upon
number of authorities holding that where a mutual insurance company
ecomes insolvent, the insolvency of the company is no defense to a policy
older when sued for the payment of his premium note. (Conigland v.
orth Carolina Insurance Co., 98 Am. Dec., 89 and cases cited in note;
ardwell v. Kelly, 10 L. R. A., 240.)

Where an insurance company has become insolvent, the rule is that the
older of an unmatured policy is a creditor and is entitled to share with the
her creditors in the assets, the amount of his claim being the value of the
olicy at the date of the dissolution of the company; and where he is in-
ebted to the company a set-off will be allowed him to the extent of his
aim. (Boston, &c. R. R. Co. v. Mercantile Trust Co., 38 L. R. A., 97,
nd cases cited in note.) We see no reason why the same principle should
ot apply here. Appellees are the holders of bonds issued by the investment
ompany. By reason of the insolvency of the investment company the
hole scheme has failed. After its insolvency, appellees cannot be required
continue their monthly payments. (Jones v. Life Association, 83 Ky. 75.)
he scheme upon which the appellees were investing their money having
iled by reason of the insolvency of the company, they are now creditors of
e company at least to the extent of the value of their bonds, according to
hat they had paid at the time of the assignment. This gives them a
rger claim against the company than the note sued on. In cases of this
haracter a set-off may be maintained in equity, although the debt is not
ue at the time of the assignment by the company. (Kentucky Flour Co.
Merchants' National Bank, 90 Ky., 225.) The cases holding that where a
utual insurance company becomes insolvent, the insolvency of the com-
any is no defense to a policy holder when sued for his premium note, are not in
oint, for the reason that appellees are not stock holders in the investment
ompany, but are simply creditors holding its bonds. Though the bonds
ontain no undertaking on the part of the corporation to pay anything to
he holder before maturity, still they rest on the idea that the scheme set
ut in the conditions endorsed on the bond is to be carried out by the com-
any, and when the company becomes insolvent and makes an assignment
enerally for the benefit of its creditors, the chancellor must determine, on

equitable principles, the value of the bonds according to what has been paid upon them; for the bond holders are in no manner responsible for the failure of the company to carry out its engagement. As the amount due upon the bonds was in any view larger than the amount of the note, the circuit court properly sustained the demurrer to the reply and dismissed the action.

Judgment affirmed.

COMMONWEALTH, FOR USE OF, &c. v. KENNEDAY.

(Filed September 22, 1904.)

Office and officer—Fiscal Court—Illegal tax levy—Liability of magistrate therefor—In an action by Arris Wiggins, for himself and other tax-payers of Nicholas county, on the official bond of John C. Kenneday, to recover taxes paid by plaintiffs which were illegally assessed by defendant, Kenneday, in his capacity as a member of the fiscal court in said county, in excess of the Constitutional limit, Held—The magistrates of a county, when assembled as a fiscal court, do not act as conservators of the peace, or in the performance of any judicial function appertaining to the office of justice of the peace. They are, by statute, ex-officio members of the fiscal court; the duties there performed by them are statutory—extra duties quasi legislative in character—and not such as are required of them as judicial officers, for error or mistake in the performance of which neither they nor the sureties on their official bonds, are liable in an action for damages.

Winfield Buckler for appellant

Morgan & Hughes for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Settle.

Appellant, Arris Wiggins, for himself and in behalf of all tax-payers of Nicholas county, brought this action in the court below to recover of appellee and the sureties in his official bond as magistrate, about $4,000, amount of taxes paid by the tax payers of the county to the sheriff under illegal levies made by the fiscal court, of which appellee was a member, at its April and June terms, 1897. It is alleged in the petition that the above amount is made up of nine cents on each $100 worth of taxable property in the county of Nicholas, in the year 1897, and was levied by the fiscal court in excess of the Constitutional limit, which is only fifty cents on the $100 worth of property. It is also alleged that the tax thus illegally levied was, by order of the fiscal court, collected by the sheriff from appellant and the other taxpayers of the county, and no part of same has been repaid to them. That the sheriff is insolvent and that it has been held by this court that the sureties in his official bond are not liable for the tax thus wrongfully collected by him. It is further alleged in the petition that appellee and other members of the fiscal court exceeded their authority, and were without jurisdiction to levy the nine cents tax on each $100 worth of taxable property collected by the sheriff, for which reasons it is claimed appellee and associate justices of the peace composing the fiscal court, are individually liable, and should be made to pay appellant and other taxpayers the amounts thus wrongfully collected of them.

A demurrer was filed to the petition which the lower court sustained, and ppellant failing to plead further, his petition was dismissed.

It is contended for appellant that the levies made by the fiscal court were udicial acts, that the members of that court are judicial officers, justices of he peace; and further that an action may be maintained against such fficers by the party injured for official acts exceeding their jurisdiction, hough done neither maliciously nor corruptly.

The demurrer was sustained by the lower court upon the idea that in aking the levies the fiscal court acted in a legislative capacity, for which eason no legal responsibility can be fastened upon its members for the rrors complained of. We think this view of the matter sustained by the eight of authority.

Thus, in Pennington v. Woolfork, 79 Ky., 16, it is said: "The power to mpose taxes is legislation and cannot be conferred under our Constitution pon a strictly judicial tribunal or officer. * * * The power to assess roperty for taxation, that is to apportion the tax upon the property, upon hich the legislature has imposed it, is not judicial, and can no more be onferred upon a judicial tribunal than the power to levy taxes."

To the same effect is the opinion in McLean county Precinct v. Deposit ank, &c., 81 Ky., 264. And in Muhlenburg County, &c. v. Morehead, 20 y. Law Rep., 376, and Fleming v. Dyer, &c., 20 Ky. Law Rep., 689, this octrine seems to be accepted as fundamental.

It is also said in Cooley on Taxation, pp. 546-547, "And in the case of local axation there must commonly be two distinct acts of legislation: First, hat by the State giving the power to tax, and second, that by the local egislature, or quasi legislative authority, levying the tax under the power o given." It seems to be equally well established that the legislator, or fficer who acts in a quasi legislative capacity, is not liable in damages for is official acts.

Under the Kentucky Statutes, chapter 52, the fiscal court is composed of he magistrates of the county and the county judge. They are required to eet in a body to levy taxes and appropriate funds for the needs of the ounty.

Their every act must be the recorded result of their collective and delib-rative action. They can only act when a quorum is present, which, as pro-ided in section 1837 of the statute, supra, is a majority of the members of he fiscal court.

In Meachem, on Public Officers, section 644, it is said: "Legislative officers re not liable for their legislative acts. * * * The performance of their uties is owing to the public, to the community at large, and not to indi-iduals, and they would certainly perform their duties in a timid and me-serving manner, if indeed they would undertake their performance at ll, if every dissatisfied person could compel them to vindicate the wisdom f their enactments in an action for damages."

It will be found that the following authorities are in line with the octrine as thus announced. Cooley on Torts, 276; Jones v. Loving, 55 Miss., 09; 30 Am. Rep., 508; Booker v. State, 27 Ind., 485; County Commissioners . Duckett, 20 Md., 459.

It is further said by Meachem, section 646: "This immunity is not con-

fined to members of National and State legislatures, but extends to the protection of the members of the inferior legislative bodies, such as boards of supervisors, county commissioners, city councils and the like."

The following quotation from Jones v. Loving, supra, aptly illustrates the reasons for the rule in question. "It certainly cannot be argued that the motives of the individual members of a legislative assembly, in voting for a particular law, can be inquired into, and its supporters be made personally liable, upon an allegation that they acted maliciously toward the person aggrieved by the passage of the law. Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for public good, and are clothed with all the immunities of government, and are exempt from liability for their mistaken use. * * * If, on the contrary, the aldermen of the town of Beauregard exceeded the measure of their authority in passing the ordinance in question, it was a mere brutem fulmen, and could not for one moment have deprived the plaintiff of the privileges, emoluments or fees of his office. If he chose voluntarily to yield obedience to avoid law, it was his own folly for which the court can afford him no relief by awarding damages against the individuals voting for the ordinance."

The magistrates of a county when assembled as a fiscal court, do not act as conservators of the peace, or in the performance of any judicial function appertaining to the office of justice of the peace. They are, by statute, ex-officio members of the fiscal court, the duties there performed by them are statutory, extra duties quasi legislative in character, and not such as are required of them as judicial officers, for error or mistake in the performance of which, neither they nor the sureties in their official bonds are liable in an action for damages.

We conclude, therefore, that the lower court did not err in sustaining the demurrer, and the judgment is, therefore, affirmed.

COMMONWEALTH FOR USE, &c. v. RICE, &c.

(Filed September 22, 1904.)

Winfield Buckler for appellants.

Morgan & Hughes for appellees.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Settle.

This is similar in all respects to that of Commonwealth For Use, &c. v. John C. Kenneday, this day decided, and for the reasons given in the opinion in the Kenneday case, the judgment of the lower court in this case is affirmed.

DEMAREE v. COMMONWEALTH.

(Filed September 23, 1904—Not to be reported.)

Homicide—Instructions—Reasonable doubt as to degree of offense—Under sec. 239, Criminal Code, which provides: "If there be a reasonable doubt of the degree of the offense which the defendant has committed, he shall only be convicted of the lower degree," where there is any evidence introduced which might be calculated to raise a reasonable doubt of the degree of the guilt of the accused, it is a reversible error in the court to fail to instruct the jury that if they have a reasonable doubt of the degree of the offense which the defendant had committed, he should be convicted of the lower degree.

E. H. Gaither for appellant.

N. B. Hays and Loarine Mix for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hobson.

Obie Demaree was indicted and convicted for the murder of Ella Meaux and his punishment was fixed at imprisonment for life. The proof for the Commonwealth on the trial, showed that he was twenty years old and very much in love with Ella Meaux, who was fifteen years old. It also showed, or tended to show, that she had other admirers and was not as much in love with him as he was with her.

On the night before she was killed they all went to a party, she going with another beau. They got home about daylight and had breakfast, and some time after breakfast defendant appeared at the door of the room in which Ella Meaux was sitting with a child in her lap. He had a pistol in one hand and a handkerchief in the other and he immediately shot her through the heart with the pistol, powder-burning the child in her lap. He looked then like he was about to shoot himself and the pistol was taken from him.

After this he left and went to his brothers' where he told of having killed the girl, and said he had killed her because he loved her so and she would not have him. On the other hand the proof for the defense tended to show that the defendant and the girl were laughing and talking and in good spirits; that he was cleaning his pistol with the handkerchief and it accidentally went off when he did not suppose it was loaded. He offered to prove that his general character for peace and quiet was good. This the court admitted. He then offered to show that his character was, that he was gentle and kind and would not hurt anybody. The court properly refused to allow this, for his general disposition was not competent evidence, and threw no light on the case. He also offered to prove that he had not much sense and was little removed above an idiot. This was also properly rejected as it was not claimed that he had not sufficient mind to be responsible for his acts.

His testimony on the trial and the letters written by him which were introduced, showed that he had sense enough to know what he was about, or to control his action.

We see, therefore, no error of the court in the admission or rejection of evidence.

The court instructed the jury properly as to murder, voluntary man-

slaughter involuntary manslaughter and homicide by misadventure. He also instructed them if, upon the whole case, they had a reasonable doubt of the defendant's being proven guilty, they should acquit him; but gave no instruction that if the jury had a reasonable doubt of the degree of the offense which defendant had committed, he should only be convicted of the lower degree.

Sections 238 and 239 of the Criminal Code, are as follows:

"Sec. 238. If there be a reasonable doubt of the defendant being proven guilty, he is entitled to an acquittal.

"Sec. 239. If there be a reasonable doubt of the degree of the offense which the defendant has committed, he shall only be convicted of the lower degree."

In Williams v. Commonwealth, 80 Ky., 513, the judgment of conviction was reversed for the failure of the court to instruct the jury under section 239.

The court said "As it was the duty of the court to state the law fully and correctly to the jury in the instructions, it was error therefore, not to instruct them that, if they should believe the appellant guilty, but entertained a reasonable doubt of the degree of his offense, they should convict him of the lower degree. This is substantially the language of section 239, of the Criminal Code, and the failure to so instruct the jury affected seriously his substantial rights.

"It is true the jury must believe beyond a reasonable doubt that the accused is guilty before they can convict at all, but it might be, that while they had no doubt of his guilt, they entertained a reasonable doubt of the degree of that guilt, and the policy of this humane provision of the law cannot be questioned, nor can it be rendered nugatory by a failure to execute it. Whenever there is evidence introduced which might be calculated to raise a reasonable doubt of the degree of the guilt of the accused, the jury should be instructed in pursuance of the provision of the Code quoted."

This case was followed in Arnold v. Commonwealth, 24 Ky. Law Rep., 1931, where the judgment of conviction was also reversed for this reason. We see no other error in the record, but for this the judgment must be reversed and the defendant awarded a new trial.

Judgment reversed and cause remanded for a new trial.

COMMONWEALTH v. SCHATZMAN.

(Filed September 23, 1904.)

1. Indictment—Slot machines—Sufficient description of offense—In an indictment against the defendant for unlawfully operating on his premises a contrivance for gaming known as a slot machine, Held—That as it is clearly stated, in the accusative part of the indictment, that the premises in question were in the defendant's occupation and under his control, it was unnecessary to again repeat this statement in the descriptive part of the indictment, for a person of ordinary understanding could not fail to know what was meant; and the allegation being contained in the indictment, its meaning is to be determined from the whole instrument and not from any particular part of it alone.

2. Same—The fact that the indictment in the accusative part does not show that the slot machine was a contrivance ordinarily used for gambling, is not sufficient to vitiate it, as the other facts stated in the accusative part, are sufficient to apprise a person of ordinary understanding of the precise offense charged

F. P. O'Donnell, Ed. Daum, N. B. Hays and L. Mix for appellant.

Worthington & Cochran for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hobson.

The circuit court sustained a general demurrer to the following indictment: "The grand jury of Mason county, in the name and by the authority of the Commonwealth of Kentucky, accuse William Schatzman of the offense of suffering and permitting certain machine and contrivance known as 'slot machine,' to be operated on the premises in his occupation and under his control, whereby money and property and other things of value was won and lost, committed as follows, viz: The said William Schatzman, on the 1st day of January, 1904, and other days before and since, within twelve months last past, and before the finding of this indictment in the county aforesaid, did unlawfully suffer and permit a certain machine and contrivance, commonly known as a slot machine, and which machine and contrivance is ordinarly used for gambling for money and property and for whiskey, brandy, wine, ale, beer, cigars and tobacco and other things of value, to be operated on the premises on Second street, in the city of Maysville, Ky., the more exact location of said premises and the manner and way of operating said machine and contrivance is to the grand jury unknown, whereby and at and on which machine and contrivance money and property, and whiskey, brandy, ale, beer, cigars and tobacco and other things of value were then and there won and lost, and with the permission, consent and procurement of the said William Schatzman, contrary to law and against the peace and dignity of the Commonwealth of Kentucky."

The indictment is based on section 1967, Ky. Statutes, which, so far as material, is as follows: "Whoever shall suffer or permit any game or table, bank, machine or contrivance, mentioned or included in section 1960, of this chapter, to be set up, conducted, kept or exhibited in any house, boat or float, or on any premises in his occupation or under his control, or shall lease the same, or any part thereof, for that purpose, shall be fined from two hundred and fifty ($250) to five hundred dollars ($500) for each offense."

Section 1960, above referred to so far as material is as follows "That whoever, with or without compensation, shall set up, carry on, keep, manage, operate or conduct, or shall aid or assist in setting up, carrying on, keeping, managing, operating or conducting a keno bank, faro bank or other machine or contrivance used in betting, whereby money or other things may be won or lost, shall be fined five hundred dollars ($500) and costs, and confined in the penitentiary."

By section 1967, whoever shall suffer any machine or contrivance embraced in section 1960 to be conducted in any house or on any premises in his occupation or under his control, shall be fined from two hundred and fifty ($250)

to five hundred ($500) dollars. The machines or contrivances included in section 1960 are a keno bank, faro bank, or other machine or contrivance used in betting, whereby money or other thing may be won or lost. It has been held that to convict under this section it should appear that the table, machine or contrivance, was such as is ordinarily used in gambling for money or property, where the contrivance is not a keno bank, faro bank or one of the things named in the section. (Ritte v. Commonwealth, 18 B. Monroe, 85; Commonwealth v. Kammerer, 11 Ky. Law Rep., 777.)

It has also been held that the indictment must be certain as to the offense charged and as to the particular circumstances of the offense. (Brooks v. Commonwealth, 98 Ky, 143; Commonwealth v. Tupman, 17 Ky. Law Rep., 217; Sulbett v. Commonwealth, 18 Ky. Law Rep., 100.)

It is insisted for the appellee that the indictment is insufficient because, in the accusative part of it, it is not stated that the slot machine was a contrivance ordinarily used for gambling for money and property, and that it is also insufficient because, in the descriptive part of the indictment it is not alleged that the slot machine was operated on premises under the defendant's control or in his occupation, although this statement is made in the accusative part of the indictment. Precisely this question was made in Shouse v. Commonwealth, 95 Ky., 631, where the indictment accused the defendant "of the offense of cutting John Reffit with intent to kill him, committed in manner as follows: The said William Shouse did unlawfully, wilfully and feloniously cut, thrust and stab John Reffit with a knife, from which cutting and stabbing said John Reffit did not die." It was contended that it was not sufficiently charged that the defendant cut Reffit with intent to kill him. The court said: "It seems to us that the positive and direct charge that the appellant cut Reffit with intent to kill him having been once made, it was not necessary to repeat the same statement in giving the particular circumstances of the offense, for the Criminal Code expressly declares that the acts constituting the offense shall only be made in ordinary and concise language." This case was followed and approved in Clark v. Commonwealth, 18 Ky. Law Rep., 758, and Commonwealth v. C. & O. R. R. Co., 24 Ky. Law Rep., 1880.

The rule is that where the indictment is for a statutory offense it is sufficient if, in the accusative part, the offense is designated by a brief general description in the language of the statute, or sufficiently so to apprise a person of ordinary understanding of what is meant. (Knoxville Nursery Co. v. Commonwealth, 21 Ky. Law Rep., 1483.)

The fact that the indictment before us in the accusative part, does not show that the slot machine was a contrivance ordinarily used for gambling, is not sufficient to vitiate it, as the other facts stated in the accusative part are sufficient to apprise a person of ordinary understanding of the precise offense charged. And, as it is clearly stated in the accusative part of the indictment that the premises in question were in the defendant's occupation and under his control, it was unnecessary to again repeat this statement in the descriptive part of the indictment, for a person of ordinary understanding could not fail to know what was meant, and the allegation being contained in the indictment, its meaning is to be determined from the whole instrument and not from any particular part of it alone.

We, therefore, conclude that the indictment is good and that the court erred in sustaining a demurrer to it.

Judgment reversed and cause remanded with directions to overrule the demurrer to the indictment.

COMMONWEALTH v. DIENER.

(Filed September 23, 1904.)

F. P. O'Donnell, Ed. Daum, N. B. Hays and Loraine Mix for appellant.

Worthington & Cochran for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hobson.

The indictment in this case is the same as in the case of Commonwealth v. William Schatzman, this day decided, and for the reasons given in that case the circuit court erred in sustaining the demurrer to the indictment and dismissing the prosecution.

Judgment reversed and cause remanded with directions to overrule the demurrer to the indictment.

COMMONWEALTH v. HICKS.

(Filed September 23, 1904.)

1. Suicide—Accessory before the fact—Under the law as it now stands in Kentucky, an accessory before the fact in case of suicide, is subject to punishment for the crime of willful murder.

2. Evidence—Confessions made out of court—One accused of being accessory before the fact cannot be convicted therefor on confessions made out of court, unless accompanied with other proof that such an offense was committed.

3. Peremptory instructions—We are of the opinion that an analysis of the evidence and the enforcement of the provisions of the Code on the subject of confessions, warranted the trial judge in giving the peremptory instruction to find the defendant not guilty.

W. H. Hester, N. B. Hays and L. Mix for appellant.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Barker.

Ulyssus Hicks was indicted by the grand jury of Graves county, charged with being accessory before the fact to the self murder or suicide, of one Chris Haggard. A trial resulted in the court's sustaining a motion of the accused for a peremptory instruction to find him not guilty, made at the close of the Commonwealth's testimony. To review this judgment, this appeal is prosecuted under section 337 of the Criminal Code.

The evidence for the Commonwealth was, substantially, as follows: Tom Sears testified that he was standing at the corner of Hunt's drug store, when Hicks came along, and smiled, and said: "I have got to go to the drug store and get Chris Haggard a quarter's worth of morphine, I reckon

he's going to kill himself." Shortly afterwards, he met the accused, who told him that he had obtained the morphine, and also that he had delivered it to Haggard. After the death of Haggard, Hicks told the witness of a conversation which took place between himself, Haggard and one Arnett, on the Saturday night before the purchase of the morphine, in which Haggard said that would be the last night that they would ever be together.

Mrs. Lizzie Hicks, a sister of Haggard, and a relaitve by marriage of the accused, testified that, on Wednesday preceding the death of Haggard, the accused offered to bet her that Chris Haggard would not be alive until Saturday night.

Ben Hunt, the druggist, testified that he sold the accused half a drachm of morphine, which he said he was purchasing for a young man by the name of Haggard.

Mrs. Lucy Hicks, another sister of Haggard, and also a relation to the accused by marriage, testified to the following conversation between the accused and Haggard: "On Wednesday night before he died, Ulyssus asked him, when he started home, what night he had set for him to come back, and Chris told him Friday night, and Ulyssus says, 'Put it off, I can't come,' and Chris says: 'I will put off killing myself until Saturday night, and you all can come to my burying Sunday.'" At the time of this conversation, the witness said her brother Chris was playing the guitar, and "seemed like he was just as lively as he could be; I didn't think there was anything the matter with him."

Dr. A. A. Hurt testified that, on the Saturday night of the week in which the morphine was purchased by the accused, he was called to the bedside of Chris Haggard. The witness said: "When I got down there, he was lying in bed, unconscious, like he was nearly dead, and I inquired of his mother how long he had been that way, and she said he came in about 10 o'clock at night, and she told me how he did, and I soon decided he was poisoned on morphine or some preparation of opium. From what his mother told me, and his symptoms, I decided he was suffering from some preparation of opium." To the question: "Did you ever succeed in arousing him?" the witness said: "Well, yes sir, to some extent. We worked with him and got him up out of bed, and walked him around some, but could not keep him aroused but for a few minutes at a time; he would go right back to sleep again."

Q. Did he send or call for any one?

A. Yes sir, about twice, I think.

Q. Who was it?

A. Ulyssus Hicks.

The witness testified that Haggard died from the effects of opium, or morphine.

Mrs. Lucy Hicks being re-called, stated that, after the burial of Haggard, the accused said that he knew more about Chris' troubles than anybody, but would never tell it.

The crime with which the accused stood charged, is, we believe, a somewhat novel one, certainly, in Kentucky. Blackstone, in his Commentaries, vol. 4, page 189, says: "Felonious homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or

sex, without justification or excuse. This may be done either by killing one's self, or another man.

"Self murder, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law, yet was punished by the Athenian law with cutting off the hand, which committed the desperate deed. And also the law of England wisely and religiously considers that no man hath a power to destroy life, but by commission from God, the author of it; and as the suicide is guilty of a double offense, one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for, the other temporal, against the King, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder."

In Bishop's New Criminal Law, section 1187, it is said: "The same principle which forbids one to take the life of another prohibits equally the taking of his own life. Therefore, self murder, or suicide, like any other murder, is a common-law felony." And in subsection 5, of the foregoing section, it is said: "As suicide is felony, not misdemeanor, if it is committed in the advisers absence, the latter, at the common law goes free of punishment; because the principal, being dead, cannot be first convicted. In reason, on a question probably not decided, the statutes which widely prevail among us, making the accessory before the fact in felony a principal felon, should, in the States wherein they have been enacted, be held to work a reversal of this doctrine, subjecting the instigator in these cases to punishment."

Clark, in his work, on Criminal Law, section 72, page 164, thus states the rule: "Suicide, however, being a felony at common law, it has been held that one who counsels another to commit suicide, and is present when the act is committed, is guilty of murder, as a principal in the second degree. If the adviser is absent at the time of the suicide, he cannot be punished at common law, as he is an accessory before the fact, and cannot be punished until the conviction of the principal."

In the Am. & Eng. Encycl. of Law, second edition, vol. 21, page 98, the law is thus stated: "Under the common law, if one counsels another to commit suicide, and the other, by reason of the encouragement and advice kills himself, the adviser was guilty of murder as an aider and abettor, provided he was present when the advice was carried out; but if he was not present, he was a mere accessory before the fact, and escaped punishment because of the impossibility of his principal being tried first and convicted. The abolition of the distinction between aiders and accessories has, however, carried away this distinction with it, so that a person may now be convicted of murder for advising a suicide, whether absent or present at the time it is committed, provided the State is able to prove that the suicide was the result of this advice and not of the volition of the deceased, himself." (Commonwealth v. Bowen, 13 Mass., 356.)

Section 1128, Ky. Statutes provides: "In all felonies, the accessories before the fact shall be liable to the same punishment as the principal, and may be prosecuted jointly with the principal, or severally, though the principal be not taken or tried, unless otherwise provided in this chapter."

Robertson, in his work on Kentucky Criminal Law and Procedure, section 185, says: "Suicide or self murder, is a felony at the common law. It has, therefore, been held that if one kills himself upon the advice of another, the adviser, if present when the act is done, is guilty of murder, as a principal in the second degree. If the adviser is absent at the time of the suicide, he cannot be punished at the common law because, being an accessory before the fact, the principal must first be convicted; but by statute in this State, as we have seen, accessories before the fact may be arrested and tried, although the principal has not been taken or tried, and the rule of the common law does not, therefore, apply. So where two persons agree to commit suicide, and only one of them kills himself, the survivor is a principal in the murder of the other."

It cannot be said, that an accessory before the fact in self murder is not liable to punishment under the terms of the statute, because his principal, being of necessity, dead, he cannot be punished by any earthly sentence for his crime. We have seen that suicide at the common law is murder, and our statute, section 1149, Ky. Statutes, fixes the punishment of wilful murder at death, or confinement in the penitentiary for life, in the discretion of the jury. The case stands, in principle, as if one was accessory before the fact for the murder by his principal of a third person, and after the commission of the crime, the principal should immediately kill himself; in this case, it would be impossible to punish the principal, but it is not believed, that, under any sound reasoning, the accessory would thereby go scot free; on the contrary, the very object of the statute is to make the punishment of the accessory entirely independent of the conviction or punishment of the principal.

We conclude, then, that, under the law as it now stands in Kentucky, an accessory before the fact in a case of suicide is subject to the punishment for the crime of wilful murder. It remains, then, to ascertain whether or not the Commonwealth's evidence authorized, if uncontradicted, the conviction of the accused in this case.

Section 240, of the Criminal Code, is as follows: "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed."

Examining the evidence in the light of this provision of the Code, what do we find? Nearly all the evidence consists of the admissions out of court, of the defendant. Leaving out the statements of the accused, there is this testimony, and nothing more: Hurt said that, on the Monday preceding the death of Haggard, he sold Hicks half a drachm of morphine. Mrs. Lucy Hicks testified to a conversation between Haggard, Arnett and the accused on the Wednesday preceding the suicide, in which, as the party was about to break up, the accused asked Haggard what night he should come again? Whereupon Haggard said "Friday." The accused said, "Put it off, I can't come Friday" Then replied Haggard (substantially) "I will put off killing myself until Saturday, but no longer; you all can come to my burying Sunday."

On Saturday night, Dr. Hurt says he was called to his bedside, and found n dying from opium poison. He expired Sunday morning about 9 a. m. at evidence is there here, that tends to show that the crime of being essory before the fact to a suicide was committed? There may be evi- ce that suicide was committed; but that is not the crime, of course, h which the defendant is charged; he is charged with being accessory, l there is no evidence of accessorial acts save in his own confessions. ken as a whole, this case presents an anomaly seldom found in the annals actual crime. The accused smilingly says to Sears, "I am on my way to rchase morphine for Chris Haggard. I reckon he is going to kill him- f." In the presence of his sister, Lucy Hicks, Haggard, while playing the guitar, and seemingly in the best of spirits, appoints the day of his th, and refuses to extend the time to accommodate the engagements of his end beyond one day, from Friday until Saturday. At the appointed time, is found by the physician dying from opium poison. Nobody seems to ve regarded the matter, except in the light of a joke, and the motive, if ere was one, is not disclosed.

We are of opinion that an analysis of the evidence and the enforcement of e provisions of the Code, on the subject of confessions, warranted the trial dge in giving the peremptory instruction to find the defendant not guilty, which the Commonwealth complains. And this conclusion is certified to e circuit court.

COMMONWEALTH v. WILLS.

(Filed September 23, 1904—Not to be reported.)

Gaming—Billiard and pool tables—Suffering minors to play thereon—fficiency of indictment—Under Ky. Statutes, section 1972, an indictment ich charges the defendant with "being the owner and having control of lliard and pool tables, similar to tables called pigeon-hole tables, did un- vfully, wilfully and knowingly suffer and permit, for compensation and ward, Sam Burton, a person then under 21 years of age, to play games on d tables and without written permission from the father, mother, or ardian, or other person having the custody or control of said minor, au- orizing him so to do, is a good indictment; and the demurrer thereto ould have been overruled.

B. A. Crutcher, N. B. Hays and Loraine Mix for appellant.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Barker.

The appellee was indicted by the grand jury of Clark county, charged th the offense of suffering and permitting a minor to play games on pool d billiard tables for compensation and reward, under section 1972, Ky. atutes. A general demurrer was filed to the indictment, and sustained the court. The indictment is as follows:

"The grand jury, of Clark county, in the name and by the authority of e Commonwealth of Kentucky accuse James Wills, of the offense of suffer- g and permitting minors to play games on pool and billiard tables, for mpensation and reward committed as follows, viz: That said James Wills, the 10th day of February, 1904, in the county aforesaid and before the

finding of this indictment, he, the said James Wills, being then and there the owner and having control of billiard and pool tables (similar to tables called pigeon-hole tables) did unlawfully, wilfully, and knowingly suffer and permit, for compensation and reward, Sam Burton, a person then under twenty-one years of age, to play games on said table and without the written permission from the father, mother or guardian, or other person having the custody or control of said minor, authorizing him so to do, against the peace and dignity of the Commonwealth of Kentucky."

Section 1972, Ky. Statutes: "If any person, being the owner or controller of the tables called 'pigeon-hole tables,' or any table similar thereto, or any billiard table, shall knowingly suffer or permit, for compensation or reward, any minor under the age of twenty-one years, without the written permission of the parent or guardian of said minor, or other person having the care, custody or control of said minor, to play any game thereon, either by betting or not betting, or shall knowingly suffer or permit any person to bet upon any game played, every such person so offending shall be fined for each offense one hundred dollars, and shall forfeit the right and privilege of again keeping such tables."

There is no suggestion in the record as to the ground, or grounds, upon which the trial judge based his judgment dismissing the indictment. A comparison of the allegations of the pleading with the section of the Statutes above quoted, convinces us that it charges appellee with a public offense, and that the demurrer should have been overruled.

Wherefore the judgment is reversed for proceedings consistent herewith.

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COURT OF APPEALS OF KENTUCKY.

COMMONWEALTH v. SMITH.

(Filed September 23, 1904—Not to be reported.)

. Embezzlement—Sufficiency of indictment—An indictment for embezzle-ent which charges "that Joe Smith wilfully embezzled and fraudulently nverted to his own use, $1, currency of the United States, which was en and there the subject of larceny, which sum of money, $1, with other oney, had been entrusted to him, the said Smith by Lola Davis, to be de-ered by him to Archie Davis, which delivery to the said Archie Davis, he, e said Smith, then and there undertook for hire," sufficiently stated the-ts constituting the offense, and the court erred in sustaining a demurrer-ereto.

. Value of property converted—Under Ky. Statutes, section 1203, provid-g "that if any carrier, porter or other person to whom money or other-operty, which may be the subject of larceny, may be delivered to be car-d for hire, or any other person who may be entrusted with such property, bezzle or fraudulently convert to his own use, or secrete, with intent to-so * * * before delivery at the place or to the person to whom the-ne was to be delivered, shall be confined in the penitentiary not less than-, nor more than five years," the value of the money or other property-ndulently converted is immaterial.

. N. Sharp for appellant.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Burnam.

The appellee, Joe. Smith, was indicted under section 1203, of the Ken-cky Statutes, for embezzlement. The specific charge is:

'That he wilfully embezzled and fraudulently converted to his own use-currency of the United States, which was then and there subject of lar-y, which sum of money, $1, with other money had been intrusted to him, said Smith, by Lola Davis to be delivered by him to Archie Davis, which livery to the said Archie Davis, he, the said Smith, then and there under-k for hire."

A general demurrer was sustained to the indictment upon the ground that.

the money embezzled was not sufficient to constitute the crime of grand larceny, and the Commonwealth has appealed.

The statute is as follows: "If any carrier, porter, or other person to whom money or other property or thing which may be the subject of larceny may be delivered, to be carried for hire, or any other person, who may be entrusted with such property, embezzle or fraudulently convert to his own use, or secrete with intent to do so, any such property, either in mass or otherwise, before delivery thereof at the place or to the person to whom the same were to be delivered, he shall be confined in the penitentiary not less than one nor more than five years."

Under this section of the statute the value of the money or other property fraudulently converted is immaterial. The crime consists in the fraudulent appropriation, and embraces all persons who are guilty of fraudulently secreting or converting to their own use the money or property of others, intrusted to them or placed in their hands for the purpose of being carried or delivered to another, without regard to the value thereof. (Johnson v. Commonwealth, 68 Ky., 430; Jackson v. Commonwealth, 86 Ky., 1; Warmoth v. Commonwealth, 81 Ky., 133.) The facts constituting the offense are, we think, sufficiently stated in the indictment, and the court erred in sustaining the demurrer thereto.

Judgment reversed and cause remanded for proceedings consistent herewith.

TEMPLE NATIONAL BANK v. LOUISVILLE COTTON OIL CO.

(Filed September 23, 1904—Not to be reported.)

1. Banks and banking—Drafts—Bills of lading—Where a bank discounted a draft with bill of lading attached, the goods cannot be subjected by a creditor of the shipper for debt against him.

2 Same—Attachment—An action for the non-delivery of goods pursuant to contract with the shipper, cannot be maintained by attachment against the goods where a draft with bill of lading attached had been discounted by a bank at the time of the shipment, the claim of the bank on the article shipped being superior.

Arthur M. Rutledge for appellant.

Matt O'Doherty for appellee.

Appeal from Jefferson Circuit Court, 2nd. Chancery Division.

Opinion of the court by Judge Hobson.

On July 29, 1901, the Empire Mill Co., of Temple, Texas, sold to the Louisville Cotton Oil Co., 15 tank cars of prime crude cotton seed oil at 26¼c a gallon, to be loaded in the buyers' tanks at full capacity; 5 tanks to be delivered during the last half of October and 10 in November, the buyer furnishing the tank cars and their routing. There was some complaint that the tank cars furnished in October were not loaded properly, but the 5 tanks to be loaded in October were filled and shipped. On November 5, 1901, the Cotton Oil Co., wrote to the Mill Co., as follows: "Kindly advise by return mail if our tank cars have been delivered to you, and when shipment will be made. We also desire to know when it will be convenient for you to re-

eive tanks for November purchases. Our tank cars are very busy at the present time, and we desire the information so we can make our arrangements to have tanks reach you in due time."

The Mill Co., on November 8, wrote in reply this letter: "Replying to your favor of the 5th inst., would ask that you ship us at once six (6) tanks and follow with wire tracer. We will give you instruction for remainder in imple time."

Nothing more occurred until Nov. 18, when the Mill Co. sent a telegram directing their four (4) tanks to be sent. They were immediately shipped but for some reason did not reach Temple, Texas, until after the first of December. The Mill Co. then refused to fill the tanks or fill the order, but wired the cotton oil company that they would sell the oil at 31c F. O. B. cars at Temple, Texas. The Cotton Oil Co. insisted that it should fill the tanks under the old contract at 26½c, but finally sent this telegram on Dec. : "Telegram received, offer accepted, three tanks prime crude, thirty-one, ight draft, with exchange weights and quality guaranteed destination, will old you for difference other three tanks.

(Signed.) "LOUISVILLE COTTON OIL CO."

The Mill Company then loaded the tanks and shipped them, drawing a ight draft for the amount of the price, which it attached to the bill of lading nd discounted to the Temple National Bank. The draft was forwarded to ouisville and protested, and being returned to the bank on the 16th of December was charged back to the Mill Co; but on the 21st the Mill Company bjecting to this and insisting that the bank should follow up its collateral, he mill company was credited again by the amount of the check, and on the 3d, the oil having reached Louisville, it was attached by the Cotton Oil o. in this action brought to recover damages for the non-delivery of the hree tanks of oil, pursuant to the contract for November. The bank filed s petition asserting its claim to the oil, and on final hearing the court gave dgment in favor of the plaintiff, giving it a lien on the oil for the damges sued for; and the bank appeals.

In Sable v. Planters' National Bank, 110 Ky., 299, it was held where the ank had discounted a draft with bill of lading attached, that the goods could ot be subjected by a creditor of the shipper for the debt against him. The se before us on the facts we have stated seems on all fours with that case. ut it is insisted that the bank in this case did not in fact own the draft, nd that the property was always in the Empire Mill Co. The testimony of e officers of the bank is clear and explicit that the draft for $4,071.20, ated December 6, 1901, with bill of lading attached, was discounted by the emple National Bank and the proceeds placed to the credit of the Empire ill Co.; that no other security was taken by the bank except the bill of ding, and that it forwarded the draft to its correspondent for collection; at the Empire Mill Co. has never paid or refunded to the bank any part the amount paid for the draft, and that the bank is now the owner of the raft; that it paid $490 on account of demurrage in the cars; that the Mill ompany was in debt to the bank when the draft was negotiated and has ntinued in debt to it since, being overdrawn even after the draft was redited back to it on December 21st; and that the Mill Company has now

sold its property and is no longer carrying on business and is also overdrawn with the bank.

The proof by the plaintiff is that the Mill Co., on December 21st, and therafter, telegraphed to Louisville, proposing to sell the oil and dealing with it as is its property. But the explanation of this is that the cashier of the bank not knowing what to do with the oil or being in the oil business, employed L. F. Cowan to sell the oil for it and Cowan, who was also the president of the Mill Co., sent the telegrams and wrote the letters in the name of the Empire Mill Co.; but this was without the knowledge of the bank and should not prejudice its rights.

To say that the bank did not own this property would be to reject the unimpeached testimony of the officers of the bank—testimony, which on its face, carries with it the unmistakable air of sincerity and truth. The fact that the draft, after it was protested, was charged back to the Mill Co., is explained, its having been done by the bookkeeper as a matter of routine, he not observing that the draft was protected by collateral which it was the duty of the bank to look after, and the mistake was corrected as soon as attention was called to it and two days before the bank had any intimation of any suit or trouble.

We, therefore, conclude that the case falls squarely within the rule laid down in Sable v. Planter's National Bank, and that the property attached cannot be subjected to the claim of appellee against the Mill Co.

Judgment reversed and cause remanded with directions to the circuit court to dismiss the plaintiffs' petition.

CLAY v. CUNNINGHAM.

(Filed September 23, 1904.)

Judge Hobson delivered the following opinion on motion to reinstate injunction.

Lavinia E. Cunningham was, in July, 1899, appointed as guardian of Nannie Clay. On May 21, 1904, the county court which appointed her made an order removing her as guardian for cause. She excepted to the judgment and prayed an appeal to the Bourbon Circuit Court, which was granted. In the same order, the court appointed Brutus J. Clay, Jr., her successor, and directed her to pay over the funds in her hands to him. On May 23, she perfected her appeal, gave bond and had a supersedeas issued.

On August 30, Clay, as guardian, filed this suit, alleging the foregoing facts and obtained an injunction from the clerk restraining her from acting further as guardian, on the ground that her powers had ceased upon the entry of the judgment removing her, and were not revived by the subsequent appeal and supersedeas. On motion the circuit judge discharged the injunction and a motion is now made to reinstate it.

By our statute appeals may be taken from the orders of the county court removing a guardian, and when taken they must be tried de novo in the circuit court. Our statutes also provide that an appeal may be taken in sixty days and that a certain bond must be given. A supersedeas is then issued. The order of the county court removing Mrs. Cunningham is, therefore, no

nger in force; and when the case is tried in the circuit court the judgment the circuit court must determine whether she must be removed as guarn or must continue as such. The judgment removing Mrs. Cunningham guardian having been superseded and being no longer in force, cannot be eaded or relied on as the basis of an action. The statute which authorizes e judgment to be entered in the county court, removing a guardian, also thorizes an appeal from that judgment and requires the case on appeal to tried de novo. After the appeal is taken and the judgment is superseded, stands as though is had never been entered, until the case is hard in the rcuit court. This is the necessary effect of our statute. Otherwise no rce would be given to the provisions allowing an appeal in this class of ses as in other cases tried in the inferior courts. The statute making no ception, the court can make none. The cases of State v. McKown, 21 Vt., 3, and Merrell v. Phelps, 34 Conn., 109, relied on for plaintiff, were decided nder statutes materially different from ours. A married woman may be ppointed guardian. (Leavel v. Bettis, 3 Bush, 74; Colton v. Wolf, 14 Bush, 8.) If the appeal bond executed by Mrs. Cunningham is in any manner efective, a new bond may be executed under section 682, of the Civil Code. he sureties of Mrs. Cunningham as guardian will be responsible for all er official acts, now as well as before the judgment of the county court, for ey entered as her sureties with the knowledge that she had the right to ppeal from any order removing her, and, if they wish indemnity or to be eleased, they have their remedy under the statute. If her sureties are not fficient this also may be remedied by proper proceedings.

The motion to reinstate the injunction is overruled.

STROUD v. ROSS, &c.

(Filed September 23, 1904.)

R. M. Stroud's wife died in 1891, leaving no children and at her death eld the title and possession of several tracts of land, in this State. Appelnt brought suit against her heirs-at-law, claiming the land under the folwing writing, viz:

"South Carrollton, Ky., Oct. 26, 1898.

"This agreement made and entered into by and between R. M. Stroud nd Delia Stroud, his wife, by mutual consent and of their own free will, nd do enter into the following agreement for their own protection in case f the death of either party, namely, to-wit: That all of our property, both ersonal and real, that we have now or that may come into our possession ereafter, by deed or purchase, shall revert to the one that survives, and to e his or hers as the case may be, forever. And, furthermore, he or she, as ne case may be, shall have the right to sell and convey said property to the est advantage.

(Signed) "R. M. STROUD,
"DELIA STROUD."

1. Held—Husband and wife—Contracts with each other—Disability—Comnon law—Statutes—Whilst the common law rule prohibiting married women rom entering into legal contracts has been largely modified by the statutes, nd she may now carry on business on her own account, and, as incident to hese rights, enter into enforceable contracts with a third person, for the

purchase and sale of personal property without the consent of her husband, as though she were a feme sole, the common law disability to deal with her husband or make binding contracts with him, has not been changed in this State by legislation respecting the rights of married women, and we are, therefore, of the opinion that appellant acquired no right, enforceable at law, by virtue of the contract entered into with his wife previous to her death.

2. Equities—Land—Improvements paid for by husband—Title taken to wife—Reimbursement of husband—We are of the opinion that, to the extent that appellant, on the faith of the agreement entered into with his wife, advanced his own money for the purchase and improvement of real estate, the title to which was taken to her after the execution of the obligation between them, he is equitably entitled to be reimbursed therefor, either by the sale of the property or a transfer of the title to him. But he is not entitled to be reimbursed for taxes paid thereon or for improvements made upon real estate which she owned in her own right, and to the purchase of which he did not contribute his own money.

Sweeney, Ellis & Sweeney for appellants.

Miller & Todd for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Burnam.

R. M. Stroud and Delia Stroud were married in 1886, and lived together as husband and wife until the death of Mrs. Stroud in 1901. No children were born to them. On the 26th of October, 1898, the following writing was drawn by R. M. Stroud and signed by him and his wife:

"South Carrollton, Ky., Oct. 26, 1898.

"This agreement made and entered into by and between R. M. Stroud and Delia Stroud, his wife, by mutual consent and of their own free will, and do enter into the following agreement for their own protection in case of the death of either party, namely, to-wit: That all of our property, both personal and real, that we have now or that may come into our possession hereafter either by deed or purchase, shall revert to the one that survives, and to be his or hers as the case may be, forever. And furthermore, he or she, as the case may be, shall have the right to sell and convey said property to the best advantage.

"R. M. STROUD,
"DELIA STROUD."

Mrs. Stroud at her death, held the title and was in possession of several tracts of land situated in Daviess, McLean and Muhlenberg counties in this State. After the death of Delia Stroud, appellant brought this action in the Daviess Circuit Court against the appellees, heirs-at-law of his deceased wife, claiming that by virtue of the above writing he held the fee simple title to all the real estate owned by his wife at the time of her death; that his title thereto might be quieted. A general demurrer was sustained to the original petition and the appellant tendered and moved to file an amended petition, in which he alleged that after the execution of the writing supra by himself and wife, and believing that it was a valid and enforcible obligation, he purchased a lot in the town of Sacremento, McLean county, Kentucky, which he paid for with his own money, and had the title thereto

taken to his wife; that he subsequently erected on this lot a dwelling house, barn, cistern and other out-buildings at the cost to himself of more than $1,200; and that he also subsequently, relying upon the agreement between himself and wife, purchased of one Ross an undivided interest in a certain tract of land in Muhlenberg county, for which he executed his individual promissory note for $250, and had the title to the property taken to his wife, Delia Stroud. He also alleged that he had expended divers sums of money, in the payment of taxes on real estate owned by his wife in her own right, and asked that he be adjudged a lien upon these two separate pieces of real estate for the money so advanced by him, upon the faith of the agreement, or that the title thereto should be taken to him. The trial court refused to allow the amended petition to be filed and dismissed plaintiff's petition, and he brings his case to this court and asks a reversal. The questions to be decided upon the appeal are; first, whether the writing sued on is enforcible as against the heirs-at-law of the deceased wife; second, if not, whether any equity in favor of the appellant, arises in consequence of his belief in its validity, which would authorize a court of equity to direct the repayment to him of moneys advanced in the purchase and improvement of real estate, the title to which was taken to his wife.

It is contended by counsel for appellant that the act of March 15, 1894, which is embraced between sections 2127 and 2148, of the Kentucky Statutes, has the effect of removing all the disabilities imposed by coverture upon the wife, and authorizes her to make a valid contract with her husband for the conveyance to him of her separate estate. While under section 2128, of the Kentucky Statutes, a married woman may purchase and dispose of her personal property in her own name as if she were unmarried, may make contracts, sue and be sued as a single woman, she cannot sell, mortgage or convey her real estate unless her husband join in such contract. The statutes also provide that any gift, transfer, or assignment of personal property between the husband and wife shall not be valid as to third persons, unless the same be in writing acknowledged and recorded. In Brown v. Dalton, &c., 20 Ky. Law Rep., 1484, the appellant executed a note for unpaid purchase money on real property, which he afterwards transferred to one Dalton, who assumed to pay the note. Dalton transferred his purchase to his wife, J. C. Dalton, and she assumed to pay the note. The appellant having been compelled to pay the note to his vendee, a Virginia corporation, instituted an action to recover thereon from the wife in Kentucky. In that case it was held that the contract of the married woman imposed no personal liability upon her, the court saying:

"This transaction is clearly contrary to the public policy of this State as defined in the statutes in force when it was made, and if it could be enforced, the door might be opened for grave abuses. The wife was entitled, not only to the protection of the husband, but to his counsel and guidance in the management of her affairs, and she had learned that it was her duty to submit to him. If, when the law had imposed this duty upon her, it shall allow him to make contracts with her to pay his debts, and enforce these contracts against her because the debt is payable in another State, it will defeat the purpose of the statute framed to protect married woman and prevent their property being wasted."

In the case of Higgins v. Stokes, &c., 24 Ky. Law Rep., 2427, the appellant owned the fee simple title to a tract of land which her husband sold and conveyed to the appellee, but she did not unite in said conveyance. Appellee took possession thereunder and held it continuously until the death of the husband in 1900. The wife instituted her action after the death of her husband to recover possession of the land. Appellant pleaded as a defense that the plaintiffs' disability as a married woman was removed by the act of March 15, 1904; and that under section 2502, of the Kentucky Statutes, her right to recover the land in controversy was barred by limitation. It was decided that the mere fact that a married woman could have brought her suit during coverture did not deprive her of the benefit of the exception in her favor in the statute of limitation; whilst the common law rule prohibiting married women from entering into legal contracts has been largely modified by the statute, and she may now carry on business on her own account, and as an incident to these rights, enter into enforcible contracts with third persons for the sale and purchase of personal property without the consent of her husband to the same extent as though she were a feme sole, the common law disability, to deal with her husband or make binding contracts with him, has not been changed in this State by legislation respecting the rights of married women, and we are, therefore, of the opinion, that appellant acquired no rights enforcible at law by virtue of the contract entered into with his wife previous to her death. But the jurisdiction of the chancellor has been frequently exercised to enforce contracts and agreements for settlements made between the husband and wife, both before and after marriage, in favor of the wife, and it has also been exerted, though less frequently, to enforce agreements in favor of the husband when the facts and circumstances clearly so warrant. In Livingston v. Livingston, 2 Johns. Chancery 537, a husband and wife agreed by parol that he should purchase a lot in her name and build a house thereon; and that he should be reimbursed the cost thereof, out of the proceeds of another house and lot of which she was seized, which should be sold for that purpose; and the husband having executed the agreement on his part, the contract failed by the sudden death of the wife, who left infant children, to whom the legal estate in both lots descended. At the petition of the surviving husband it was decreed by the chancellor that the agreement should be carried into effect. The doctrine of this case was approved in Hinnan v. Parks, 133 Conn., 197; Burdine v. Amperse, 14 Mich., 96; and in numerous other cases, and we are of the opinion that, to the extent appellant, on the faith of the agreement entered into with his wife, advanced his own money for the purchase and improvement of real estate, the title to which was taken to her, after the execution of the obligation between them, he is equitably entitled to be reimbursed therefor, either by the sale of the property or a transfer of the title to him. But he is not entitled to be reimbursed for taxes paid thereon, or for improvements made upon real estate which she owned in her own right and to the purchase of which he did not contribute his own money. We are, therefore, of the opinion that the trial court erred in overruling the motion to file the amended petition, and the judgment is reversed and cause remanded for proceedings consistent with this opinion.

GOFF v. JANEWAY & CARPENDER.

(Filed September 28, 1904—Not to be reported.)

1. Sales of merchandise—Guaranty—In an action upon a guaranty that the purchase price of goods sold to a dealer shall be paid at the maturity of the indebtedness, judgment and execution had been obtained by the seller against the purchaser and a return of nulla bona, defense was made that at the time of the creation of the indebtedness the buyers were solvent, and that several terms of court had been held after the creation of the indebtedness before the institution of the action to recover against the guarantor, and a demurrer having been sustained to this answer interposing such defense, judgment was rendered against the guarantor for the amount of the unpaid indebtedness. Held—The petition is not defective in that the action was not commenced upon the failure of the parties to pay when due, or because the petition does not allege notice to the guarantor of the amount of the indebtedness, but it is defective because it fails to allege acceptance of the seller of the guaranty by appellant.

2. Pleading—It has been the uniform rule of this court that the total omission of a fact necessary to constitute a cause of action, cannot be supplied by referring to an exhibit not copied in the petition, but simply filed and referred to as part of the pleading, and it was error in the trial court to overrule a demurrer to the petition, it alleging that there was no notice to the guarantor of the creation of the debt, its maturity, or the failure of the buyers to pay.

Wilfred Carrico and Little & Slack for appellant.

Powers & Anderson for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barker.

The appellant executed and delivered to appellee, a corporation, the following guaranty: "In consideration of sales of merchandise hereafter to be made on credit by Janeway & Carpender, of Chicago, Illinois, to J. C. Stivers & Bro., of Owensboro, State of Kentucky, and in order to induce such credits by Janeway & Carpender, and for other good and valuable considerations the receipt of which is hereby acknowledged, I hereby guarantee the prompt payment at maturity of all indebtedness incurred by J. C. Stivers & Bro. to Janeway & Carpender, not exceeding, however, at any one time the sum of one thousand dollars.

"This guaranty is, however, accepted, and such credit as may hereafter be extended, is so extended upon the following conditions: The accounts, or any part thereof, for the merchandise that may be sold by Janeway & Carpender in reliance on this guaranty may, at any time be settled and adjusted between Janeway & Carpender and the principal debtor, by notes of the debtor either endorsed or unendorsed, and with, or without, further security, and said accounts or notes, or other security given therefor may be extended from time to time by Janeway & Carpender to the principal debtor, without notice to the subscriber, and all of which may be done without in any way affecting obligations hereby created. The subscriber hereby expressly waives notice of the acceptance of this guaranty by Janeway & Carpender of all credits extended and goods sold and delivered hereunder, and of the taking

of notes or other security for such indebtedness as may be incurred by the principal debtor to Janeway & Carpender.

"This instrument is intended to be, and shall be taken and construed as a continuous guaranty to the extent of the said sum of $1,000, without further notice by Janeway & Carpender and until revoked by the subscriber in writing. Such revocation when made shall apply only to sales thereafter to be affected, or credits extended to the principal debtor subsequent to the service of such notice of revocation, and any payments thereafter made by the principal debtor, shall be credited as may be agreed between him and Janeway & Carpender. In the event of default by the principal debtor in payment of the debt, or any part thereof, recovery therefor shall be had directly against the subscriber without previous notice after the prosecution of the claim against the principal debtor.

"Dated at Owensboro, Ky., Nov. 16, 1900. T. S. GOFF."

Afterwards, the principal debtors Stivers & Bro , purchased of appellees six hundred and forty-one dollars ($641.06) and six cents worth of goods and merchandise on credit, upon which indebtedness they made payments reducing it to a balance of five hundred and forty dollars ($540.04) and four cents. Of this balance, all but the sum of one hundred and eighty-nine dollars ($189.22) and twenty-two cents was settled by the execution and delivery to appellee by the principal debtors, of their three notes for the sums of one hundred and ninety-one dollars ($191.96) and ninety-six cents, one hundred and ninety-one dollars ($191.95) and ninety-five cents, and sixty-eight dollars ($68.22) and twenty-two cents, respectively. None of this indebtedness being paid, appellee instituted an action in the Daviess Circuit Court, against Stivers & Bro., and obtained a judgment, execution, and a return of nulla bona; whereupon this action was instituted by appellees as against appellant, the guarantor, to recover a judgment for the sum due by Stivers & Bro. Appellant filed a general demurrer to the petition, which was overruled; whereupon he filed his answer, admitting all of the allegations of the petition to be true by failing to deny them, but affirmatively alleging that Stivers & Bro., at the time of the creation of the indebtedness of six hundred and forty-one dollars ($641.06) and six cents were solvent, that several terms of the county court, of Daviess county, had been held after the creation of the indebtedness by the principal debtors, before the institution of the action by appellees against them in the circuit court, that appellees might have obtained a judgment on the several notes and the open account constituting its claim, and its failure so to do was laches; that appellees had failed to notify appellant of the creation of the debt by Stivers & Bro., its maturity, or their failure to pay, by reason of all of which he was released from any liability to appellees under his guaranty.

To this answer, appellees filed a general demurrer, which was sustained by the court, and appellant declining to plead further, a judgment was awarded against him as prayed for in the petition. To reverse which, this appeal is prosecuted.

We cannot agree with appellant, that the petition is defective in that the original indebtedness of Stivers & Bro., is not itemized. The allegation of the petition as to this is as follows: "Plaintiff states that, relying upon said written guarantee, and in consideration of the execution and delivery

it to plaintiff, as aforesaid, and between the dates of its execution and
livery as aforesaid, and the 16th day of August, 1902, it did sell, furnish
d deliver goods, wares and merchandise to the said firm of J. C. Stivers
Bro., amounting to the sum of $641.06, and which they were reasonably
rth, but no part of which has ever been paid except the sum of $80.06, on
e 14th day of August, 1902, and the further sum of $67.97, paid on the 27th
y of August, 1902, and the further sum of $3.26, paid on the 28th day of
gust, 1902, leaving a balance due and unpaid of $540.04. No part of
ich has ever been paid though long past due."

Then follows the allegation of the settlement of a part of this balance by
e notes of Stivers & Bro., their final failure to pay, the institution of the
tion in the Daviess Circuit Court, the rendition of the judgment, the
uance of execution, and the return of "no property found."

The case of Webb v. Jeffries, 2 Bush, 221, relied on by appellant, does not
pport his contention that the petition is bad for the reason stated. On
e contrary, when properly understood, it constitutes authority against
m. In the case cited, the allegations of the petition as to the account
ed on were quite as general as those of the petition in the case at bar, and
re held to be sufficient. The error in the case cited was not that the peti-
n was bad, but that the answer, which contained general denials of in-
btedness, was good, and that the lower court erred in not admitting it to
filed, and in not setting aside the judgment by default.

Nor do we think that the petition is defective in that it fails to allege no-
e to the guarantor of the amount of the indebtedness of Stivers & Bro.,
their failure to pay when due. In the case of Lowe v. Beckwith, 14 B.
n., 150, involving a guaranty similar to the one under consideration, the
urt, speaking through Judge Simpson, after an exhaustive review of the
thorities, held that notice of the amount of the indebtedness, and the de-
ult of the principal debtor, was not necessary in order to bind the guar-
tor. Upon this subject the court said: "Upon such a guaranty as the
esent, notice to the guarantor of its acceptance and an intention to act
der it in pursuance of its terms is necessary, because it is in the nature
a proposition, which the party addressed may accept or reject at his
tion, and until accepted does not constitute a contract between the parties.
t no additional obligation devolves upon the creditor. The guarantor,
applying to the party in whose favor the guaranty has been given, can
tain information as to the extent of the liability incurred under it, and
so whether such liability has been discharged or still exists; and if he has
dertaken that the debt shall be paid by the debtor when it falls due, its
n-payment by him necessarily involves a breach of this undertaking: or
his contract be that he will pay it himself in the event of its non-payment
the debtor, the default of the latter renders his undertaking absolute,
d he becomes immediately liable to an action, inasmuch as it is his duty,
cording to the very terms of his contract, to pay the debt without demand
notice. This will form a safe and sound rule upon the subject, and by
s practical operation render a guarantee of this description, when accepted
d acted upon, of some value to the party who has dealt upon the faith of
and trusted to it to secure the payment of his debt."

But the petition is defective, because it fails to allege notice by appellee

that it had accepted the guaranty of appellant. (Mast, Crowell & Kirkpatrick v. Lehman, 100 Ky., 464; Lowe v. Beckwith, 14 B. Mon., 150; Steadman v. Guthrie and others, 4 Met., 147; Greer Machine Co. v. Sears, 23 Ky. Law Rep., 2025.) It is urged, however, by appellee, that notice of the acceptance of the guaranty is waived by the very terms of the instrument. It has been the uniform rule of this court, except in the one case to be hereafter mentioned, that the total omission of a fact necessary to constitute a cause of action can not be supplied by referring to an exhibit not copied into the petition, but simply filed and referred to as a part of the pleading. (Bank of Monticello v. Huffaker and Shy, 12 Bush, 291; Gebhard v. Garnier, 12 Bush, 321; Green v. Page, on rehearing) 80 Ky., 370; Artemus v. Asher, 24 Ky. Law Rep., 2416). Newman, in his Pleading and Practice, 250-1, in treating this question, thus announces the rule: "But it (exhibit) can not supply an averment which has been wholly omitted. An exhibit which even forms a part of the pleadings does not dispense with the express averment of all the facts necessary to show the rights of the party; it can only aid in making direct, positive, and certain an allegation which would otherwise be vague and uncertain." In the case of Citizens' Bank of Dyersburg, Tenn. v. Millet, 103 Ky., 1, the court held that the failure to aver protest of a bill of exchange and notice thereof, was cured by the fact that it appeared that the bill, which was filed with, and made a part of the petition, but not copied into it, had printed on its face "no protest," which the court held constituted a waiver of the protest and notice. This is in direct conflict with the cases above cited, and, to that extent, is overruled.

The trial judge should have sustained the demurrer to the petition, and, failing in that, should have carried the demurrer to the answer back to the petition, and adjudged it insufficient for the reason indicated.

When the case returns, the appellant, if he so desires, should be awarded a rule requiring the filing of the original guaranty, or its absence accounted for. Both parties should be allowed to amend their pleadings, if desired.

For the reasons indicated the judgment is reversed for proceedings consistent herewith.

DRYDEN v. POGUE DISTILLERY CO.

(Filed September 27, 1904—Not to be reported.)

Master and servant—Personal injury—Use of dangerous machinery—Ignorance of servant—Peremptory instructions—In an action by plaintiff alleging the loss of a hand by machinery in the use of which he was inexperienced and wherein he testified that he was directed by the superintendent of defendant company, to place himself under the orders of the miller, who put him to work in a dangerous place, of which he was ignorant, with insufficient light, and who assured him it was safe to do the work, and in doing which his hand was caught in the roller and crushed so as to render amputation necessary, it was error in the court, at the conclusion of plaintiffs' testimony, to give the jury peremptory instructions to find for the defendant.

Allan D. Cole and Frank P. O'Connell for appellant.

Thos. R. Phister and Pogue & Pogue for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Robert W. Dryden, instituted this action to recover damages against the appellee, the H. E. Pogue Distillery Company, for the loss of his hand, which he alleges was occasioned by the negligence of the agents and servants of the employer company. A trial of the case resulted in the court's sustaining a motion by appellee, at the close of appellant's (plaintiffs') testimony, for a peremptory instruction to find for it, from which judgment this appeal is prosecuted. For the purpose of reviewing the soundness of this ruling of the trial court, the evidence of appellant must be considered as true.

The cause of action, as stated in the petition, is, substantially, that appellant was inexperienced on the subject of machinery; that, as an employe of appellee, he was directed by its superintendent, who had authority so to do, to place himself under the orders of the miller, Will Hays, and to do as he was told; this, he did. That, on the day he was hurt, at about 3:30 o'clock, a. m., when it was dark, he was put to work by Will Hays in raking the meal from what he calls the shaker, into the rollers, by which it was ground, and which were about five inches below the shaker; that he was not furnished with light sufficient to discern the danger he was in, but was assured by the miller, his superior, that it was safe to do the work in hand without a light, although it was very dangerous so to do, owing to the proximity of the rollers to the shaker, of which he was ignorant, but which appellee knew; that relying upon this assurance of safety, and in ignorance of the danger attendant upon the duty, he continued to work until, by accident, his hand was caught in the roller, and crushed in such manner as to render amputation necessary.

All of the allegations of the petition were controverted by the answer, which, also, contains affirmative defenses not necessary for the purposes of this appeal, to be noticed.

Appellants' (plaintiffs') evidence consisted mainly of his own testimony, which fully substantiated the allegations of the petition.

Shearman and Redfield, in their work on the Law of Negligence, volume 1, sec. 186, 5th Ed., say: "Where a servant, seeing a defect, and notifying his master thereof, is nevertheless ordered to continue his work, without any express or implied promise of a remedy, it has been sometimes held that he cannot recover, on the theory that from that time he assumes the risk. But this is unsound. A master's order is at least as much justification for the servants' continuance, as would be another's invitation; and we have seen (Art. 91) that a mere invitation is, in some cases, enough to acquit the person acting upon it from the imputation of contributory negligence. The true rule in this, as in all other cases is, that if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that, in fact, he does not rely upon the master's opinion. So, if the peculiar risk of the act commanded by the master is not obvious, the servant has a right to assume that he is not sent into any unusual peril, and he is not bound to investigate into the risk before obeying his order. A servant is not called

upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice and still more upon their orders, notwithstanding many misgivings of his own. If the master directs the servant to do some act which is dangerous, but which could be made less dangerous by the use of special care on the part of the master, the servant has a right to assume that such special care will be taken, and does not take the greater risk upon himself. The servant's dependent and inferior position is to be taken into consideration, and, if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not obviously so dangerous that no man of ordinary prudence would have obeyed. This, we are glad to say, is now settled law. In short, the law of estoppel applies to such cases. The master is estopped from alleging the falsity of his own representations, unless it appears clearly that the servant did not rely upon them. Yet there are extreme cases in which the danger was so glaring that no prudent man would have entered into it, even under orders. Risks incurred under coercion are not assumed." (Illinois Central R. R. Co. v. Langan, 25 Ky. Law Rep., 500; Shanks v. Citzens Electric Co., 25 Ky. Law Rep., 811; Henderson Tobacco Works v. Wheeler, 25 Ky. Law Rep., 495.)

According to the testimony of appellant, he was uneasy as to the possible danger attendant upon doing in the dark the work which he was ordered to perform, but relied on Hays' assurance of safety. An ignorant or inexperienced servant must, of necessity, rely upon the superior wisdom of his employer, or those who stand in the employer's stead with reference to him, and we are unable to say that the danger in performing the work at which appellant was engaged was so obviously apparent that a prudent man would not have continued it under the circumstances. A careful reading of the testimony in this case convinces us that, under the rule laid down in the authority above cited, the case should not have been taken from the jury.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

BERRY, &c. v. LEWIS, &c.

(Filed September 27, 1904.)

1. Real estate—Sale for division—Vested estate—Value of share—In a sale of real estate under subsection 1 of section 490, Civil Code, on the ground that the remainder interest of certain heirs is a vested estate and the share of each owner is worth less than $100, where the evidence shows that the interest of any one of the joint owners, at the time of the sale, was worth more than 100, the sale is invalid; and this is true though such interest is a life estate, and without reference to the time when it was acquired by the owner.

2. Possession—Remainder interest—Under subsection 2 of section 490, Civil Code, providing that a vested estate may be sold for division, "if the estate be in possession, and the property cannot be divided without materially impairing its value or the value of plaintiffs' interest therein," it is necessary in order to make the sale that the estate should be in possession, and we have uniformly held that remainder interest is not property in possession within the meaning of this subsection.

Reed & Berry for appellants.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Barker.

In this action it is sought to sell a lot of ground situated in Paducah, Ky., for division of the proceeds among the owners, under section 490 of the Civil Code of Practice. The appellee, Henry Lewis, is the owner of a life estate in the land during the life of Mrs. Margaret Berry, from whom he purchased his estate therein. The children of Mrs. Margaret Berry, eight in number, were originally the owners of all the remainder interest in the estate, but one of them died leaving infant children, and one sold her interest to Thomas Lewis. All of the remaindermen, except Thomas Lewis, resist the sale of the land.

The authority of the chancellor to make the sale is rested by the pleadings both upon subsections 1 and 2 of section 490. The final judgment ordered the property sold and the proceeds distributed in accordance with the prayer of the petition, from which the remaindermen have prosecuted this appeal. The evidence and actual sale under the judgment show the land to be worth $1,400. Mrs. Margaret Berry's age at the date of the judgment was 57 years, and her life estate, under the life tables, was fifty-eighty-two one hundredths per cent of the proceeds, or something over $700.

It is insisted by appellee that the judgemnt of the chancellor may be upheld under subsection 1, on the ground that the remainder interest of the appellants is a vested estate, and the share of each owner is worth less than $100. The principle of law involved in this proposition may be sound (Ward v. Edge, 100 Ky., 757), but the facts upon which it is postulated are not to be found in this case. The record indubitably shows that the share of appellee, Henry Lewis, in the estate under consideration is worth, at least $700, and he is none the less the owner of a share in the property within the meaning of the section, because his interest is a life estate; by the very terms of the statute, the sale cannot be made unless the share of each owner is worth less than $100. The language applies to the value of the share of the owner at the time the sale is sought to be made, without reference to the time the interest is acquired, so that, if one owner purchases the share of another, and thus increased the value of his share to $100 or more, the sale cannot be had under this section, although the remaining shares are each worth less than $100.

Subsection 2 of section 490 provides that a vested estate may be sold for division, "if the estate be in possession, and the property cannot be divided without materially impairing its value or the value of plaintiffs' interest therein." It will be observed, that in order to make a sale under this provision, it is necessary that the estate should be in possession, and we have uniformly held that a remainder interest is not property in possession within the meaning of this subsection. (Swearington v. Abbott, &c., 99 Ky., 271; Malone v. Conn, &c., 95 Ky., 93; Dineen v. Hall, 23 Ky. Law Rep., 1615.)

It follows, therefore, that the judgment ordering a sale of the land is unwarranted, and it is, therefore, reversed, with directions to dismiss the petition.

MAYSVILLE & BIG SANDY R. R. CO. v. McCABE, BY, &c.

(Filed September 27, 1904—Not to be reported.)

Railroads—Damages—Instructions—Where appellee and two companions stole a ride on appellant's train, disembarking at Maysville in appellant's yard, sat down on the track and fell asleep when a freight train in passing cut off his leg and killed his companions, he was a trespasser and the company owed him no duty except reasonable diligence to prevent injury to him after his peril was discovered. There being no evidence to the effect that the boys were discovered by those in charge of the train, but on the contrary it appearing that their presence was not discovered, a peremptory instruction should have been given the appellant.

W. H. Wadsworth and L. J. Crawford for appellant.

Jas. C. & B. A. Wright and Geo. Veith for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Barker.

The appellee, a lad of fifteen years, and two other boys about the same age, secretly boarded appellant's passenger train, called in the record "The Fast Flyer," at Newport. Ky., and stole a ride to Maysville, Ky., where they disembarked in the yard of appellant at about 11 o'clock p. m., and sat down on the railorad track, smoked cigarettes, and finally fell asleep. At 12:40 o'clock a. m., one of appellant's freight trains came along ran over the sleeping boys, killing his companions and cutting off appellee's leg and foot. To recover damages for this injury this action was instituted. A trial resulted in a verdict for $3,000 in appellee's favor.

The evidence shows beyond a doubt that the boys were asleep on the track in appellant's private yard, and they were, therefore, trespassers. Appellant owed them no duty save to use reasonable diligence to prevent injuring them after their peril was discovered.

The case of Dugan's Adm'r v. C. & O. Railway Co., 24 Ky. Law Rep., 1754, is in all substantial respects similar to the case at bar and is conclusive of it.

There was no evidence that applellant's servants saw appellee prior to his injury; on the contrary, it was shown that they did not see him at all, and did not know until some minutes after the catastrophe, that any one had been hurt. The court should have awarded the peremptory instruction asked by appellant.

The judgment is reversed for proceedings consistent herewith.

IRONTON FIRE BRICK CO. v. TUCKER, &c.

(Filed September 27, 1904—Not to be reported.)

Lands—Heirs at law—In this action by the children of a deceased sister to recover an interest in land of her brother on the ground that he is dead, there being no evidence that he was unmarried or without issue, or that he is not still living, no inquiry appearing to have been made for him at his last known place of residence, and the proof failing to establish that he is dead intestate without issue, a judgment in favor of those claiming, in this record to be his heirs, was unwarranted.

E. B. Wilhoit for appellant.

Armstrong & Woods for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Hobson.

By his will, probated in the year 1861, James Henderson devised to Lydia Mockabee for life and after her death to her two children, William David Mockabee and Martha Ann Mockabee, a tract of land in Carter county. Lydia Mockabee was then living on the land with her children. Shortly afterwards she removed with them to the State of Ohio and thereafter died there on October 4, 1865. Martha Ann, her daughter, married David McGraw, and on September 13, 1866, she and her husabnd conveyed to O. P. Holland her one-half interest in the land.. Holland conveyed to L. L. Tabor, who conveyed to Sarah J. Gill the entire boundary of land. Gill conveyed to Clark and Clark conveyed to those under whom appellants claim. Tabor had a tenant on the land while he held it, but after this it was vacant for a while. Clark got it in November, 1877, and moved on it, and from that time to the bringing of this action it was held by Clark and those claiming under him as their property.

This suit was filed on May 12, 1896, to recover one-half of the land. Appellants are the children of Martha Ann McGraw. They do not claim their mother's one-half of the land, but claim as heirs at law of their uncle, William David Mockabee, alleging that he died intestate and without issue. The only proof to sustain this averment is that about the year 1863, William David Mockabee was in Carter county. He had then enlisted in the U. S. army and wore a soldier's uniform. The only other proof as to him is by appellee, Rebecca J. Tucker, who says that she was thirty-one years of age when she gave her deposition in the year 1896. She says that William David Mockabee was at her mother's house when she was a small child, and that her mother received a letter from him from Vincennes, Ind., in the year 1872; that she heard her mother read the letter and he said in the letter that he was working as porter in a hotel. He also told her to go to Carter county and redeem the land and to keep his part of it, and if he ever needed it he would call on her for it, but that he never expected to return. Her mother wrote to him after that time but received no answer and none of the family have heard from him since.

On this proof it is insisted that it must be presumed that William David Mockabee was dead in 1879, and section 1639, Kentucky Statutes, is relied on.: "If any person, who shall have resided in this State, go from and do not return to this State for seven successive years, he shall be presumed to be dead, in any case wherein his death shall come in question, unless proof be made that he was alive within that time."

It is not easy to see that this statute applies to the case. William David Mockabee was not a resident of this State, and did not go from this State when he went to Indiana. He was a resident of Ohio and went from Ohio to Indiana. The common-law rule was that to raise the presumption of death the person must have been absent from his home or place of residence. (Commonwealth v. Thompson, 87 Am. Dec., 685; 22 Am. & Eng. Ency. of Law, 1248; Spur v. Trimble, 1 A. K. Marshall, 278.) But aside from all

this if it could be presumed that William David Mockabee was dead there is nothing in the record to show that he died without issue or died intestate.

There is no evidence as to how long William David Mockabee had lived in Vincennes, Ind., when he was last heard from there, or that he had any other home. There is no showing that he was unmarried or without children. It is not shown that he is not still living at Vincennes, for no inquiry appears to have been made there for him. His mother died in 1865. His only sister died in 1878. His only relatives were her children, the oldest of whom only saw him once when she was a little child and afterwards changed her name in marriage and her residence. The proof, therefore, fails to show that he is dead intestate and without issue, or that appellees, who are the children of his sister, are his heirs at law or have any interest in his share of the land. (Martin v. Royse, 21 Ky. Law Rep., 775.)

Appellees have not made out their claim for the property and the judgment in their favor is unwarranted. The only appellants before us are the Ironton Fire Brick Co and N. D. Tabor. As to them the judgment is reversed and the cause remanded, with directions to dismiss the petition.

FORDSVILLE BANKING CO. v. THOMPSON, &c.

(Filed September 27, 1904—Not to be reported.)

Note—Sureties—Liability—Defenses—Verdict—Peremptory instructions—The defendants admit they signed the note sued on as sureties, and it is not denied that the Thompson Coal Co. got the money thereon by reason of their signatures, but they seek to escape liability, first, because C. C. Roberts, who signed the name of the "Thopmson Coal Co." to the note, had no authority to do so; second, that said coal company, after the maturity of the note, frequently had to its credit in the bank a sufficient sum of money to have paid the note, and negligently permitted the money to be checked out for other purposes; third, that the note sued on was embraced in a mortgage for $1,034.96 given to the bank March 24, 1898, by C. C. Roberts. In our opinion the proof wholly fails to make out a valid defense on either ground, and the verdict of the jury in favor of the appellees is palpably and flagrantly against the evidence. A peremptory instruction to find for the plaintiff should have been given.

R. L. Greene and Robt. Crenshaw for appellant.

R. A. Burnett for appellees.

Appeal from Trigg Circuit Court.

Opinion of the court by Chief Justice Burnam.

Appellant for the second time appeals from a judgment rendered in favor of the appellee upon the verdict of a jury. The opinion upon the first appeal is reported in 23 Ky. Law Rep., 1276, and contains a full statement o the issues raised by the pleading, and the testimony introduced upon the former trial. The judgment upon the $200 note was paid, and only the note executed on the 12th of May, 1897, for $350 was in issue upon the last trial. The testimony thereon was not materially different from that introduced upon the first trial. The appellants, Hickman and Pointer, admit that they signed this note as securities, and it is not denied that the coal company got the money thereon by reason of their signatures, but they, nevertheless,

ek to escape liability on three grounds. First, because as they allege G. Roberts, who signed the name of the Thompson Coal Company to this ligation, was not authorized by the company to do so; and that for this ason, it is not an enforcible obligation against the company, nor against em as securities. The only testimony introduced to support this defense that of the witness, M. S. Thompson, for whom the money was borrowed. hile he denies the right of Roberts to borrow money and sign the firm me to the obligation therefor, he admits that the company got the money ereon and appropriated it to its needs. He further testifies that he was sent from the company's place of business most of the time, and gave up e management of the business to Roberts, who had express authority to form all acts necessary for the conduct of the business. On this point berts testifies that he was the superintendent and general manager of the l company, and transacted all its business at the mines from the time y started to do business, and that this included the supervision of its ancial affairs; that he procured Mrs. Pointer, his sister and Mr. Hick- n, his friend, to sign the note as an accommodation to him. While on e other hand, I. C. Adair, the cashier of the banking company who made e loan, testifies that Roberts represented to him that he was a member of e firm, and by virtue of his position as general superintendent and man- er had authority to sign its name; that Thompson had also previously vised him in writing that Roberts would attend to all the financial busi- ss of the company; and that he subsequently acknowledged his indebted- ss for the obligation sued on, and repeatedly promised to pay it. The timony of Arthur E. Smith, the teller of the bank, fully corroborates se statements. It seems to us that the testimony wholly fails to support defense.

t is next contended that the Thompson Coal Company, after the maturity the obligation sued on, frequently had to its credit in bank a sufficient n of money to have paid the note, and that the banking company were lty of such negligence in permitting the company to check this money , as to relieve them from liability on their obligation. On this point berts testifies that the account of the coal company with the bank gen- lly showed an overdraft, but that on several occasions it had a balance ts credit, out of which the obligation sued on could have been paid, if the pany had been vigilant and charged up the note; and he specifically es that in the month of November, 1897, he deposited orders on the treas- r of the Illinois Central Railroad Company for coal sold them, which regated $1,500 and $1,700, out of which the note could have been paid. admits, however, that he drew a check on this deposit for $390, in favor W. F. Browder, and another in favor of the Frazier Grocery Company $245, and the balance to the sheriff of Ohio county in settlement of cer- executions he held against the coal company. He also admits writing umber of letters addressed by him to the bank, at the time he would e deposits, calling the attention of the bank to the fact that there were tanding checks against such deposits. For instance, on the 26th of Sep- ber, 1898, he wrote the following letter:

Dear Ike: Enclosed find check for $165, which you will please place to credit to pay check given 21st and 22d. I will have $300 from Mrs.

Pointer this next week, and have written Capt. Stone to send me check for $500, this month. I will get it. Ike, I want all the checks I have out paid, the amount sent you to-day will more than do it. I will make out R. R. bills to-day and will see you Wednesday. The Thompson debt must be transferred to me or I may require you to bring suit on it and judgment assigned to me. When I see you, will devise way and means. See that no check given 21 and 22 is returned but all paid. I will be all right with the bank and you this week.

"Yours, ROBERTS."

On the 30th of September, 1898, he wrote as follows:

"Ike: Have just finished making out bills for coal shipped this month. Local bills $760.59 and $212.12. Have requested that all remittances be sent to Fordsville Banking Co. I have done fairly well this month considering how short handed I was at start, then too the same old story-not cars enough. I will be up early next week, and we will arrange about the Thompson debt. I want it transferred to me, if we can arrange about it. F. T. Gunther will take the Wagon Factory note, pay note and take stock. You might write to him.

"Yours, ROBERTS."

On the other hand the cashier of the bank and its book-keeper, both testify that there never was at any time after the maturity of the obligation sued on, a day when the coal company had to its credit sufficient funds to pay the note; that the account was almost always overdrawn, as contemporaneously with making deposits the coal company drew check on the funds so deposited, generally more than sufficient to consume it, and the itemized account of the coal company with the bank, filed in the record, supports this testimony. On the 24th of July, 1898, G. C. Roberts, executed a mortgage to the bank to secure the payment of a note for $1,032.96, and he testifies that this sum covered the entire indebtedness of the coal company to the bank, including the obligation sued on, and appellees rely upon this testimony as conclusive evidence of payment. When this mortgage was executed, Thompson had retired from the firm, transferring the business to Roberts. Adair, the cashier of the bank testifies that this mortgage was given to secure an unpaid balance of $985.66 and interest on a note given June 3, 1898, which had been secured by a claim against the I. C. R. R. Co., but which they had failed to pay, and that a note was given simultaneously with the execution of the mortgage; that it had no connection whatever with the note sued on, and they were not included in it; and that suit was then pending to enforce the payment of that note, and his testimony was fully supported by that of the assistant cashier. This in brief is a summary of the testimony upon the defenses relied on by appellees. In our opinion it wholly fails to make out a valid defense upon either ground, and the verdict of the jury in favor of appellees was palpalby and flagrantly against the weight of evidence. A peremptory instruction to find for the plaintiff on the obligation should have gone, on the trial of the case.

For reasons indicated the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

GEOGHEGAN v. TURNER, &c.

(Filed September 27, 1904—Not to be reported.)

1. Forcible entry—Uninclosed land—It is not necessary for the maintenance of forcible entry, that the land in controversy should be enclosed.
2. Possession—Division line—Lane—Where the plaintiff was in possession of land to an old division line between him and defendant, the fact that he moved his fence in, so as to leave a lane for his own convenience, between him and defendant, was not an abandonment of his possession to said line, and an entry by defendant within said lane, made him liable for a forcible entry.

L. A. Faurest and J. P. O'Meara for appellant.

J. S. Worthan and C. H. Moorman for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellees instituted a proceeding against the appellant for forcible entry and detainer before the judge of the Hardin County Court. Upon the trial it was adjudged that appellant was guilty and a judgment of restitution entered. A trial in the circuit court upon appeal resulted in the affirmance of the judgment of the county court, and defendant appeals.

Appellant and appellees and those under whom they claim have owned adjoining tracts of land for more than forty years before the institution of this proceeding, and a division fence had been maintained between their respective tracts. The line as marked by the fence was not a perfectly straight one. About twelve years before the institution of this proceeding, the appellant, Geoghegan, and William Turner, who was the father of appellee, W. T. Turner and the husband of appellee, S. W. Turner, in order to straighten the line between them, verbally agreed that Turner should set a stone at one end of the line on the turnpike road, and Geoghegan should set one at the other end of the line on the bank of the Ohio river; and that a straight line connecting these two stones should be the division line between their respective tracts of land; and that the division fence should be moved to and maintained on this new line. The line was a long one and the terminal point thereof, could not be seen from either end. Some time after the setting of these stones, the parties employed George G. Taylor, a surveyor, to run the line. When they met on the land for this purpose, it was discovered that Geoghegan's stone on the bank of the river was missing. Turner, however, insisted that the line should be run from the stone in the edge of the turnpike road to the point where he claimed the stone had been placed on the bank of the river. Geoghegan refused to abide by his agreement, and insisted that the line between them should be run without reference to the stones and by the calls of his deed. Being unable to come to an understanding, no survey was made and the old fence continued the division line between them. William Turner, Sr., died in January, 1900. After his death, his widow and only child, the appellee, W. T. Turner disconnected their end of the division fence, pursuant to notice, and set their fence back on their land sixteen feet from the old division line, for the avowed purpose of leaving a lane sixteen feet wide on the outside of their fence along the old division line for their own use and convenience. Several

weeks after they had built the new fence, the appellant took possession of about onethird of the sixteen feet left for the lane, and enclosed it with a fence with the residue of his tract. To recover the strip of land so enclosed this proceeding was instituted.

Appellant's chief, and in fact his only contention upon this appeal is, that appellees did not have actual adverse possession of the strip of land enclosed by him at the time of the entry; and that consequently the writ of forcible entry was not available for its recovery. The main basis for this contention is that parol agreement between the elder Turner and appellant fixing the division line with the stones as they terminate, it being insisted that from this time the line fixed by the stones was the true line; and, that Turner ceased thereafter to be either in the actual or constructive possession of the land outside of that line. In a number of well-considered case it has been decided that an oral agreement, fixing a dividing line, between adjoining lands of antagonistic parties is not within the statute of frauds and perjuries and may be enforced in equity. (Jannison v. Petit, 6 Bush, 669; Brown v. Crow, Sneed, 108; Brisby v. Combs, 14 Ky. Law Rep., 651.) But in our opinion the facts of this case do not bring it within this rule. Even if it be conceded that the elder Turner and appellant actually agreed upon the new division line, it is equally clear that before this agreement could be carried into effect one of the terminal stones was removed from some cause, and that appellant subsequently refused to carry the agreement into effect, and apparently by mutual consent the agreement was abandoned, each party remaining in possession of the land separated by the old fence. There can be no doubt that appellees were in the actual and adverse possession up to the old line at the time they set the fence back for the lane, and the law is settled that it is not necessary for the maintenance of an action for forcible entry that the land in controversy should be enclosed. (Howard v. Whitaker, 17 Ky. Law Rep., 1775.)

The judgment is, therefore, affirmed.

ALTSHELER, &c. v. CONRAD.

(Filed September 28, 1904.)

1. Action for damages—Limitation in an action by plaintiffs against the defendants to recover damages on the allegation that by reason of the failure of defendants to repair an iron apron at the side of the door, to a building which plaintiffs had rented from defendants, and which defendants promised to repair in a reasonable time, and by reason of such failure one of plaintiffs' employes was injured by falling on said defective apron, for which injury plaintiffs were compelled to pay said employe damages in the sum of $205, the limitation to plaintiff's cause of action is five years.

2. Consideration—Demurrer—A demurrer of defendant to plaintiffs' petition should have been sustained because it does not allege that there was any consideration for the promise or agreement made by defendants to repair said apron.

3. Pleading—Breach of contract—An amended answer filed by defendant alleging that the person injured was in the employe of plaintiff at the time of his alleged injury, which occurred on December 11, 1896, and that plaintiff's action is founded on said alleged injuries to said employe, and is

barred by limitation, which they plead and rely on, is not a good plea, and the plaintiffs' demurrer thereto should have been sustained, as the plaintiffs' action is not founded on the injury to his employe, but, upon the failure of defendants to comply with their contract to repair the apron by reason of which plaintiffs sustained the loss of $205.

O'Neal and O'Neal for appellants.

M. A., D. A., and J. G. Sachs for appellee.

Appeal from Jefferson Circuit Court, Chancery Division.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the lower court in overruling a demurrer to an amended answer pleading the statute of limitations, to the cause of action set forth in appellants' petition. The petition in substance sets forth the following facts; that appellants had rented from the appellee a business house on the corner of Eighth and Main streets in the city of Louisville, for the term of three years for the purpose of conducting a wholesale grocery business therein. That they discovered an iron apron, at the side of Eighth street door, in a dangerous condition; that it was placed at too great an incline and made it dangerous for one passing merchandise into and out of the building, over it; that they called appellee's attention to the dangeorus condition and improper construction of this apron and requested him to have it changed or altered so as to make it safe. That he then promised and agreed to do so within a reasonable time, but did not make such change, or any change in the apron, and violated his promise and agreement with reference thereto, and alleged that one of their epmloyes, by the name of Breen, while in the exercise of his duties, slipped and fell on this apron and broke one of his limbs; that Breen brought an action against these appellants for, and on account of the damages he had received for the injuries stated, and recovered of these appellants a judgment, including costs, amounting to $205, which they were compelled to and did pay Breen; that this payment was the result of the failure of appellee to comply with his promise and agreement to repair and make safe this apron, and they sought judgment against appellee for that sum.

The appellee demurred to this petition, which was overruled. He then answered, making a general denial of all the allegations in the petition and in another paragraph undertook to plead the statute of limitation. A demurrer was filed to this paragraph by the appellants, which the court sustained, and the appellee then filed an amendment to this paragraph as follows: "The defendant, for amendment to his answer herein, and to make more definite, specific and certain his plea of limitation herein says that P. Breen was a servant of the plaintiffs and in their actual employment at the time of the alleged injury to the said Breen. This defendant says that the alleged injury to said Breen occurred on the 11th day of December, 1896, in the city of Louisville, Ky., where said Breen was acting in his capacity as servant and employe of plaintiff aforesaid and this actiou is founded on said alleged injuries to plaintiff's servant and employe, Breen, as afore said. This defendant says that under the law of the statute of Kentucky the plaintiffs' causeof action is long since barred, and he pleads and relies upon

the law of theState of Kentucky in such cases made and provided as a bar to any recovery herein."

The court erred in overruling a demurrer to this plea of the statute of limitations. The appellants had no right to maintain an action for the injuries to Breen, their servant; this right alone existed in Breen, and the appellee is in error when he says that applelants' action is founded on such injuries. As appears from the petition itwas founded on the violation of the alleged contract made by appellee with appellants to repair and make safe this iron apron, and on account of such failure and violation of contract they sustained this loss of $205. If it had been brought for the injuries to Breen, the twelve-months' statute would apply, but if it had been brought to recover the $205, which they had lost by reasdn of the breach of this contract or agreement, then the five-years' statute would apply, and this time had not elapsed at the time of the institution of this action.

We are of the opinion that the court erred also in overruling the demurrer to the petition. It is not stated in the petition that this promise and agreement on the part of the appellee to repair and make safe this apron, was in writing, nor was there any writing filed with the papers showing any such promise or agreement; therefore, it must be deemed that this promise and agreement was verbal. Such being the case it was indispensably necessary for the appellants to have alleged, in their petition, a consideration for this promise and agreement. There is not an intimation in the pleadings that they paid or promised appellee anything to make this repair. (1 Mar., 538; 2 Mar., 139 and 382.) Unless there was a consideration paid or promised the appellee for the making of this repair, the appellants can not sustain their action on appellee's promise to repair. (Elbin v. Miller, 78 Ky., 371; Proctor v. Keith, 12 B. M., 252.)

Wherefore the judgment of the lower court is reversed and the cause remanded with directions to sustain the demurrer to both the amended answer and the petition.

REYNOLDS v. COMMONWEALTH.

(Filed September 28, 1904—Not to be reported.)

Criminal law—Instructions—An instruction which told the jury that if defendant in sudden affray, or in sudden heat and passion, without previous malice and not in his necessary, or apparently necessary self-defense, shot and killed deceased, the crime was manslaughter, was proper where the proof showed that appellant and deceased were in a fist fight, during which appellant shot and killed his adversary.

Tye & Denham and T. C. Morrow for appellant.

N. B. Hays, and Loraine Mix for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge O'Rear.

In this appeal from a judgment convicting appellant of manslaughter, his principal criticism of the trial court's ruling is, as to the instruction defining manslaughter. This instruction told the jury that if the defendant in sudden affray, or in sudden heat and passion, without previous malice, and

not in his necessary, or apparently necessary, self-defense, shot and killed the deceased, the crime was that of manslaughter. The court told the jury also that "an 'affray' is a mutual combat voluntarily engaged in by two or more persons in a public place."

Unobjectionable instructions were given on the subject of self defense. There was proof tending to show that appellant and the deceased were fighting with their fists at a public gathering in the town of Corbin, during which appellant shot and killed his adversary. From the testimony of the Commonwealth witnesses it appears that the affray came up over some trivial remark, or maybe, by reason of some previous feeling. The jury, under their interpretation of the evidence accepted this view of the matter, and rejected appellants' evidence tending to show self-defense. Under the evidence we are of opinion that the case called for the instruction as given, and that the definitions used by the court are correct. (2 Bishop's Crim. Law, section 701 East Pl., Cr., 244; 4 Bl. Com., 145.)

Judgment affirmed.

DARRELL v. COMMONWEALTH.

(Filed September 23, 1904—Not to be reported.)

1. Criminal law—Rape—Evidence—Upon the trial of appellant for rape, evidence tending to show that he endeavored to procure medicines for the purpose of bringing about an abortion, was improperly admitted where the accused testified that he had sexual intercourse with the prosecutrix and that he had had such relations with her on many occasions Had he denied these relations, then it would have tended to contradict him, because the jury might have inferred that he was not willing to produce the abortion unless he was responsible for her condition.

2. Same—Conduct of prosecuting attorney upon the trial—Upon the trial of appellant in this action he filed an affidavit of Gaddis and moved for a continuance. During the argument for the Commonwealth, the county attorney, in commenting upon the affidavit, said: "The affidavit of Gaddis is a lie and they knew it. I don't care who resents it." This statement was improper and prejudicial to the rights of the appellant.

Watkins & Birkhead for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Paynter.

The appellant was found guilty under an indictment charging him with the offense of rape upon the person of Lillie Thomas Darrell, his niece. From appellant's admissions with reference to his sexual relations with the complainant, he is shown to be brutal and without the slightest claim upon good people for their respect. While this is true he is entitled to have a fair tiral under the indictment charging him with rape.

It is urged that the court should have given a peremptory instruction to find the appellant not guilty, because the prosecutrix did not make an outcry at the time she claims the offense was committed, it having occurred at a place where she might have expected some one to have heard and come to her rescue, and because she did not tell of the occurrence for months after

wards and continued to sustain friendly relations with the appellant, and for other reasons not necessary to mention. The circumstances relied upon to show that the court should have given a perepmtory instruction, were simply admissible as tending to show that she consented to the act which she now claims was a rape. The jury might well have reached the conclusion that the sexual act was with her consent; this, however, was a question for the jury, not for the court.

On the trial of the case the court admitted evidence tending to show that the appellant endeavored to procure medicines for the purpose of producing an abortion upon the prosecutrix, she having become pregnant. The tendency of this evidence was to show that the appellant had it in mind to commit another offense. In admitting this evidence the court erred. It had no legitimate bearing upon the question at issue. The court admitted it for the purpose of contradiction. The accused admitted that he had had sexual intercourse with the prosecutrix at the time she claims he committed the rape, and declared that he had had such relations with her on many occasions. Had he denied that he had had sexual intercourse with her, then it would have tended to contradict him, because the jury might have inferred that he was not willing to produce an abortion unless he was responsible for her condition.

The appellant filed an affidavit and moved the court for a continuance of the case. In the affidavit he stated what certain absent witnesses would prove. The court allowed it to be read as a deposition. The affidavit was competent and material. During the argument for the Commonwealth, the county attorney, in commenting on the affidavit which was read as a deposition, (one of the witnesses was named Gaddis) said "that the affidavit of Gaddis was a lie and they knew it. I don't care who presents it," and he again said: " I say the statements in the affidavit, that Gaddis had relations with this girl, is a lie, and they knew it when they made it." Objections were made to the statements of the attorney, and the court simply admonished him to keep within the record. The defendant was entitled to have the statements made in the affidavit as to what an absent witness would prove to be, considered by the jury as the evidence of the absent witness. It was entirely improper for the county attorney to endeavor to break the force of the testimony by stating that the defendant lied when he made the affidavit and knew it. We think the statements of the county attorney were improper and prejudicial to the rights of the defendant. Under the facts of this case the defendant, having made the admission that he had sustained improper relations with his niece, was calculated to arouse a strong feeling of condemnation in the jury, hence the remark of the county attorney added to that feeling, because it imported that he had been guilty of the offense of false swearing in addition to the offense admitted by him, and the one which the Commonwealth was endeavoring to establish.

The judgment is reversed for proceedings consistent with this opinion.

COMMONWEALH v. ROBT. AND LULA VINEYARD.

(Filed September 23, 1904.)

Indictment--Taking property—Owner—Peremptory instruction—Under section 128, Criminal Code, providing: "If an offense involve * * * the taking of property and be described with sufficient certainty to identify the act, an erroneous allegation * * * as to the owner of the property taken * * * is not material," on the trial of an indictment alleging that the property stolen belonged to the Columbus Stave Co., and that it was an incororated company the failure of the Commonwealth to prove that the company was incorporated, did not authorize the trial court to give a peremptory instruction to the jury to find defendants not guilty, as it was not necessary to allege or prove that the company was incorporated.

N. B. Hays and Loraine Mix for appellant.

J. M. Nichols & Son for appellees.

Appeal from Carlisle Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charged that the defendants stole certain manila ropes from the Columbus Stave Co., which was a duly incoprorated company. The evidence introduced by the Commonwealth tended to show that the ropes were stolen from the Columbus Stave Co., and that they belonged to that company and that it was incorporated. The Commonwealth did not introduce the records to show that it was a duly incoprorated company. For this reason the court gave the jury an instruction to return a verdict for the defendants. The case was brought here to review the action of the court.

Section 128, Criminal Ccde of Practice, reads as follows: "If an offense involve the commission of, or an attempt to commit an injury to person or property, or the taking of property, and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured or attempted to be injured, or as to the owner of the property taken or injured or attempted to be injured, is not material."

The indictment was sufficiently certain without an averment that the Columbus Stave Co. was an incorporated company, therefore, it was unnecessary to aver that it was an incorporated company. The offense could have been committed whether the company was incorporated or not. Although the indictment averred that it was a corporation, had the evidence upon trial shown that it was not a corporation, still a case would have been made out against the defendants. It was to meet this and similar cases that section 128 was enacted.

In our opinion the court erred in giving the peremptory instruction. The case is not reversed because there can not be another trial.

COMMONWEALH v. PHILLIPS.

(Filed September 27, 1904—Not to be reported.)

Criminal law—Evidence—Confession of guilt—Upon the trial of appellee charged with the offense of housebreaking, the confession that he had made to a police officer was held not to be voluntary, and he was acquitted. No rule can be stated as to just what will make a confession voluntary, as the

facts attending each case are different. The evidence in this action, however, that the defendant was in possession of the stolen goods was admissible, and if he had not produced them, evidence that they were found where defendant said they were, was admissible.

W. H. Hester, N. B. Hays and Loraine Mix for appellant.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Paynter.

The defendant, Phillips, was indicted for housebreaking with intent to steal therefrom. On the trial the attorney for the Commonwealth introduced witnesses and offered to prove by them that the defendant had made a confession of guilt, and that on the same day produced the goods which had been stolen from the house by those who had broken into it. The court, after hearing the witnesses, ruled that the confession was not voluntary, because he had been improperly induced to make it by a police officer who had him in custody, although not under a warrant of arrest, but for the purpose of obtaining a confession from him. The improper inducement by the officer was made some two hours before the confession was made, and if it had any effect on the mind of the defendant, it was to induce him to return the stolen goods to the owner, whereupon he made a confession to the owner and officer.

If the court did not err in holding that the improper inducement was still operating on the mind of the defendant, and that he was thereby influenced to make the confession of guilt, still the evidence that he was in possession of the stolen goods and produced them, was admissible. Even if he had not produced them, and they had been found where he in the course of a confession said they were, the evidence that they were found, together with the statement of the accused as to their location, would have been admissible. (Jane v. Commonwealth, 2 Met., 32; Rector v Commonwealth, 4 Ky. Law Rep., 32; Whitley v. Commonwealth, 24 Ky. Law Rep., 2526.)

It is not necessary to enter into a discussion of the question as to whether the court erred in reaching a conclusion that the confession had been improperly obtained, as no rule can be stated as to just what will render a confession voluntary, as the facts and circumstances attending each confession, are different. As there cannot be another trial of the case, the clerk will certify this opinion to the lower court.

STANDARD OIL CO. v. DOYLE.

(Filed September 28, 1904.)

1. Pleading—Sufficiency—Conspiracy to injure another's business—Use of unlawful means—Damages—In an action for damages by one who alleges that the defendants maliciously conspired and confederated together to injure and destroy plaintiff's business, (who was a rival of the defendants) by the use of unlawful means for that purpose, the conspiracy becomes actionable and the plaintiff may recover for any loss or damage suffered in consequence thereof.

2. Same—It was most assuredly unlawful to harrass and annoy plaintiff's employes when engaged in the discharge of their duties, in selling and distributing oils to plaintiff's customers, to threaten paintiff's customers, to

shut up their business if they continued to deal in plaintiffs' oils, to cause and procure false and injurious reports concerning plaintiff and his business, to be circulated in Lexington and vicinity, where plaintiff's business was located, and to procure plaintiff's arrest and prosecution on false charges in connection with his business in the sale of oils for the purpose of estranging plaintiff's customers and patrons.

3. Reasonable inference—Where it is shown by the evidence that a purpose was accomplished by unlawful means, and when we consider the relation of the parties, their manifest motives of self-interest, the manner in which the purpose was carried out and the declarations of the parties, it is reasonable to infer that this purpose was carried out by concert of action and agreement of the defendants.

4. Co-conspirator—Declarations—A conspiracy having once been established or facts having been adduced which justify the inference of a conspiracy, the acts and declarations of each conspirator, made pursuant and in furtherance of the conspiracy, are competent evidence against all.

5. Same—Where one enters into or becomes a party to a conspiracy it matters not how prominent or inconspicuous a part he may take in the execution of the unlawful purpose, or the use of the unlawful means, he is responsible to the fullest extent for all that precedes, as well as for all that follows, in connection with the plot, whether done by himself or by one or more of his associates. The only limitation upon the rule, is, that what is said and done must be said and done after the formation of the conspiracy and in furtherance and pursuance thereof. But, what may be said and done by any one of the conspirators after the completion of the purpose for which the conspiracy was formed, can be used only against the one saying or doing it.

6. Depositions—Private conveyance—Under section 588, Civil Code, requiring the officer taking depositions to send them to the clerk by mail or private conveyance, it is lawful for the officer to send them by the Adams Express Co., where the agents of the company, through whose hands they passed, made affidavit that the depositions had not been opened by them or by any person in transit.

7. Damages—Amount—Inequality—Excessive—Province of jury—It is within the province of the jury to determine from the evidence who was most in fault and who would be benefitted most by the formation and success of the conspiracy, and it is reasonable to presume that this accounts for the inequality of the amounts adjudged, and if it be true, as the jury seems to have determined, that the conspiracy was formed and in pursuance thereof, defendants fraudulently caused plaintiff's oils to be condemned and wilfully reported to be below the legal test, and had plaintiff arrested upon the false charge of selling condemned oil, and obstructed and annoyed plaintiff's employes when delivering oil, for the purpose of driving the plaintiff out of business, a verdict of $2,500 in damages against the Standard Oil Company, and of $300 against C. B. Gilman, is not excessive.

Breckinridge & Shelby and E. L. Hutchison for appellants.

Morton, Webb & Wilson for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is prosecuted from a judgment of the Fayette Circuit Court, awarding appellee $2,300 in damages, against Standard Oil Co. and $300 against C. B. Gilman, and involves some interesitng questions. The appel-

lants claim that a cause of action was not stated in the petition and the court erred in overruling their demurrer thereto.

It was, in substance, alleged in the petition that in the spring of the year 1901, in the city of Lexington, Ky., the appellants, C. B. Gilman and M. F. Griffith, oomposing the firm known as the Brilliant Light Oil Co., and the Standard Oil Co., a corporation, did maliciously, unlawfully and wickedly conspire, combine, confederate and agree together, between and among themselves to estrange and alienate the acquaintances, customers and patrons of the appellee, to ruin, oppress and impoverish the appellee and drive him out of the business of selling and contracting for the sale of oils, gasolines, etc., and to deprive him of all benefit and profit under his said contract, with the Wilburine Oil Works Co.

After setting out the series of wrongful acts, which we will hereafter refer to, it continued as follows; that each and all of the wrongful acts were done in pursuance of the conspiarcy alleged as existing between and among the several defendants, and that by reason of such conspiracy and of the commission of the named wrongful acts, in furtherance and execution thereof, appellee had been forced to give up and quit the business of buying, selling and dealing in illuminating oil, gasolines, etc., in the city of Lexington and vicinity, and had been forced to cancel his contract with the Wilburine Oil Works Co., and had been thereby deprived of all benefit and profit arising therefrom, and had been deprived of the opportunity to earn a livelihood for himself and family, and had been wrongfully prevented from engaging at his own home in the business and vocation of his life, which he had been pursuing for many years, and for which, from his long experience therewith and his extensive and favorable acquaintance in Lexington and vicinity, he was thoroughly fitted.

It is contended that the acts of appellants, and each of them, as alleged, were legitimate for the purpose of building up their own business and as against the appellee as a competitor, and if the appellee suffered any damages it was damnum absque injuria and cite the following cases as sustaining their position. Boulier v. McCauly, 91 Ky., 136; Chambers v. Baldwin, 91 Ky., 121; Brewster v. Miller Sons & Co., 101 Ky., 368; Baker v. Metropolitan Life Ins. Co., 23 Ky. Law Rep., 1174; West Va. Transportation Co. v. Standard Oil Co., 50 West Va., 611; Continental Ins. Co. v. Board of Underwriters, 67 Fed., 310. These cases are easily distinguished from the case at bar. The first two cases cited, in effect, decide that a third party can not be made responsible in damages for causing a party to a contract to break it, unless force or fraud is used in accomplishing the result. In such cases, without an allegation and proof of force and fraud, the party breaking the contract must be regarded as having broken it of his own will and for his own benefit, and is alone responsible to the other party to the contract in damages. The third case cited. in substance, decides that no cause of action arises in favor of a person who is refused the right to purchase articles from a dealer; the merchant or dealer having the lawful right to sell or refuse to sell to whom he pleases. In the case of Baker v. Metropolitan Life Ins. Co. it was sought to recover damages from the company, and charged it with maliciously combining and confederating with other companies to prevent him (Baker) from receiving employment as an insurance agent at Lex-

ington for the term of two years, and in pursuance of such conspiracy the Metropolitan Co. discharged him from its employment, without any fault on his part, and by reason thereof he had been deprived of earning his livelihood. The court decided the case against Baker for the reason that he alleged in his petition that his employment was for an indefinite length of time, and he had, therefore, the right to quit whenever he saw proper, and the company had also the right to terminate the employment at pleasure; and the court also approved the principles announced in the case of Brewster v. Miller Sons & Co. to the effect that it is lawful in one to decline to enter into a business undertaking with any one. The other two cases referred to do not support appellant's contention.

In the petition a malicious conspiracy and confederation on the part of appellants to injure appellee in his business, was charged, also the means employed by them to effectuate their purpose and the injury and damage resulting to appellee by reason of the alleged wrongs. The charge of malicious conspiracy, confederation, etc., against appellants, even if true, did not give appellee a cause of action unless the means used by them to carry out their purpose, were unlawful, and that by such means they succeeded in injuring appellee's business. Malice and bad motive alone do not constitute a cause of action, but where one exists they only make it worse for the defendants. Undoubtedly one man may, by fair methods, compete with a rival until by sheer force of competition, by under-selling or outbidding him, his own business is built up to the detriment and ruin of his rival. The damage in such case is, in the eye of the law, damnum absque injuria. But a different case is presented where one seeks not only to build up his own business at the expense of a rival's, but to impair, and, if possible, destroy that rival's business by the use of unlawful means, by saying and doing that which he has no lawful right to say and do, in so far as it works loss and damage to his rival. It is also true whether a conspiracy formed for the purpose of injuring or driving one out of business be lawful or unlawful so far as the purpose is concerned, yet, where unlawful means are used in effectuating that purpose, the conspiracy becomes actionable, and any loss or damage suffered in consequence, may be recovered.

The petition, in apt words, alleged the conspiracy, the means used to effectuate the purpose and the resulting loss to appellee. The remaining matter to be determined is, whether the alleged means used to injure or drive appellee out of business were lawful or unlawful; if lawful, the petition did not state facts sufficient to constitute a cause of action; if unlawful, it did, and the lower court did not err in overruling appellant's demurrer. That part of the petition which describes the means used to effectuate their purpose is as follows: "By wanton and malicious interference with plaintiff's business and the conduct thereof, in obstructing, harrassing and annoying plaintiff's servants and employes while engaged in the discharge of their respective duties, in selling and distributing oils, etc., to plaintiff's customers and patrons, and by wilfully enticing, persuading and otherwise influencing such servants and employes to leave plaintiff's employ, against the will and consent of plaintiff, by threatening certain wholesale customers of plaintiff to shut them up in their business if they continued to purchase and deal in plaintiffs' oils, etc., and by threatening both wholesale and retail

customers of plaintiff, that it, the Standard Oil Co., aforesaid, would refuse to sell them oil, gasolines and other commodities dealt in by said defendant, as long as they continued to purchase such articles, or any of them, from plaintiff; by causing and procuring false and injurious reports concerning plaintiff and his business, to be circulated in and about the city of Lexington, and published in certain of the daily newspapers of the city; by causing and procuring plaintiff to be arrested on various charges of violating the ordinances of said city, and the criminal and penal laws of the city of Lexington and Commonwealth of Kentucky, and to be prosecuted therefor, and by divers and sundry wrongful acts to estrange and alienate the acquaintances, customers and patrons of the plaintiff, to ruin, oppress and impoverish the plaintiff and drive him out of the business of contracting for the sale of oils, gasoline, etc."

It was most assuredly unlawful to obstruct, harass and annoy appellee's employes when engaged in the discharge of their duties in selling and distributing oils to appellee's customers; to threaten customers of appellee to shut them up in their business if they continued to deal in appellee's oils; to cause and procure false and injurious reports concerning appellee and his business to be circulated in Lexington and vicinity, and to procure appellee's arrest and prosecution on false charges in connection with his business in the sale of oils, for the purpose of estranging and alienating the acquaintances, customers and patrons of appellee. (69 Wis., 483; 42 Hun., 153; 52 N. J. L., 284; 46 Am. Rep., 379; 49 Am. Rep., 666; 5 W. Va., 611.)

The appellant's claim that the court erred in refusing to give a peremptory instruction on their behalf at the close of appellees' evidence, and at the close of all the evidence. The testimony is voluminous and mostly circumstantial. That introduced by appellee tended to show the following state of facts; that appellee, prior to April, 1901, had been in the employ of the appellant, the Standard Oil Co. for fifteen or twenty years in the sale of oil, etc., in the city of Lexington and vicinity. At the date named, Doyle resigned as its agent, and made an arrangement with the Wilburine Oil Works Co., of Cincinnati, to furnish him oils for sale in that city and vicinity. He was furnished this oil in carload lots and did a thriving business in the months of May, June and a part of July. He sold or contracted one carload of the oils to M. F. Griffith, a party defendant to this action, who was in the business of selling and distributing oils under the name of The Brilliant Light Oil Co. Dolye sold other oils to wholesale and retail dealers.

Some time in the month of June, one Bonnycastle, representing the Standard Oil Co., arrived in the city of Lexington to look after the business interests of the Standard Oil Co. in Kentucky, by increasing its sales of oil, by making for it new customers and, if possible, to regain the customers lost by reason of Doyle's connection with the Standard Oil Co. having been severed. According to his statement, he first approached appellant, C. B. Gilman, who was the oil inspector for Fayette county, for aid and advice. They concluded that the best thing to do was to furnish wagons and oil to one Fisher, who was deputy oil inspector under Gilman, to sell and distribute oil in opposition to Griffith who was running the Brilliant Light Oil Co. Immediately after this Bonnycastle and one Guthrie, another

agent of the Standard Oil Co., went to the house of Griffith and asked him why he had quit buying oil of the Standard Oil Co., and Griffith told them that the company had not treated him right by not giving him a sufficient rebate. They then proposed that if he would ship back the oil he had purchased from Doyle they ,would then consider giving him a rebate of one cent per gallon, and also that if he did not ship the oil back, that they would put wagons on the route in opposition to him and ruin his trade. As a result of this and subsequent conversations, Griffith returned the oil he had purchased from Dolye, and formed a partnership with appellant, Gilman, and they continued in partnership, under the name of The Brilliant Light Oil Co. for six months, when Gilman bought Griffith's half interest in the business. During this partnership and afterwards, Fisher, who was the deputy oil inspector, was secretary and treasurer of the concern. They received two wagons from the Standard Oil Co. to be used in peddling the company's oils.

Appellee's evidence tends to show that they were furnished without charge, while appellant's, that they were purchased. These wagons were run by drivers of the Brilliant Light Oil Co. in opposition to the appellees' wagons and the proof of applelee shows that they obstructed, annoyed and harassed the driver of appellee by following him and, some times getting in front of him and stopping at every place where appellee's driver stopped. Some times going into the residence with appellee's driver and there offering to sell oil at a cheaper rate and offering to give their oil without charge, if they would not buy oil of appellee. In one or two instances cursing and abusing the driver of appellee. Some times they would stand for hours at one place awaiting the movement of appellee's driver. It was in proof that this conduct of the drivers of the Brilliant Light Oil Co., was authorized and directed by the appellant, Gilman. Gilman stated that he did not authorize the abuse, nor any of the improper conduct, but stated that the Brilliant Light Oil Co. had their cans deposited at different residences throughout the city, and they did direct the drivers to follow up the drivers of appellee and see to it, that the oils sold by the appellee be not deposited in their cans, and if the people at the places where their cans were deposited did not desire to continue to trade with the Brilliant Light Oil Co., then to take up their cans. That the following up of appellee's driver was continued only for a day and a half.

Appellee's proof shows that in some instances Gilman's drivers persisted in this conduct at places where the Brilliant Light Oil Co. had no cans on deposit. Appellee proved that after he discovered that the Standard Oil Co. had made an arrangement or contract with appellant, Gilman, the oil inspector of Fayette county, to receive and dispose of its oils in competiton with him, he then became fearful that his oils would not receive a fair inspection at the hands of his rival in business, and he had the next carload of oil run across from Cincinnati to Ludlow, in Kenton county, and there inspected by the oil inspector of Kenton county and then shipped on to him at Lexington. When this car reached Lexington, appellant and his deputy, Fisher, inspected it. Fisher first, and afterwards appellant, and they reported that it was below the test of 180 deg. F. The Kenton county inspector reported that it was above the legal test. When appellee learned of the

action of the appellant and his assistant he, with a friend, took samples of this oil from four or five barrels to the A. & M. College, and there had Profs. Scovel and Peters, expert chemists, make the test and they found it above the legal test, and on the next day Gilman and R. J. O'Mahoney, an ex-oil inspector for that county, took samples of this oil and made tests themselves, and had the same chemists, Scovel and Peters, make tests of it, and they found that the oil would burn at 129 Deg. F. Gilman then branded this carload of oil and condemned it as unsafe for illuminating purposes. Then Gilman caused his deputy, Fisher, who was also a deputy clerk, to issue a summons against appellee to appear before the court to show cause why he should not be punished for selling unsafe oils. At the time of the issual of this summons, appellee was in the State of Illinois visiting his father. On his return the summons was served and on motion of defendant it was dismissed for the reason that it was illegally issued. Then appellant, Gilman appeared before a magistrate and made affidavit and caused a warrant to be issued against appellee, charging him with selling and offering to sell unsafe and condemned oils. On the trial of this case before County Judge Bullock, the court selected two persons to select four or five samples of this condemned oil, and had them brought into court, and there had tests made in his presence by Gilman, O'Mahoney, B. Tansey, the inspector for Kenton county, and Profs. Scovell and Peters. After hearing all the evidence and witnessing these tests he dismissed the charge against appellee. After Gilman condemned this carload of oil he reported verbally and in writing to the customers of appellee, that the oils had been condemned, and that they must not buy it or sell it, that if they did they would be prosecuted for it. After this notice, these customers of appellee did not sell any more of this oil nor purchase any more oil from him.

It was shown that the next carload of oil that was shipped to appellee was tested by Gilman and his assistant and showed that it was above the legal test, as was reported by the inspector. Appellee introduced as a witness one Haffey, who was formerly in the employ of the Brilliant Light Oil Co., who stated that before this carload of oil was condemned by Gilman and his assistant, he was present and in a conversation which took place in the office of the Brilliant Light Oil Co., when Gilman said to the witness and Bonnycastle, the agent of the Standard Oil Co., that appellee had not treated him right in having this oil inspected in Kenton county and trying to cut him out of his fees for inspection, and then remarked: "I dont think it will stand the test anyhow and I will condemn it.' Bonnycastle then said, "Condemn it and we will see you through it." Appellee also introduced one W. C. Chipps, who stated that he was in the employ of the Standard Oil Co. in Louisville at the time this competition arose between appellee and appellants, but soon thereafter ceased his connection with the company and went to the city of Chicago and engaged in the oil business with another company. That he returned to Louisivlle in August or September of the same year and visited the office of appellant. That while he was there he remarked to Capt. Harrison, who was the manager for the appellant for the State of Kentucky, "I understand that John Bonnycastle is now agent for the company at Lexington." He made an affirmative reply and I then asked him how Mr. Doyle was getting along in the oil business there, and

he replied, "It has been reduced to a minimum, as we made arrangements with some peddlers that were already there and furnished them wagons and oil and put them out, and that soon settled the matter."

The proof also showed that during this contest for supremacy in the oil business at Lexington, that Bonnycastle and Gilman were often together in private conversation, each visiting the others' office frequently. It was also in proof that Bonnycastle, about the time this oil was condemned, stated to one, J. R. Dodd, a grocery merchant, who bought oil from appellee, that in the event he continued to buy oil from the appellee that he, Bonnycastle, would stop his wagon from delivering oil to him. He also told one Martin, another grocery merchant, that he could not buy oil from both parties. If he bought Doyles oil he could not get any more from the Standard Oil Co. This evidence, the statements of Bonnycastle to the customers of appellee, was not introduced for the purpose of showing illegal acts on the part of appellant company, for, as stated, it had the right to sell or refuse to sell its products to whom it pleased, but it was introduced to show the connection bewteen it and those composing the firm of the Brilliant Light Oil Co. as a circumstance tending to show the conspiracy charged in the petition. It appears from all the testimony of appellee that he was injured and damaged in his business by unlawful means used by appellants.

While the evidence was conflicting upon all the questions at issue, and especially upon the issue of conspiracy, yet we are of the opinion that there was sufficient evidence upon that point to authorize a submission to the jury. A conspiracy is a combination between two or more persons, by concerted action, to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. It is shown by the evidence that a purpose was accomplished by unlawful means, and when we consider the relation of the parties, their manifest motives of self-interest, the manner in which the purpose was carried out and the declarations of the parties, it is reasonable to infer that this purpose was accomplished by concert of action and agreement of appellants.

Appellants complain that the court permitted statements made by appellant, Gilman, to be considered against himself and appellant, Standard Oil Co. jointly, and statements made by the agents of the company to be considered as against Gilman. This was done upon the idea that there were sufficient circumstances and evidence shown and introduced to authorize the jury to find that a conspiracy actually existed between appellants. The conspiracy being once established, or facts having been adduced which justify the inference of a conspiracy, the acts and declarations of each conspirator made pursuant to and in furtherance of the conspiracy, are competent evidence against all.

It matters not, in either case, when one enters into or becomes a party to the conspiracy, how prominent or inconspicuous a part he may take in the execution of the unlawful purpose, or the use of the unlawful means, he is responsible to the fullest extent for all that precedes as well as all that follows in connection with the plot, whether done by himself or by one or more of his associates. The only limitation upon the rule is, that what is said and done must be said and done after the formation of the conspiracy and in furtherance and in pursuance thereof. Of course what may be said or

done by any one of the conspirators after the completion of the purpose for which the conspiracy was formed, can be used only against the one saying or doing it. The main contentions of appellants are, that the petition did not state a cause of action and that the proof did not authorize the submission of the case to the jury.

The lower court did not agree with them, and gave to the jury seven instructions which were admirably drawn and met every phase of the issues involved, and if erroneous in any particular, it was because one or two of them may have been more favorable to appellants than they were entitled to. The court, in these instructiouns, did not authorize the jury to find any damages for appellee for any loss sustained, if any, by the breaking of his arrangement or contract with the Wilburine Oil Works Co., and, therefore, appellants have not cause for complaint upon this point.. The appellants also complain that the lower court erred in not a suppressing the depositions of Carrie Shrader and W. C. Chipps, because they were transmitted from the examiner at Louisville, the place where they were taken, to the clerk of the Fayette Circuit Court at Lexington, where the action was pending, by the Adams Express Co.

Soetion 588, of the Civil Code, requires that the officer taking the depositions shall deliver them to the clerk of the court in which the action is pending, or send them by mail or private conveyance. If sent by private conveyance, the person by whom sent must make oath that they were not opened by him or any one else in their transit. In this case the officer taking the depositions made affidavit as to the individual agent of the express company to whom she delivered the depositions, and this agent, with all others of the express company into whose hands the depositions passed, to the time they were delivered to the clerk of the Fayette Circuit Court, made affidavit that the depositions had not been opened by them or any person in transit. The clerk made affidavit that the depositions reached him in a sealed envelope directed to him, as clerk, with an endorsement showing the style of the action and contained depositions. This, in our opinion, met the requirements of the Code and is not in conflict with the opinion in the case of Breeding, &c. v. Stamper, 18 B. M., 175. This opinion construed section 646 of the Civil Code of 1854, which is unlike the present Code. The Code of 1854 did not authorize depositions to be transmitted by private conveyance.

It is shown by the bill of exceptions that after the case was submitted to the jury, they returned to the court room and asked for information, to wit: "If the jury believe that three were in a conspiracy can they find against two of them and leave the other one out." The court, in response to that question, said to the jury, "If the evidence in the case, under the law as is given by the court, shows that three defendants were in a conspiracy, and that the plaintiff, under the law and facts in this case, is entitled to a verdict against all three, the jury should so find. The jury may, however, if they think, that under the law and facts in this case, such verdict is warranted, find a verdict against the different defendants in different amounts, etc."

Appellants say that this last part is not responsive to the question asked by the jury and was prejudicial to them. We do not so understand it. The

court stated an undoubted proposition of law, as had already been stated in the fifth instruction, and this oral re-statement of the proposition by the court could not have been prejudicial to the defendant's rights. At least not to such an extent as would authorize a reversal of the case. The objection to and criticism of the argument of appellee's counsel in his closing remarks to the jury, are not well taken. The effects of the remarks objected to amounted only to his opinion of the great desire of the Standard Oil Co. to relieve itself of a competitor in the oil business in the city of Lexington.

Appellants also complain of the amount of inequality of the verdict, and claim that it is an evidence of passion and prejudice on the part of the jury. It was within the province of the jury to determine from the evidence who was most in fault and who would be benefitted most by the formation and success of the conspiracy, and it is reasonable to presume that this accounts for the inequality of the amounts adjudged against appellants.

If it be true, as the jury seems to have determined, that this conspiracy was formed and in pursuance thereof the appellants fraudulently caused appellee's oils to be condemned, and willfully reported the oils to be below the legal test, when they knew or had reason to believe that they were not below the test, and had appellee arrested upon the false charge of selling condemned oil and obstructed, harassed and annoyed appellee's driver when delivering his oil, for the purpose of injuring and driving appellee out of the business of selling oils, we can not say that the verdict is excessive.

Perceiving no error prejudicial to the substantial rights of appellants, the judgment of the lower court is affirmed.

Whole court sitting.

HALL v. HALL.

(Filed September 28, 1904.)

1. Husband and wife—Mortgage on wife's land—Duress of husband—Surety of wife—Limitation—Appellant, with her husband, executed a note to appellee secured by mortgage on her land. In this suit against her and the administrator of her deceased husband to recover upon the note and enforce the mortgage, her defense was that her signature to the mortgage had been obtained by the duress of her husband, and that she was surety only on the note and was released by the seven years' statute of limitation. Held—Even though she had been induced by the fraud of her husband to sign and deliver the mortgage, yet her subsqeuent admission before the officer taking her acknowledgment, that she had voluntarily executed it for the purpose of giving it validity, and appellee, in ignorance of the truth, and relying upon the officer's certificate of her acknowledgment, parted with the consideration, she is bound.

2. Same—Appellant's plea of duress is not good because it fails to allege that the creditor at the time he accepted the mortgage, knew of her alleged coercion by her husband, and a demurrer to that part of her answer was properly sustained.

3. Certificate of officer—To avoid the certificate of an officer on the ground of fraud practiced by the party benefitted, it must appear that the grantee in the instrument was guilty of the fraud or had knowledge or notice of it before the transaction was completed.

4. Rights of married women—Surety—Pledge—Under section 2127, Ken-

tucky Statutes (Act March 15, 1894), providing that "no part of a married woman's estate shall be subjected to * * * answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed or mortgage," married women as to becoming sureties were left precisely as they were before the adoption of the statute, and it is impossible now as it was then for a married woman to become personally bound as surety for any one, but she may bind her specific estate by an appropriate conveyance or pledge. That did not constitute her a surety, nor could she, against such conveyance, be availed of the seven-years' statute of limitation for the benefit of sureties.

5. The demurrer should have been overruled to appellant's plea of coverture so far as it presented that fact as a defense of her personal liability, and a personal judgment should not have been rendered against her.

Clay & Hardin for appellant.

R. L. Greene and A. C. Tharp for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, Lucy Hall, with her husband, W. F. Hall, executed a note to appellee, secured by mortgage upon appellant's land. In this suit against appellant and the administrator of her deceased husband, to recover upon the note and to enforce the mortgage, appellant's defense was that her signature to the mortgage had been obtained by the duress of her husband, and that she was a surerty only in the note, and as more than seven years had gone since the note was due, she and her estate were released by the statute of limitation applicable to sureties. (Section 2551, Kentucky Statutes.)

The duress of the husband, by which he procured his wife to mortgage her land to secure his debt, is, if true, as pleaded, a fraud upon her rights, and would vitiate the transaction. The mortgage would be voidable by her at any time, unless she had thereafter ratified it, or have estopped herself from contesting its validity. So far as the pleadings show, the consideration for the note and mortgage was simultaneous with their execution. It is not alleged that appellee knew at that time, or had notice then, that the mortgage as signed and acknowledged by appellant, as shown by the county court clerk's certificate, was not her free and voluntary act. The law is that the clerk was obliged to read and explain the instrument to the feme covert not in the presence of her husband, and if she thereupon acknowledged that she freely and voluntarily signed it, it was his duty to certify to that fact, whereupon the instrument was admissible to record so as to pass her title according to its expressed intent. In this case the clerk's certificate fully imports his compliance with the statutory requirements. The natural and proper effect of which is an assurance in the most solemn and deliberate form of the truthfulnesss of the facts recited in the certificate. Even though appellant had been induced by the fraud of her husband to sign and deliver the mortgage, yet if she subsequently admitted that she had voluntarily executed it, for the purpose of giving it validity, and appellee in ignorance of the truth, but relying upon the officer's certificate of her acknowledgment, parted with the consideration, she is bound.

It is not claimed that the officers' certificate is a mistake. It is admitted

on the contrary, that it is true. Its legal effect is to establish, beyond future controversy, the facts required therein to be stated and done. Every person subsequently dealing with that title may rely implicitly on the verity of the certificate of the officer. (Harpendings Ex'or v. Wylie, 14 Bush, 380; Cox v. Gill, 83 Ky., 669.) Latent equities and facts that would impeach the certified act, must yield to the public policy that establishes land titles upon a permanent basis. Section 3760, Kentucky Statutes, is that "no fact officially stated by an officer in respect of a matter about which he is required by law to make a statement in writing, either in the form of a certificate, return or otherwise, shall be called in question, except upon the allegation of fraud in the party benefitted thereby, or a mistake on the part of the officer," unless in a direct proceeding against the officer or his sureties.

In the two cases just cited (Harpending v. Wylie; and Cox v. Gill) it was held that when the officer certified to the feme covert's acknowledgment, it could not be collaterally impeached by her on the ground that her husband had been present (presumably exercising some act of coercion thereby) or that it had been acknowledged in a different county from that stated in the certificate.

In Aultman Taylor Co. v. Frazure, 95 Ky., 429, where it was permitted to impeach the certificate of acknowledgment by showing that it was in the presence of the husband of the feme covert, and by his coercion, it appears that the mortaggee's agent was also present and participating in the efforts to overcome the reluctant wife's refusal to mortgage her property. To avoid the certificate on the ground of fraud practiced by the party benefitted, it must appear that the grantee in the instrument attacked was guilty of the fraud, or had knowledge or notice of it before the transaction was completed. The instrument was solely for his benefit. That another incidentally derived benefit through the transaction and committed fraud in inducing it, cannot alone satisfy the requirement of the statute just quoted. Appellant's plea of duress is not good, because it fails to allege that the creditor, at the time he accepted the mortgage, knew of her alleged coercion by her husband. The demurrer to that part of the answer was, therefore, properly sustained.

Section 2127, Kentucky Statutes, being the act of March 15, 1894, giving to married women the right to control their property, and to contract with reference thereto, contains this limitation: "No part of a married woman's estate shall be subjected to the payment or satisfaction of any liability upon a contract made after marriage, to answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed or mortgage or other conveyance."

It has been frequently and uniformly held since the adoption of the above statute, that the only way in which a married woman could bind her estate as security for another was by pledging it. (Postell v. Crumbaugh, 23 Ky. Law Rep., 2193; Deposit Bank v. Stitt, 21 Ky. Law Rep., 671, 107 Ky., 49; Russell v. Rice, 19 Ky. Law Rep., 1613.) The purpose of the statute was to enlarge the rights of married women with respect to their property and their contractual capacity. But as to becoming sureties, they were left precisely as they had been for many years before the adoption of the statute, supra.

In Hobson v. Hobson, 8 Bush, 635, citing a number of earlier cases from

this court, it was said that the right of the married woman, under our statutes regulating conveyances, to alienate or convey her general estate, even by deed or mortagge, to secure the prior debts of her husband, is now too well settled to admit of doubt; but it was there denied that her attitude was that of a surety for him in the meaning of the statute. It is impossible now, as it was then, for a married woman to become personallly bound as surety for any one. Nevertheless she may now, as she might then, bind her specific estate by an appropriate conveyance or pledge. That did not constitute her a surety, nor could she, as against such conveyances, be availed of the provisions of the seven-years' statutes of limitation for the benefit of sureties.

The circuit court sustained a demurrer to this paragraph of the answer, and upon final hearing rendered a decree foreclosing the mortgage lien, as well as gave a personal judgment against appellant. The court is of opinion that the demurrer should have been overruled to the plea of coverture in so far as it presented that fact as a defense of appellant's personal liability; nor should the personal judgment against her have been rendered in the present state of the case.

For the reasons, and to the extent indicated, the judgment is reversed and cause remanded for proceedings not inconsistent herewith.

STITH v. COMMONWEALTH.

(Filed September 28, 1904—Not to be reported.)

Criminal law—Evidence—Upon the trial of appellant upon an indictment charging him with feloniously administering poison to another, it was improper for the Commonwealth's attorney to ask a witness for the prosecution if it was not current talk that Stith, the appellant, had not poisoned his father and mother, and it was error in the trial court to admit this question over defendant's objection, or to fail to exclude the witness' answer on defendant's motion.

N. B. Hays, J. R. Layman, L. Mix and L. A. Faurest for appellant.

H. L. James and J. D. Irwin for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Nunn.

The appellant was tried upon an indictment charging him in substance with wilfully, maliciously and feloniously administering poison to one Malissa Stith, by putting poison in the flour owned and used by her for making bread to eat, and of which she did eat and was poisoned, but from the effects of which she did not die, the name and kind of poison being unknown to the grand jury. Upon the trial he was convicted and given two and one-half years in the State penitentiary.

The evidence upon which he was convicted was circumstantial and not entirely conclusive of his guilt. After the appellant testified in his own behalf, the Commonwealth introduced several witnesses who stated that they knew his moral character and that it was bad. Among these witnesses was one Tom Bush, who was then deputy sheriff of the county. The Common-

wealth's attorney asked him this question: "I will ask you if it is not current talk that Luther Stith poisoned his father and mother?" The witness answered, "Yes, sir, I have heard that talked." The appellant objected to the question and also to the answer, and moved the court to exclude the answer of the witness from the jury. The court overruled the motion and the appellant excepted.

This was very prejudicial to the appellant, and it is possible that it may have had great influence in bringing about his conviction. This is not one of the cases where it is permissible for the Commonwealth to prove previous offenses of the like kind for the purpose of showing guilty knowledge or intent, such as the uttering of a forged instrument and the like.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

SILER, &c. v. ARCHER'S GD'N.

(Filed September 28, 1904—Not to be reported.)

1. Infants—Sales of real estate—In an action to sell the real estate of an infant, where there was no averment or proof of the value of the infant's interest, or what would probably be realized therefor, and no sufficient proof showing that such sale would benefit the infant, the judgment of the chancellor directing a sale will not be upheld.

2. Same—In an action to sell the real estate of an infant for the purpose of re-investment, subsection 2, of section 492, Civil Code, and subsection 3, of section 36, must be complied with, and the failure to comply with these provisions are such irregularities as to render such sale without effect.

Tye & Denham and Johnson & Snyder for appellant.

K. D. Perkins for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 16th of April, 1892, John Archer and his wife, Charity Archer, acquired jointly, title to a tract of twenty-eight acres of land in Whitley county, on which there was a dwelling house and other improvements, and which they occupied together until the death of the wife in 1901. Three children survived her, Amanda, Ben and Joie. Ben died in infancy, unmarried. Amanda, after she became twenty-one years of age, conveyed her interest in the property to her father, John Archer. John Archer subsequently conveyed all his right, title and interest in the tract, which included the one-half interest which he held under the joint deed to himself and wife, the interest which he acquired by purchase from his daughter, and also his right as tenant by the courtesy in the interest which belonged to his infant daughter, Joie. After this sale by John Archer, the plaintiff, L. L. Peace, as statutory guardian of Joie Archer, brought this action under sub-section 5, of section 489, of the Civil Code, against his infant ward and the other defendants, in which he asked that the one undivided one-fourth interest in remainder in the entire tract of land belonging to his ward, should be sold for re-investment in other more remunerative property. The petition alleges that the one-fourth interest belonging to the infant in the entire tract of

land could not be laid off without impairing its value, and also the value of the residue of the tract, and that he believed a sale of his ward's interest and its re-investment in other property would be for her benefit. A judgment was entered in accordance with the prayer of the petition, decreeing a sale of the one undivided one-fourth interest of the infant in the entire tract of land, and directed that the proceeds be invested in other property more remunerative to her. From this judgment the defendants, Adam and Nancy Siler, have appealed and ask a reversal.

While it is alleged in the petition that the share of the infant defendant in the tract of land, and the reinvestment of the proceeds in other property, would be for the best interest of the infant, no facts are alleged to support this declaration. There is no averment or proof of the value of the infant defendants' interest in the land, or what would probably be realized therefor, and no sufficient proof showing how the sale would be beneficial to the interest of the infant.

It appears, both in allegation and proof, that the interest of the infant could not be separated from the residue of the land without impairing its value and the value of the rest of the tract. It would, therefore, seem necessarily to follow that a sale of this undivided one-fourth interest would result in its sacrifice, as there would be no temptation for any one to bid for the property except the owner of the residue. This is especially true, as her interest is subject to the life estate of her father, and possession thereof indefinitely delayed. Subsection 2, of section 492, requires that the title papers or copies of them, under which the property is held, should be filed with the petition in sales made under section 489 and 491 of the Code. This requirement has not been complied with.

Subsection 3, of section 36, of the Code, provides that no judgment shall be rendered against an infant who is summoned in this State, until the regular guardian, or committee or guardian ad litem of such defendant, shall make defense, or have filed a report stating that after careful examination of the case, he is unable to make defense. In this case no such report or defense in behalf of the infant was made. As the proceeding is in the name of the statutory guardian, the best interest of the infant required the appointment of a guardian ad litem, which is always in the sound discretion of the chancellor. (McMeekin v. Stratton, 82 Ky., 229.)

The irregularities pointed out require the reversal of the judgment appealed from, and the cause is remanded for proceedings consistent with this opinion.

YATES, COUNTY CLERK, &c. v. COLLINS.

(Filed September 28, 1904.)

1. Elections—Voters—Registration—Taxpayers—Authority to sue—Constitutionality of amended act—In order to carry out the provisions of the act of the General Assembly, approved February 11, 1904, entitled "An act to amend an act, entitled 'An act, to regulate elections in this Commonwealth,'" some expense for printing must be incurred by each county of the State, which must be paid out of the county levy, and, therefore, a taxpayer who is a qualified voter has such an interest in the matter, as will entitle him to sue to test the constitutionality of said act.

2. Same—Section 145 of the Constitution provides the qualification of voters and certain disqualifications. Section 147 provides as follows: "That the General Assembly shall provide by law for the registration of all persons entitled to vote in cities and towns having a population of 5,000 or more, and may provide by general law for the registration of other voters in the State. Where registration is required only persons registered shall have the right to vote. The mode of registration shall be prescribed by the General Assembly." That the State Constitution may prescribe what qualifications shall be possessed by those upon whom it proposes to confer the elective franchise, none will deny. And it is equally true that that instrument may empower the legislature to prescribe the mode of its exercise, in which case the authority of the latter body to enact such laws as may be necessary to the proper exercise of the power thus conferred, cannot be questioned.

3. Same—The act, in our opinion, is not open to the criticism that it will tend to disfranchise voters otherwise qualified. The voter is put to no inconvenience in obtaining the registration certificate, it is given to him when he registers, and the provision which allows him, in the event of its loss, to procure another of the county clerk by filing with that officer his affidavit proving such loss, relieves the voter of the disfranchisement that would otherwise necessarily result from its loss. It is to be taken for granted that the loss will rarely occur except through the fault or neglect of the owner, for which reason it were better to put upon the one in fault the duty of paying the clerk for the duplicate certificate, than to compel the unoffending officer to perform the service without compensation.

4. Same—The act is not defective in that it fails to provide penalties for its violation, as it is an amendment to the statute in regard to registration, already in existence, which contains penalties that will apply to violations of the statute as amended. The fact that such penalties will not cover all offenses that may arise under the statute does not make the amendatory act unconstitutional.

5. Same—The failure of the act to provide for the issual of original certificates of registration to persons who may be registered by him during the three days of supplemental registration provided by sections 1498, 1499, Kentucky Statutes, does not affect the validity of the amendment, as such officer may, under the amended statute, issue to the voters admitted to registartion by him, certificates of registration which shall as fully entitle them to vote at the election as if they had been issued by the officers entrusted with the duty of holding the first or regular registration.

6. We are not required to pass upon the policy of its enactment, but as to the constitutionality of the act we have no doubt.

Eli H. Brown, Furber & Jackson and Lewis McQuown for appellants.

Burton W. Vance and D. W. Fairleigh for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted in the Kenton Circuit Court by the appellee, J. D. Collins, against the appellant, John C. B. Yates, clerk of the Kenton County Court, to restrain him by injunction from carrying out the provisions of the act of the General Assembly of Kentucky, approved February 11, 1904, entitled, "An act to amend an act entitled 'An act to regulate elections in this Commonwealth', approved June 30, 1892." (Acts 1904, page 31.)

It is conceded that the appellee is a male citizen, resident and taxpayer of Kenton county, Kentucky, that he possesses the qualifications under the

Constitution and laws of the State which entitle him to vote at the approaching November election, and no objection is urged against his right to institute this action. Nor do we question his right to do so, for in order to carry out the provisions of the act, supra, some expense for printing must be incurred by each county of the State, through its county clerk, which is required to be paid out of the county levy. If, therefore, the act in question is unconstitutional, this expense should not be placed upon the counties, and a taxpayer like the appellee has such an interest in the matter as will entitle him to sue as he has done to test its constitutionality.

Section 145, of the Constitution, provides that "Every male citizen of the United States of the age of 21 years, who has resided in this State one year, and in the county six months, and the precinct in which he offers to vote, sixty days, next preceding the election, shall be a voter in said precinct and not elsewhere, but the following persons are excepted and shall not have the right to vote: 1. Persons convicted in any court of competent jurisdiction of treason or felony or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon. 2. Persons who, at the time of the election, are in confinement under the judgment of a court for some penal offense. 3. Idiots and insane persons."

Section 147 provides that "The General Assembly shall provide by law for the registration of all persons entitled to vote in cities and towns having a population of 5,000 or more, and may provide by general law for the registration of other voters in the State. Where registration is required, only persons registered shall have the right to vote. The mode of registration shall be prescribed by the General Assembly."

So much of section 147 as provides for registration in cities and towns having a population of 5,000 or more, is clearly mandatory, and in pursuance thereof the General Assembly soon after the adoption of the present constitution by the people of the State, enacted such laws as were found necessary to carry this provision into effect. (Ky. Statutes, sections 1486 to 1506 inclusive.) But no attempt was made by that body to exercise the discretion conferred by the same section of the Constitution to require registration of voters, other than those in cities and towns having a population of 5,000 or more, until the passage of the amendatory act now complained of by appellee. This act requires registartion of all qualified voters, in all the cities and towns of the State, without regard to population. It amends section 1488, of the original statute, by adding to the end of that section the following: "The officers of registration shall issue a certificate of registration to each voter registering at the time he registers, showing that he has registered, and the date of his registry, and no person who is required to register under the provisions of this act shall have the right to vote at any election held in this Commonwealth, until he shall have presented to the election officers his certificate of registration.

"Any person who has registered, and whose certificate of registration has been lost or otherwise destroyed after the registration books containing his registration have been filed with the clerk of the county court, may, upon filing his affidavit before the county court clerk showing that fact, obtain a

duplicate certificate of registration, and, upon filing such an affidavit before the county court clerk, it is hereby made the duty of the said clerk to issue said certificate, for which he may charge the applicant a fee of fifty cents; and said certificate shall entitle the person named therein to vote as if issued by the officers of registration, and for the purpose of better enabling the officers of registration to carry out the provisions of this act, it is hereby made the duty of the county court clerk to furnish with the registration book, as in this act required, a sufficient number of printed certificates of registration to meet the requirements of this act, and for which he shall be paid a reasonable compensation out of the county levy of the county."

It is insisted for appellee that the amendatory act is unconstitutional, because of the provision requiring the voter to produce to the election officers when he presents himself to vote, a certificate of registration from the officers of registration, or in the event of its loss a duplicate certificate of registration from the county clerk. And because of the further provision that he shall not be permitted to vote unless he produces such certificate or duplicate certificate, to the election officers. It is being urged that these provisions constitute qualifications of the voter, in addition to those contained in the Constitution, that they impose unreasonable regulations and burdens upon him, and tend to obstruct and destroy the right of suffrage. We agree with counsel that the right of the legislature to enact laws requiring registration existed before the adoption of the present Constitution, though the former Constitutions were silent on that subject. And that in passing upon a registration law enacted while the third constitution was in force, Judge Lewis, in Commonwealth v. McClelland, 85 Ky.. 686, said: "It is only where such laws add to the qualifications prescribed by the Constitution, or impose unreasonable conditions to the exercise of the privilege of voting, that courts will interfere."

An examination of the subjoined authorities, cited and relied upon by counsel for appellee, will show that, though expressed in different language, they do not enlarge the ground for interference upon the part of the courts with legislative action of this character, beyond the rule announced by Judge Lewis in the case, supra. (McCreary on Elections, section 126; Cooley's Constitutional Limitations, 7th edition, section 907; City of Owensboro v. Hickman, &c., 90 Ky. 6-9.)

That the State Constitution may prescribe what qualifications shall be possessed by those upon whom it proposes to confer the elective franchise, none will deny. And it is equally true that that instrument may empower the legislature to prescribe the mode of its exercise; in which case the authority of the latter body to enact such laws as may be necessary to the proper exercise of the power thus conferred, cannot be questioned. "The judicial power of the government may so far regulate and control the legislative department as to set aside and declare void laws enacted by it, where such laws are in conflict with the Constitution. But this is upon the theory, not that the judicial department is superior to the legislative, but that the Constitution is superior to both, and that it is the province of the former to construe both the Constitution and the statutes, and determine whether there is a conflict. If there is, it is the Constitution that controls and limits the legislature, and not the courts." (Works on Courts and Jurisdiction, page 191.)

It was said by Judge Cooley on this subject: "Nor can a court declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate natural, social or political rights of the citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed or protected by the Constitution." (Cooley's Const. Lim., 7th Ed., page 232.)

"If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the mind of the judges to violate fundamental principles of republican government, unless it shall be found that these principles are placed beyond legislative encroachments by the Constitution." (Cooley's Const. Lim., 7th Ed., page 237.)

"Nor are the courts at liberty to declare an act void because, in their opinion, it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words." (Cooley's Const. Lim., 7th Ed., page 239; Edmunds v. Baubury, 28 La., 272; State, &c. v. Dillon, 32 Fla., 545.)

In Kinneen v. Wells, 144 Mass., 497, it is said: "The qualifications of voters are fixed by State legislation. The requirements as to ownership, citizenship, sex and residence, in connection with the right of voting, vary with the Constitutions, or laws of the several States. However unwise or unjust or even tyrannical its regulations may be, or seem to be in this record, the right of each State to define the qualificatons of its voters is complete and perfect, except so far as it is controlled by the fifteenth article amendments of the Constitution of the United States."

As before remarked, section 147 of the Constitution declares that "The mode of registration shall be prescribed by the General Assembly." The power thus delegated is comprehensive. By it the General Assembly is not only authorized to fix the plan or method of registration, but also to provide every detail thereof Of the many registration laws of the States it will, we doubt not, be found that hardly any two of them are alike. In some of the States the voter in registering is required to make oath as to his name, age, residence, etc. In others it is necessary to enter in the registration book a description of his person, in addition to his name, age and place of residence.

We are told by counsel that in one State the voter is required to sign the registration book, and also the election book, so that his identity may be established by a comparison of signatures. In several of the States the law, as in this State, requires the registration officers to issue a certificate to the voter when he registers, and this certificate he must preserve and present to the election officers on election day as a prerequisite to voting. "Registration," as applied to elections, is defined by the Century Dictionary, as follows: "In the United States it is a system for the preventing of frauds in the exercise of suffrage by requiring voters to cause their names to be registered in books provided for the purpose, in each election district, with appropriate particulars of residence, age, etc., to enable investigation to be made and the right of the voter to cast the ballot, to be challenged, if there be occasion. In Great Britain and Ireland, the word registration, as used with reference to elections, means the making up of a list of voters, which, after judicial revision, is the accredited record of the electors entitled to

vote." The word "registration," as the dictionary will show, has other meanings than that given above. But accepting the definition here given, it does not follow that the issuing of a certificate by the registration officers to the voter when he registers, is not a part of the plan of registration, for the certificate is intended to furnish the voter, as well as the election officers, with evidence in addition to that furnished by the registration book, that he is a registered voter, and, therefore, entitled to vote.

The principle thing intended is that the certificate shall furnish better means of identifying the voter. His possession of the certificate, though conclusive as to the fact that the person named therein has been registered, will not be conclusive of his right to vote, for, if unknown to the election officers, they may require other proof of his identity. In other words, as argued by counsel, the registration certificate does not mean "vote bearer" unless "bearer" be known to the election officers to be the person named therein. It is equally true that the exercise of due care upon the part of the election officers in requiring identification of holders of registration certificates who are unknown to them, would practically exclude from voting those who, through their loss by the owners, or other improper means, might get possession of them. The act is not, in our opinion, open to the criticism that it will tend to disfranchise voters otherwise qualified. The voter is put to no inconvenience in obtaining the registration certificate, it is given him when he registers, and the provision which allows him, in the event of its loss, to procure another of the county clerk by filing with that officer his affidavit proving, such loss, relieves the voter of the disfranchisement that would otherwise necessarily result from its loss.

There will doubtless be bribing of voters under the registration statute, as amended by the act in question, as there was under the former law, for while corrupt voters may, under the present law, be induced to sell their certificates of registration and thereby deprive themselves of the right to vote, under the former law the same result was reached by hiring them not to register, or to remain away from the election after registering, by which they were also prevented from voting. It is to be deplored that such evils should be associated with the elective franchise, but we must look to the Genearl Assembly for relief against them in the form of more stringent laws for their suppression. It is also argued that the act imposes a burden upon the voter not contemplated by the Constitution, in that it compels him, in case of the loss of his certificate of registration, to incur expense to the amount of fifty cents in order to procure another of the county clerk. It is to be taken for ganted that the loss of registration certificates will rarely occur, except through the fault or neglect of the owners, for which reason it were better to put upon the party in fault the duty of paying the clerk the nominal fee for the duplicate certi ficate, than to compel that unoffending officer to perform the services required of him, without compensation.

Under the law the officers of registration or those of the election may, if unacquainted with a person desiring to register or vote, require proof of his identity, and would, doubtless, be authorized, at the instance of such person, to issue subpœnas for witnesses to be summoned to prove his identity, if so, or such person should find it necessary to hire a vehicle to convey to the place of registration, or the voting booth witnesses to prove his identity, would it be

contended that he would not be legally liable for the expense of summoning or conveying his witnesses to the place of giving their testimony, and, if under these circumstances the voter would be responsible for the expense incurred in proving his identity, would it be any greater hardship to require him to pay the clerk's fee for the certificate allowed to be issued by that officer?

It is further urged in criticism of the act, that it is defective because it allows the county clerk to issue registration certificates in lieu of those lost by voters, without other proof of such loss than their mere affidavits, and does not, in express terms, provide for the preservation of such affidavits. The first of these objections overlooks the fact that the registration books are on file in the county clerk's office from the time they are completed and returned by the registration officers. And when an application is made to the county clerk for a certificate in lieu of one claimed to be lost, an examination of the registration books by the clerk would show whether or not the name of the applicant appeared therein, and if not, it would clearly be the duty of the clerk to refuse him the certificate notwithstanding his affidavit therefor. The second objection seems to be equally untenable. The requirement of the act is that affidavits showing the loss of registration certificates by the voters, must be filed with the clerk. When filed they become records in his office, and are to be preserved as such like other records that are required to be filed.

It is further urged that the act is defective in that it fails to provide penalties for violations on its provisions. It must be borne in mind that the act in question is intended to amend a statute in regard to registration, already in existence, which statute contains penalties that will apply to violations of the statute as amended. The fact that such penalties will not cover all offenses that may arise under the statute as amended, does not make the amendatory act unconstitutional. The remedy lies in the enactment by the legislature of a further amendment providing such additional penalties as may be needful.

Our attention has been called to the fact that the act fails to provide for the issual by the county clerk of original certificates of registration to persons who may be registered by him during the three days of supplemental registration provided for, by sections 1498-1499, Kentucky Statutes. This omission does not, in our opinion, affect the validity of the amendment. As the county clerk is the only officer authorized to register voters entitled to avail themselves of that right during the period fixed for supplemental registration, it will require no tortured construction of the statute, as amended, to say that he may issue to the voters admitted to registration by him, certificates of registration which shall as fully entitle them to vote at the election, as if they had been isued by the officers entrusted with the duty of holding the first or regular registration. We are not required to pass upon the policy of its enactment, but as to the constitutionality of the act we have no doubt.

Wherefore, the judgment of the lower court is reversed and cause remanded with directions to that court to sustain the demurrer to the petition, and for further proceedings consistent with this opinion.

Whole court sitting.

McKINNEY v. COMMONWEALTH.

(Filed September 28, 1904—Not to be reported.)

1. Homicide—Verdict—Flagrantly against evidence—Question for jury—The determination of the guilt of one accused of crime is a question solely for the jury, where there is any evidence authorizing the submission of the case to them, and this court cannot reverse the case because the verdict is flagrantly against the weight of the evidence.

2. Self-defense—Instructions—On a trial of one charged with murder and convicted of manslaughter, where the deceased was drunk, armed with a pistol and was approaching the house of accused where he and his wife and the children were in an insecure house, and who shot and killed deceased, an instruction that "one may lawfully defend his home from the wilful assault of another, and in so doing may use such force as appears to him, in the exercise of a reasonable judgment, to be necessary to repel such assault or to avert any danger to himself, his home or his family, real or to him apparent; but in so doing he may not lawfully use any more force than appears to him, in the exercise of a reasonable judgment, to be necessary in order, to avert that danger to himself or family, real or apparent," is erroneous.

3. Wilful assault—Necessary force—Belief as to danger—The word wilful should have been omitted from the said instruction. As a matter of fact, one's right of self-defense may exist perfectly without reference to his belief as to his danger. If it is in fact necessary, and if the jury, from the evidence, should be authorized to find that it was in fact necessary for the defendant to have used the force that he did in repelling the assault upon himself or inmates of his house, he had the right to use that force, whether or not he believed at the time that it was necessary; or if, as a matter of fact, it was not necessary to use the force that he did, but if by the exercise of a reasonable judgment it appeared to him to be necessary, he had the right to use the force that he did.

4. Impeaching witness—Effect on jury—Sallie McKinney, a twelve-year-old child of accused, testified that deceased had his pistol presented at appellant when he came to the door, an instant before he was shot. She was asked if she had not told Mrs. Turner that deceased had laid down his pistol out upon a raft of logs, and that after he was killed, her mother went out and got it and took it to her father. She denied having made the statement. Mrs. Turner proved that she made said statement, whereupon the court gave to the jury this admonition, viz: "I desire to give you the same caution that I gave you in regard to the other witness who testified on the same point, Lloyd Lewis, that is to say to you that, in so far as it may contradict the witness, Sallie McKinney, and only as affecting her testimony and not as substantial testimony against the defendant, and not to affect the defendant's case in no further except to impeach Sallie McKinney." Literally this charge had the effect of telling the jury that Mrs. Turner's evidence did impeach the witness, Sallie McKinney, removing from the jury the right to weigh the evidence and determine whether or not it had that effect.

T. G. Lewis, Cleon K. Calvert, J. G. Forrester and S. H. Kash for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was convicted and sentenced to twenty-one years' imprisonment.

in the penitentiary for the degree of manslaughter under an indictment charging him with the murder of William Griffey. One Henry Maggard, who, with his wife had been stopping at appellant's home for about two weeks, was ejected by appellant from his house because of a broil between Maggard and his wife, in which Maggard was guilty of violent conduct towards his wife in the presence of appellant's family, as well as destroying the property of applelant, his bedding, etc. Maggard went to the home of John Minniard, about a mile and one-half distant, and attempted to borrow a gun for the purpose of returning to appellant's home and renewing the trouble, or taking vengeance upon appellant. Failing in this, upon the following day, which was Sunday, he got in company with the deceased, William Griffey. The two became drunk, and went together, late in the afternoon to appellant's home. Deceased had a pistol. They indulged in loud cursing and other boisterous demonstration, including the firing of the weapon along the road, and within a short distance of appellants' home, which was isolated from neighbors. There was evidence that Maggard and Griffey made certain threats against appellant about the time they started for his house. Arriving within a few yards of the house they stopped at a pile of logs and, according to the statement of Maggard, requested that appellant send his things out to him. Appellants' version is, that, continuing the threats and boisterous conduct, they began shooting at his house. Bullet holes were found in the house. The building was a small one, built of plank boxing, through which the bullets could have entered, and according to some evidence did enter. Aside from appellant and his wife there were five small children, the oldest about twelve years, in the house. Deceased advanced upon the house, according to the testimony of appellant, with his pistol in one hand and a bottle of whisky in the other, continuing to threaten appellant and pointing his pistol at him as if to shoot. Appellant got his double-barrelled shotgun, loaded with small squirrel shot, whereupon the deceased turned to run behind a nearby stump, when appellant fired a charge into his back, instantly killing him.

The testimony of Maggard, the only eye-witness to the occurrence other than appellant and his family is, that appellant invited deceased to lay down his pistol, promising that he would set aside his gun, and invited him to his house; that appellant complied, when within a few feet of the door appellant grabbed his gun and shot deceased. Besides the hostile feelings evinced by the witness, Maggard, he is thoroughly impeached as to his character. His mission was evidently one of violence. The deceased was shown by a great number of witnesses, without any contradiction, to have been a notoriously violent and dangerous man, who habitually went armed, and was evidently a terror in any community in which he lived. His presence on this occasion was procured by Maggard for no proper purpose, so far as the record before us discloses. The jury have returned a verdict of guilty, as stated.

We are asked to reverse the judgment upon the verdict because it is flagrantly against the weight of the evidence. This, however, is not within the province or according to the practice of this court. The determination of the guilt of one accused of crime is a question solely for the jury, where there is any evidence authorizing the submission of the case to them. The

court properly defined in its instructions to the jury, murder, manslaughter and self-defense, and gave, in addition, the following instruction: "One may lawfully defend his home from the wilful assault of another, and in so doing may use such force as appears to him, in the exercise of a reasonable judgment, to be necessary to repel such assault, or to avert any danger to himself, his home or his family, real or to him apparent, even to the taking of human life; but in so doing, he may not lawfully use any more force than appears to him, in the exercise of a reasonable judgment, to be necessary, in order to avert that danger to himself or his family, real or to the defendant apparent."

This instruction is open to at least two criticisms, which, in view of the facts developed upon the trial, we are of opinion were highly prejudicial to the substantial rights of the accused. It being in evidence that deceased was drunk, it may have been a question in the minds of the jury whether his assault was wilful in the popular signification of the term. It was not incumbent upon one so assaulted to ascertain whether the assault was wilful or not, before he could lawfully exercise his right of self-defense, or of protecting his family. The fact that the assault was violent, or reasonably appeared to put him, or some member of his family in danger of losing his life, or of great bodily harm, raised his right to defend himself or those of his home from the real or apparent danger. The word wilful should have been omitted in the clause quoted.

But there is a more substantial error than that in the instruction. It will be noted that the jury are told that the defendant's right of self-defense, or the defense of his home depended upon his, the defendants' belief, in the exercise of a reasonable judgment, whether it was necessary for him to use the force that he did. As a matter of fact one's right of self-defense may exist perfectly without reference to his belief as to his danger. If it is, in fact, necessary, and if the jury from the evidence should be authorized to find that it was, in fact, necessary for the defendant to have used the force that he did use in repelling the assault upon himself or inmates of his home, he had the right to use that force, whether or not he believed at the time that it was necessary. In addition to that, if, as a matter of fact, it was not necessary for him to use the force that he did, but if in the exercise of a reasonable judgment it appeared to him to be necessary, he still had the right to use the force that he did. The importance of this distinction will be better appreciated when it is stated that the accused, upon the hearing for bail at a former day, which was proven against him on this trial, had testified that when he shot and killed the deceased it was not because of what he was doing, but because of what he had done. From which it might have been and, doubtless, was argued to the jury, that it did not appear to him, defendant, at the time, that he or any member of his family was in danger.

Appellant being violently attacked and shot at in his home, was not bound to retreat, or to seek other place of safety, nor to wait till his assailant had got behind an object of protection to better prosecute his assault. In such case, the party attacked had the right to use such force, even to the taking of the life of his assailant, as was necessary, or as to him in the exercise of a reasonable judgment seemed necessary to avert the danger to himself or family.

Sallie McKinney, the twelve-year-old daughter of appellant, was a witness in his behalf. She had testified to the fact that deceased had his pistol presented at appellant when he came to the door, an instant before the fatal shot was fired. For the purpose of impeaching her the prosecution asked whether she had not, on the morning after the shooting, told Mrs. Polly Turner, that Griffey had laid the pistol down out about a raft of logs, and that after he was killed her mother went out and got the pistol, and took it to her father. The child denied having made the statement. Mrs. Turner, the mother-in-law of Henry Maggard, was then called to prove that the child had made that statement to her, and did prove it. Whereupon the court gave to the jury this admonition: "Gentlemen of the jury—I desire to give you the same caution that I give you in regard to the other witness who testified on the same point, Lloyd Lewis, that is to say you will take and receive this evidence, in so far as it may contradict the witness, Sallie McKinney, and only as affecting her testimony, and not as substantial testimony against the defendant, and not to affect the defendant's case in no further except to impeach the witness, Sallie McKinney."

It is likely the stenographic report of the judge's admonition is not accurate, but for the puprose of this trial we cannot safely proceed otherwise than in assuming that it was given as reported. Literally it had the effect of telling the jury that Mrs. Turner's evidence did impeach the witness, Sallie McKinney, removing from the jury the right to weigh the evidence and determine whether or not it had that effect.

For the reasons indicated the court is of opinion that the judgment below should be reversed, and the cause is remanded for proceedings not inconsistent herewith.

MONTGOMERY COUNTY v. BEAN, &c.

(Filed September 28, 1904—Not to be reported.)

1. Turnpikes—Use of land by—In an action by the devisees of James Bean to recover a lot from Montgomery county which had been used as a toll house by a turnpike company before the ownership and control of the road had passed to the county, a judgment in favor of the heirs and devisees was proper, where it appeared that, by the terms of the agreement between James Bean and the company, the property should revert to him and his heirs when the company ceased to use it.

2. Where it was not shown that entries offered in evidence were in books of original entry, kept in the course of business, and those who made the entries were dead, such books and entries were not competent evidence, and were properly rejected by the trial court.

Turner & Hazelrigg for appellant.

B. F. Day and J. Coleman Reid for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee's testator, James Bean, owned a farm of 410 acres near Mt. Sterling, abutting upon the Mt. Sterling and Winchester turnpike road. About 1858 the road was built by the turnpike company. It obtained from James Bean the right to occupy and use a lot of one-half acre of that farm, for toll-

house purposes. There is no deed or other written evidence of the terms of the agreement between Bean and the turnpike company. There is but one witness testifying in the record who professes to have been present when the agreement between the parties was made. She testified that the agreement was between Newton Congleton, her uncle, and then president of the turnpike company, and James Bean, made at her uncle's home, and that she was present. That they agreed that the turnpike company was to have the use of the half acre in question for the purpose named, so long as its use was continued for this purpose, ceasing which it was to revert to Bean and his heirs; that Bean was to have the right of free travel for himself and family, and those occupying his farm, for the use of the lot.

In 1897 the turnpike company, under the provisions of the statute known as the Free Turnpike Act, sold its road and franchises to Montgomery county. In the deed conveying them it included the half-acre lot in question, but expressly stated that it only quit-claimed the title to the lot. The county has since used the lot and the building on it, not in direct connection with the maintainance or operation of that road, but by renting it out and appropriating the rent for turnpike purposes.

This suit was brought by the devisees of James Bean to recover the lot in question from the county under the allegation of ownership and grant of the easement above mentioned, coupled with the further allegation that the turnpike company and its grantee, the county, had abandoned the use of the toll-house lot for the purpposes to which it was originally dedicated by the former owner, James Bean. Aside from the customary use continued since 1858, to the date of sale by the turnpike company, there is no evidence of the company's having or claiming or exercising any other right than that conferred by the agreement above related. Such possession and use, not otherwise explained, is not inconsistent with the terms of the easement, and was not in any sense adverse to the title of the holder of the fee. The county offered evidence which it claims tends to support its plea that there was an absolute sale of the lot to the turnpike company, which was of this character: The record book kept by the company, which included the accounts kept by its secretary and treasurer, showed entries, about 1858 or 1859, where $60 was paid by the treasurer of the turnpike company to James Bean "for toll-house lot." It was not shown, nor offered to be proved, that these entries were made upon books of original entry, kept in the usual course of the company's business. Those who made the entries were dead when the suit was brought. The books were not evidence in the company's behalf on this point, and were properly rejected by the trial court.

Appellant next contends that in equity appellee should be required to restore to the county, as vendee of the turnpike company, at least the amount that the improvements put upon the lot enhanced its value. In the absence of an agreement between the contracting parties to that effect, this will not be allowed. If the house had been removed before the reverter occurred, the fee simple holder would have had no cause to complain, but upon a reverter all the property belonging to the realty goes to him who holds the title. One witness, introduced by appellees, testified that James Bean, on one occasion, told him that the effect of the agreement by which the turnpike company was occupying his lot, was that in case of its abandonment, the lot

would belong to him and the house to the company. While this is in the nature of an admission against interest, and is relevant as evidence tending to show what was the real contract bewteen the parties, when considered in the light of the testimony of Mrs. Scobee, which established the original agreement, it appears to have been more in the nature of an expression of opinion by Mr. Bean, than a recital of the facts of the agreement.

The judgment of the circuit court is in accord with this opinion, and with the following decisions of this court construing similar easements and reversions, and is, therefore, affirmed (Cynthiana & Raven Creek T. P. Co. v. Hutchison, 22 Ky. Law Rep., 1232; Mitchell v. Bourbon Co., 25 Ky. Law Rep., 512; Halley v. Scott Fiscal Court, 25 Ky. Law Rep., 1471; Harrison v. Lexington & Frankfort R. R. Co., 9 B. Mon., 470.)

WATER SUPPLY CO., &c. v. CITY OF GEORGETOWN.

(Filed September 29, 1904.)

Victor F. Bradley and Montgomery & Lee for appellants.

J. B. Finnell for appellee.

Appeal from Scott Circuit Court.

Judge Barker delivered the following response to petition for rehearing:

The court did not decide that appellant might run its pipe over property of the water company under the permit from the city. That question was not presented by the record. The only question decided is as to appellant's right to take water from the spring or the spring branch. How it may acquire the right to lay its pipe on property not owned by it, in order to reach the spring or the branch, or what rights it has as to such property to lay a pipe on it for this purpose, are questions not presented or determined. Only the rights of the parties in the spring and the water flowing from it, are determined.

Petition overruled.

MASON, GOOCH & HOGE CO. v. MECHANICS' LIEN & TRUST CO &c.

(Filed September 29, 1904.)

Injunction—Dissolution—Damages—Failure to assess—Subsequent action—Under Civil Code, section 295, providing that "Upon the dissolution, in whole or in part, of an injunction to stay proceedings upon a judgment, the damages shall be assessed by the court, which may hear the evidence and decide in a summary way, or may in its discretion cause a jury to be impaneled to find the damages, etc.," where an action was brought in the Franklin Circuit Court by the appellants against the German National Bank and others, and an injunction obtained enjoining the sheriff from selling certain engines and cars, on the ground that appellants had a prior lien thereon by virtue of certain warehouse receipts, and which injunction was dissolved by said Franklin Circuit Court, but no order was entered assessing damages on the injunction, Held—That the damages not having been assessed in the action in which the injunction was dissolved, no recov-

ery can be had in an action subsqeuently brought in the Kenton Circuit Court upon the injunction bond therefor.

T. L. Edelen for appellants.

W. H. Mackoy for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

The Home Construction Co. being indebted to the Mason, Gooch & Hoge Co. in a large amount, undertook to pledge to it certain locomotives and cars owned by the construction company, as security for the debt, and as evidence of the pledge, issued to it a paper called a warehouse receipt. The Mason, Gooch & Hoge Co borrowed from the German National Bank of Covington, Ky., something like $15,000, and to secure the loan, placed with it as collateral the warehouse receipt which it had received from the constructon company. The Mechanics' Trust Co. had a large debt against the Home Construction Co., upon which it obtained a personal judgment against it. Execution was issued on the judgment and levied on the locomotives and cars above referred to. After this levy was made, the Mason, Gooch & Hoge Co , the German National Bank, W. F. Dandridge, who was named as trustee in the warehouse receipt, H. P. Mason and Charles E. Hoge, who were sureties in the debt to the bank, instituted an injunction suit in the Franklin Circuit Court, enjoining the sheriff from selling the engines and cars under the execution, on the ground that they had a prior lien on the property by virtue of the warehouse receipt. The circuit court sustained the plaintiffs, but upon appeal to this court it was held that the warehouse receipt created no lien on the property, and the judgment was reversed with directions to the circuit court to dismiss the plaintiff's petition. (Mechanics' Trust Co. v. Dandridge, &c., 18 Ky. Law Rep., 625.) On the return of the case to the circuit court the petition was dismissed and the injunction dissolved, but no order was entered assessing damages on the injunction. Thereafter this suit was brought in the Kention Circuit Court against the plaintiffs in that action and their sureties on the injunction bond. Among other things, the defendants pleaded that there had been no assessment of damages in the action in which the injunction was obtained, and relied on this, in bar of the action, insisting that a finding of damages by the court which dissolves the injunction, is a condition precedent to the right of action on the bond.

Section 295, of the Civil Code, reads as follows "Upon the dissolution, in whole or in part, of an injunction to stay proceedings upon a judgment, the damages shall be assessed by the court which may hear the evidence and decide in a summary way, or may, at its discretion, cause a jury to be impaneled to find the damages. If the collection, payment or use of money be enjoined, the damages may be any rate per cent. on the sum released by the dissolution, which, in the discretion of the court, may be proper, not exceeding 10 per cent. And, if the delivery of property have been delayed by the injunction, the value of the use, hire or rent thereof shall be assessed; judgment shall be assessed; judgment shall be rendered against the party who obtained the injunction for the damages assessed, and the assessment shall be conclusive against the surety of such party."

This provision of the Code is taken verbatim from section 325 of the former Code, and has more than once been construed by this court. In Crawford v. Woodworth, 72 Ky., 745, Crawford had obtained a judgment to sell a tract of land and some oxen, and thereafter Woodworth asserting a claim to the oxen filed his petition enjoining Crawford from selling them as directed in the judgment. The injunction was dissolved, but the damages were not assessed. Then Crawford filed a suit to recover damages upon the bond. The court held that the petition stated no cause of action, as it did not show that the damages had been assessed by the court in dissolving the injunction. After setting out the provisions of section 325 of the Code then in force, which as we have said were verbatim the same as section 295 now in force, the court said: "This mode of proceeding is not merely cumulative, but is the only remedy afforded a party for recovering special damages upon the dissolution of an injunction, and, as conclusive of this question, the language of the section is not only that the court shall assess damages, but this assessment is made conclusive against all the obligors in the bond, including the surety."

This case was followed in Logsdon v. Willis, 77 Ky., 183, and was again followed in Mallory v. Dauber's Ex'or, 83 Ky., 241, where Mallory had enjoined the selling of certain land under execution, on the ground that it was his property. His injunction was modified by the circuit court without the assessment of damages. He appealed and Dauber prosecuted a cross appeal, complaining that the injunction had not been dissolved, and that there had been no assessment of damages by the court in dissolving the injunction. The court, however, affirmed the judgment on the original and cross appeals, holding that only nominal damages should be given, and that it would not reverse the judgment in order that nominal damages might be assessed.

The court said: "If, therefore, the appellant had an equityas against the appellee, although the injunction was improperly granted, the court had the power to give mere nominal damages on its dissolution, but having failed to dissolve the injunction, this court will not reverse on the cross appeal for that error alone, in order that the court below may determine the damages the appellee is entitled to recover."

The question was again presented to the court in Hayden v. Phillips, 89 Ky., 1, where Hayden had enjoined a writ of possession in the sheriffs' hands for execution. The injunction was dissolved, but upon the dissolution the court did not assess damages for the wrongful suing out of the injunction, and in this condition of things Phillips filed suit against Hayden on the injunction bond and recovered judgment in the circuit court. On appeal to this court the judgment in his favor was reversed and the cause remanded to the circuit court with directions to sustain the demurrer to the petition. After referring to the previous cases the court said: "It may now be regarded as settled that the remedy given by section 295, of the Code for the assessment of special damages upon the dissolution of an injunction, enjoining proceedings on a judgment, is exclusive of all other remedies."

We cannot now depart from a rule of construction of the statute so authoritatively settled. Section 285 of the Code provides that an injunction to stay proceedings on a judgment shall not be granted in an action brought in any other court than that in which the judgment was rendered. The

words of this section "To stay proceedings on a judgment" are in effect the same as in section 295, and under it, it has been often held that a sale of property under execution cannot be enjoined except in the court which rendered the judgment on which the execution issued." (C. & O. R. R. Co. v. Reason, 84 Ky., 368; Mallory v. Dauber's Ex'or, 88 Ky., 241; McConnell v. Rowe, 8 Ky. Law Rep., 348; Stahl v. Brown, 84 Ky., 335.)

It is perfectly clear from the previous decisions of this court that it has proceeded upon the idea that the words "To stay proceedings upon a judgment" in section 295 mean the same thing as the like words in section 285, and include an injunction to stay proceedings on an execution issued on a judgment no less than to stay the judgment itself in other respects. An execution which is issued on a judgment is a proceeding to enforce it, and the court has evidently treated these sections as embracing all injunctions to stay proceedings on a judgment. We, therefore, conclude that the damages not having been assessed in the action in which the injunction was dissolved, no recovery can be had in this action on the injunction bond therefor.

Judgment reversed and cause remanded for further proceedings consistent herewith.

Whole court sitting.

BEASLEY v. ADAMS.

(Filed September 29, 1904.)

1. Primary election—Contest—Appeal—In a contest before the governing authority of a political party in the holding of a primary election for the nomination of a candidate for county school superintendent, the decision of the governing authority of such party, awarding the certificate of nomination is final, and no appeal from its decision lies to the circuit or to any court.

2. Rules of committee—The fact that the committee or governing authority may have, in one of its rules governing such contest, provided for such an appeal, will not authorize the appeal, as the committee, under the statute, could regulate the proceedings of the contest before themselves, but could not confer jurisdiction on the circuit court.

Wm. Carnes and Harrison Beasley for appellant.

Clore, Dickson & Clayton and Robt. L. Greene for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Annie R. Beasley, and the appellee, Claude Q. Adams, were rival candidates for the nomination of the Democratic party for the office of school superintendent for Grant county, Kentucky, at a primary election held on the second day of April, 1904. After the election, the returns were canvassed by the Democratic executive committee, the governing authority of the party in the county, who awarded the certificate of nomination to appellee.

On the 30th day of April, 1904, appellant being dissatisfied with the action of the committee as a canvassing board, filed with them grounds of contest in writing, in which she set forth various reasons why the certificate of

nomination should be awarded her instead of appellee. On May 9th, 1904, amended grounds for contest were filed, and, on the same day, the committee met, and all having been duly sworn to faithfully discharge their duty as members of the contest board, it was then moved and carried that rules governing the proceedings of contest be adopted, and it was resolved as follows:

"Rule No. 1. The committee shall first proceed to hear and determine at this meeting, any objection of the contestee, C. C. Adams, to the sufficiency of the notice of contest, and to dismiss said contest if said notice and grounds are insufficient; and resolved:

"Rule No. 2. That in the event the said committee should hold that the notice of contest states sufficient grounds of contest to authorize the investigation of facts and the hearing of proof, that the contestee shall have ten days time, after this date, to file an answer to counter contest, and the contestant shall have ten days after notice of the filing of same has beenserved upon her in which to reply, and thereupon the committee shall proceed to direct how, and in what manner, the testimony may be produced before said committee; and this meeting will, in that event, be adjourned to meet on the call of the chairman to provide said rules for the production of the testimony, and it shall be the duty of said chairman to forthwith call a meeting at some date, not later than ten days after the filing of said reply, for the purpose of promulgating the rules governing the production of evidence and the further hearing of the contest.

"Rule No. 3. In the event the committee shall hold that the notice of contest is insufficient, and does not state grounds to authorize an investigation of the facts or the hearing of proof, then the contest shall be dismissed, and the committee finally adjourned from the consideration of the said contest."

The parties to the contest were treated as litigants in court, the appellant being plaintiff, and her grounds of contest, her petition; the appellee, who was defendant, filed a general demurrer to the petition as amended, and this, after being duly considered, was sustained, and the petition dismissed, whereupon appellant prayed an appeal to the Grant Circuit Court, which was allowed her by the committee, under amended rules governing the contest, which were adopted on her motion, and which are as follows:

"Rule No. 1. It is ordered that should the contestant or contestee offer any amendments, they should be considered as to the sufficiency or insufficiency of them in this contest.

"Rule No. 2. It is ordered that in the final hearing of this contest, the party defeated may have an appeal to the Grant Circuit Court, if they so desire."

At the June term of the Grant Circuit Court, a motion was made to dismiss appellant's appeal, which was afterwards sustained, for want of jurisdiction, from which judgment this appeal is prosecuted. The question for adjudication on this submission is whether or not an appeal lies from the decision of the committee to the circuit court. Section 1551, Kentucky Statutes, is as follows: "All primary elections held in this Commonwealth by the various political parties shall be held and conducted in the same form and manner, and under the same requirements as or shall be provided by law for

the holding of regular State elections, except in such particulars as herein excepted."

Section 1563: "The duly-authorized and contstituted committee or governing authority in the couunty or district in which a primary election may be held hereunder, is hereby empowered to count the votes received by all candidates in such primary elections, and to declare the candidate or candidates, in cases where candidates for more than one office are to be nominated, receiving the highest number of votes the nominee of such political party for the office for which he was voted for at such primary election. In all cases of a tie vote or contest, the committee or governing authority of the political party holding such primary election, shall have the power to hear and determine such contest, and decide who shall be entitled to the nomination. The proceedings in such cases shall be in such form and manner as the committee or governing authority shall determine upon. Before entering upon the discharge of the duties set forth in this article, the committee or governing authority shall be sworn by some officer authorized by law to administer an oath, to faithfully and honestly discharge the duties herein imposed, and the failure upon the part of any member of the committee or governing authority to discharge such duties faithfully and honestly, shall be deemed a misdemeanor, and the persons so offending shall, upon indictment and conviction in the circuit court of the county or district, be fined not less than $100 nor more than $500, and be imprisoned in the jail not less than sixty days nor more than one year."

Appellant insists that, under the language of section 1551, she is entitled to an appeal from the decision of the committee to the circuit court, for the reason that the law regulating the holding of elections authorizes an appeal from the decision of the board of contest to the circuit court, in contests for State and county offices. This position would, undoubtedly, be sound, were it not for the language in section 1568, which limits the right of contest in primary elections to a trial before the governing authority under whose auspices the election is held, and which is as follows: "In all cases of a tie vote or contest, the committee or governing authority of the political party holding such primary election, shall have the power to hear and determine such contest and decide who shall be entitled to the nomination. The proceedings in such cases shall be in such form and manner as the committee or governing authority shall determine upon." This makes the decision of the contest committee final. The language, that the committee shall have the power to hear and determine such contests, and decide who shall be entitled to the nomination, precludes the idea that there shall be an appeal; the entire matter is referred to the governing authority of the party for its decision, and this is eminently proper, as the question is purely political. This construction is consonant with sound reason, and any other would violate the elementary canon of statutory construction, that the law should not be so interpreted as to make it vain or illusory. Primary elections are held for the purpose of nominating party candidates for the regular State election thereafter to be held for the selection by the whole people of their official servants. The right of political parties to so select their nominees has been deemed sufficiently important to safeguard the official machinery by which the elections are held, with the protection of the law, but if, where

there are contests over the nominations, the defeated candidates may appeal to the courts, it would necessarily follow, that the State election would be held before the contests could be settled, and the political party whose nominees were thus involved in litigation would have no place on the ticket for the offices in question, and the statute rendered abortive. If subsection 12, of section 1596a, Ky. Statutes, authorizes an appeal from the decision of the board of contest to the circuit court in a primary election, then it also authorizes an appeal from the judgment of the circuit court to the Court of Appeals, and this being true, it is not believed that it would ever be possible to finally settle by adjudication a contest for a party nomination in time for the regular election. The conclusion we have reached is in line with all the utterances of this court on the subject. In Cain v. Page, 19 Ky. Law Rep., 977, the question was whether or not the committee, of which one O'Neal was chairman, was the governing authority; it was necessary to decide this question, and the court did decide, that this committee, having been recognized by the State Central Committee as such, was the governing authority, and its decision in the matter of the contest was upheld. (Moody v. Trimble, 22 Ky. Law Rep., 692; Davis v. Hambrick, 22 Ky. Law Rep., 815.)

The case of Henry v. Secrest, 24 Ky. Law Rep., 1505, in nowise militates against this view. In that case, it was sought by mandatory injunction to force the committee to act upon a contest alleged to be pending before them, and of which they refused to take cognizance. This court held that there was no contest pending, and reversed the judgment awarding the mandatory injunction.

There is no substantial ground for the inference drawn by counsel for appellant, that, because this court took jurisdiction in Cain v. Page and Henry v. Secrest, it has jurisdiction of the case at bar. Neither of those cases involved an appeal from the decision of the governing authority of a political party. In Cain v. Page as said before, the question was, whether the committee, which heard the contest, was or not, the governing authority. That question alone, was settled by this court, and then it was held that the committee's action could not be reviewed. In Henry v. Secrest the court took jurisdiction not for the purpose of reviewing the decision of the governing authority, but upon proper showing, of requiring them to decide between the parties in the matter of contest. In the case at bar, the governing authority of the party has acted upon the sufficiency of appellant's grounds of contest, and rendered a decision adverse to her. This judgment can not be reviewed by us. Courts will often require officials to act in matters, the decision of which is exclusively within their discretion, when they refuse to do so, although they will not review the decision when made, however erroneous it may be.

Appellant further contends that, although the statute, alone, may not afford her the right of appeal, yet she is entitled to it under the resolution of the committee, that either party dissatisfied with their decision, should have an appeal to the Grant Circuit Court, based upon the provision of section 1563, that "the proceedings in such cases shall be in such form and manner as the committee or governing authority shall determine upon." The language of the statute in nowise authorizs the resolution of the com-

mittee; they could, under it, regulate the proceedings of the contest before themselves, but could confer no jurisdiction on the Grant Circuit Court.

The motion to dismiss the appeal is sustained.

LEE v. MUTUAL LIFE INSURANCE CO., OF NEW YORK, &c.

(Filed September 29, 1904—Not to be reported.)

1. Insurance—Transfer of policy—Charles D. Skeggs, who owed $200 in bank, with Leeman and Lee as sureties, in consideration of the payment by Lee of the paper, assigned the latter his policy of insurance, his wife joining in the assignment. Lee took up the paper in bank and kept the policy of insurance in force, and at Skeggs' death sought to collect the insurance. Mrs. Skeggs set up claim to it and alleged that she was induced to sign the paper by which he took it, upon the understanding that he was only to use it as collateral, and that her signing was necessary to enable him to make such use of it. She was willing that he should be paid with interest, but denied beyond that amount he had any interest in it. Held—Judgment in accordance with her contention was proper.

2. Same—In some of the States it has been decided that, where a person obtained an insurance upon his life and pays the premium himself, he may make the policy payable to one who has no insurable interest in his life, and can at any period, sell and transfer the policy for value, to one who has no insurable interest in his life, who will become invested with the complete title thereto, but in this state a different rule prevails.

Montgomery & Lee for appellant.

Clare, Dickerson & Clayton and A. G. DeJarnett for appellees.

Appeal from Grant Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 20th of December, 1890, the Mutual Life Insurance Company, of New York, insured the life of Charles B. Skeggs for $1,000, the policy being known as a "twenty year distribution policy." Skeggs assumed to pay an annual premium of $42.20, on the 20th of December, of each year. He paid this premium for five years. On the 24th of January, 1895, he borrowed from the Bank of Williamstown $200, for which he executed his note with J. A. Leeman and J. L. Lee, as sureties, and, simultaneously, assigned and transferred to Leeman and Lee as collateral to indemnify them against loss, the above policy of insuarnce. Shortly after the execution of this note Skeggs, having contracted "tuberculosis," removed to Colorado. The note ran along until January, 1898, when the bank demanded its payment of the sureties. Skeggs' health had steadily grown worse, and Lee demanded that the insurance policy should be transferred to him in fee. On the 1st of February, 1898, C. B. Skeggs, Jane M. Skeggs, the beneficiary and wife of C. B. Skeggs, and J. A. Leeman, signed the following writing which was forwarded to them in Colorado, by Lee:

"For one dollar to me, in hand paid and for other valuable consideration, the receipt of which is acknowledged, I hereby assign, transfer and set over to J. L. Lee, whose P. O. address is Williamstown, Ky., all my right, title and interest in policy No. 441597, issued by the Mutual Life Insurance Com-

pany, of New York; and for the consideration above expressed, I do for myself, my executor and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, their executors, administrators, and assigns, and their title to the said policy, will forever warrant and defend.

"Dated Anaconda, Colo., this 8th day of February, 1898.

"C. B. SKEGGS,
"JENNIE M. SKEGGS,
"J. A. LEMON."

Lee thereupon took up the obligation of Skeggs to the bank and executed his own obligation in lieu thereof. He also paid the annual premium on the policy until the death of C. B. Skeggs, in 1903. After the death of Skeggs, he demanded payment of the policy, claiming to be the sole owner thereof under and by virtue of the assignment, supra. This was denied by Jennie M. Skeggs, who notified the company not to pay the insurance money to Lee Lee thereupon, brought this suit against the insurance company, asking a personal judgment for the full amount of the policy. Mrs. Skeggs was made a party to this proceeding on her own petition, and admitted that Lee was entitled to have repaid to him all the various sums of money, with interest thereon, which he had paid for her deceased husband; but denied that he had any interest in the overplus due upon the policy, and alleged that she was induced to make an absolute assignment thereof by his representation to her that this was necessary to enable him to use it as collateral, in the renewal of his note to the bank, and that he agreed that when he had been fully reimbursed the various sums of money which he had assumed to pay, that she should have the overplus, if any. She further alleged that Lee was not related by blood or otherwise to her deceased husband, had no insurable interest in his life, except as a creditor, and asked that the company be adjudged to pay the note due the bank with interest, and the premiums which had been advanced by Lee with interest, and the residue of the $1,000 to her. The insurance company in their answer admitted that they owed the $1,000, for which the policy was issued, and by agreement paid the money into court, and asked that they should be protected in any judgment which might be rendered therein. A judgment was entered upon final submission of the case, in accordance with the contention of Mrs. Skeggs, and Lee has appealed.

He insists that he assumed to pay for C. B. Skeggs and wife, the full pecuniary value of the policy at the time of its transfer to him, in 1898; and that Mrs. Skeggs is estopped from asserting any claim to the proceeds by her unconditional assignment thereof to him. In some of the States it has been decided that where a person obtains a policy on his life, and pays the premium himself, he may make the policy payable to one who has no insurable interest in his life, and can at any period sell and transfer the policy for value to a person who has no insurable interest in his life, and who thereby became invested with the complete title thereto. But in this State a different rule prevails. In numerous adjudications of this court it has been held that no one can enforce a policy of insurance issued upon the life of another, without having an insurable interest in the life of such person. (Basye v. Adams, 81 Ky., 228; Caudell v. Woodward, 96 Ky., 645.)

And in Beard v. Sharp, 17 Ky. Law Rep., 1029, it was decided that where a son had, for a number of years kept up an insurance policy upon the life of his mother, and he consented in order to carry the policy, to allow a stranger to become a joint beneficiary with himself, and where, in accordance with this agreement a new certificate was issued, it was held that the certificate was void to the stranger, and that he was only entitled to be paid out of the proceeds of the policy, after the death of the insured, the amount actually paid by him in premiums, with interest thereon. This rule was adhered to in Barbour's Adm'r v. Larue's Ass'ee, 106 Ky., 546 and in New York Life Ins. Co. v. Brown's Adm'r, 23 Ky. Law Rep., 2070. Under these various adjudications it is quite clear that appellant has no valid ground of complaint of the judgment appealed from.

Judgment affirmed.

LANGAN, &c. v. BITZER, &c.

(Filed September 29, 1904—Not to be reported.)

1. Street construction—Costs of improvement—Mistake in name of owner of property—A mistake in the apportionment warrant for street construction, by which the name of the owner of the property was incorrectly given, was no defense in an action to enforce the lien for improvement. No personal liability is created in such proceeding, but only a lien on the property. The proceeding to enforce the lien is in rem.

2. Same—The grade of the street having been fixed for thirty years, it was not necessary for the council to take any further action in regard thereto, and the fact that grade was fixed by resolution and not by ordinance, is immaterial.

Matt O'Doherty for appellant.

Pirtle, Trabue and Doolan & Cox for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Hobson.

A sidewalk was constructed on West Second street in front of the property of Annie Burgess, now Annie Langan, and an apportionment warrant was issued for so much of the cost of the improvement as fell against her property. By a clerical error the name of the owner is given in the apportionment warrant as Adam Burgess, when it should have been Annie Burgess, and this is relied on in defense of the action. By section 2234, Kentucky Statutes, the lien for the improvement, with interest, at the rate of 6 per cent. is against the respective lots, and by section 2235, the cost must be apportioned to the front foot, as owned by the parties respectively fronting the improvement. No presonal liability is created by the proceeding, but only a lien on the property. The proceeding to enforce the lien is a proceeding in rem. The clerical error, by which Adam was written for Annie in giving the name of the owner of the property, did not affect the validity of the proceeding. The basis of the action is the ordinance of the council, the contract and the apportionment to the property. The error in the name of the party is one of those things which are provided for by section 2234, Kentucky Statutes, by the provision that no error in the proceedings of the general council shall exempt from payment, after the work has been done as

required by either the ordinance or the contract, but the general council or the court in which suits may be pending may make all corrections, rules and orders to do justice to all parties concerned. The error in the name of the owner of the property is not shown to have prejudiced appellants in any way, and there is nothing in the record to break the prima facie case created by the statute. No new apportionment is necessary and, therefore, interest was properly allowed on the warrant. It is only where a new apportionment against the property must be made, that interest will not be allowed. (Allen v. Woods, 20 Ky Law Rep., 59; Barfield v. Gleason, 23 Ky. Law Rep., 141.)

It is also objected that the ordinance and contract were for the pavement on both sides of the street and that this was improper. But this is not shown to have prejudiced appellants in any way, or that anything more has been apportioned against the property than would have been apportioned against it upon the basis contended for by them. (Barrett v. Falls City Stone Co., 21 Ky. Law Rep., 669.)

The grade of the street having been fixed over thirty years ago, it was not necessary for the council to take any further action in regard thereto, unless it was desired to change the grade as already established. The fact that the grade was then fixed by resolution, and not by ordinance, is immaterial. (Augusta v. McKibben, 22 Ky. Law Rep., 1224: Gaertner v. Louisville Artificial Stone Co., 24 Ky. Law Rep., 140; Barrett v. Louiville Artificial Stone Co., 21 Ky. Law Rep., 669; Louisville v. Cassidy, 105 Ky., 424.)

A prima facie case under the statute was made out by the plaintiff and no proof was taken by the defendant to overthrow it.

Judgment affirmed.

EWING'S ADM'RS v. EWING.

(Filed September 24, 1904—Not to be reported.)

Decedent's estate—Claims against—Evidence—Where two notes were held by one, since deceased, one for $1,118 95 and the other for $318, and on August 8, 1899, there was endorsed a credit on the latter for $500, which over paid it, defense by the payor, in an action by the administrators of the decedent, that he had paid $1,000, instead of $500, will not be upheld where it appears that, on the date of the endorsement on the note he paid by check, to the owner of the note $500 and took his receipt for that amount which recited that it was to be credited on note, the check not indicating the purpose for which it was given. The burden being upon the appellee to establish his contention of the payment of the 1,000, and failing to do it, it was error in the lower court to allow it.

C. W. Goodpaster and Alex Conner for appellants.

Hazelrigg, Chenault & Hazelrigg for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Paynter.

The decedent, F. M. Ewing, held two notes, executed by appellee, G. M. Ewing, one was for $1,118.95, which was secured by mortgage, upon which certain payments had been made; the other note was for $318. On August

8, 1899, F. M. Ewing endcrsed on the latter note a credit of $500, which overpaid the principal and interest $82.10. F. M. Ewing died and his personal representatives instituted this action to recover the alleged balance on the notes and to enforce the mortgage. The appellee pleaded that on the 8th of August, 1899, he paid the decedent $1,000, instead of the $500, with which he was credited. The question for determination is which of the sums did he pay. No oral testimony was offered on the trial of the case. The only evidence offered by the appellee was a check dated August 8, 1899, for $500 and a receipt bearing the same date for a like amount. The check reads as follows:

No. "Owingsville, Ky., August 8, 1899.

"Farmers Bank.

"Pay to F. M. Ewin. or bearer, $500.00

"Five Hundred——Dollars.

For "G. M. EWING."

The receipt is as follows:

"$500.00.

"Received of G. M. Ewing Five Hundred Dollars to be credited on note as of this Aug. 8th, 1899.

"F. M. EWING."

It will be observed that the check does not indicate the purpose for which it was given, or as to how the proceeds were to be applied or used. The check might have been given as payment on a debt for property or for some other purpose. It is stated in the receipt that the $500 received is to be credited on note as of that date. When the two papers are read together, in the absence of any explanation, the conclusion to be drawn is that on August 8, 1899, the appellee paid the decedent $500 by check and the receipt was intended to be an evidence of that payment.

The appellee claims that he paid the $500 in cash and the receipt is for that money, and that the check was an additional payment. The burden was upon the appellee to sustain his claim, which he failed to do. There is an entire absence of evidence to show that $500 was paid in cash on the day mentioned. If he paid the $1,000, as he claims, it would seem that a receipt would have been given for $1,000 instead of $500. Again, if the parties had intended the receipt to be an evidence of the payment of $500 in cash, and that the check was to be the evidence of another payment, it would have been recited in the receipt that it was for cash. We are of the opinion that the court erred in allowing a credit for $1,000, instead of $500, of date August, 8, 1899, because the appellee failed to sustain his claim by sufficient evidence.

The judgment is reversed for proceedings consistent with this opinion.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT v. ALLEN.

(Filed September 30, 1904—Not to be reported.)

Damages—Negligence—Liability of city for negligence of contractor—Appellee recovered a judgment against appellant for damages sustained from

falling off a rock on a street of the City of Franfkort, which had been placed there by its contractor. The accident happened in a densely-populated section of the city where children were accustomed to play upon the streets. The appellee was a boy of nine years. He testified that he did not know the rock was dangerous and had not been warned to keep off of it, while there was testimony that he had been so warned. The city defended on the idea that it had let the contract to Lynch and took bond for the faithful performance of his duties; that he was an independent contractor and was alone responsible. Held—That section 3451, Kentucky Statutes, which has application to improvements like this in third-class cities, requires that there should be a provision in such contracts that the work be executed under the immediate supervision of the mayor and city engineer, subject to the acceptance of the council; and that even conceding that Lynch was an independent contractor, the law makes it the duty of the city to keep its streets in a reasonably safe condition for use by the public, and the judgment awarding damages will not be disturbed.

T. H. Crockett and Ira Julian for appellant.

J. A. Violett and J. W. Rodman for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

This is an appeal from the judgment of the Franklin Circuit Court for the sum of $500 recovered by reason of personal injuries received by appellee under the following circumstances:

One Lynch, under contract with appellant, was putting in some curbing along Ewing street in South Frankfort. He had caused some heavy stones to be hauled and deposited on this street for that purpose. One of them was unloaded at the corner of Fourth and Ewing streets, which stone was nine feet long, nineteen inches wide and five inches thick and estimated to weigh a ton or more. The stone was set up on an incline at the junction of the two streets, one end resting on the sidewalk and the other end extending out into the street in an unstable position. It was placed in this position for the purpose of dressing it and had remained so, according to the witnesses, for from eight to seventeen days. The appellee, a boy then about nine years of age, got upon it, and when he started to get off, it fell upon him, crushing one of his legs. This was in a densely-populated portion of the city, and many children were accustomed to play upon these streets. The boy stated that he did not know that it was dangerous to get upon this rock, and he had not been warned to keep off of it, while there was some proof that he had been warned.

The city undertook to relieve itself by pleading that it had let the contract for this curbing to Lynch and took his bond for the faithful performance of the work, and that he was an independent contractor, and contends that Lynch alone is responsible. We cannot agree with appellant's contention in this. Section 3451 of the statutes, which has application to improvements like this in third-class cities, requires that there should be a provision in all such contracts that the work be executed under the immediate supervision of the mayor and city engineer and subject to the acceptance of the common council. But, even conceding that Lynch was an independent contractor, the law made it the duty of the city to keep the sidewalks and streets in a

reasonably safe condition for the use of the public. This is a primary duty of the city and it can not relieve itself thereof by a contract of any kind.

In the case of the City of Louisville v. Keber, 25 Ky. Law Rep., 2006, after discussing several decisions of courts of other States, the court said: "The rule on which these opinions rests, is that the city, having exclusive control over its streets, and being charged with the duty of maintaining them, must keep its streets in a reasonably safe condition for public travel, and for a failure to do this, is primarily liable, although the defect in the highway may be due to the act of some contractor or third person done by authority of the city."

In curbing this street in the manner stated, it was the duty of the appellant to use at least ordinary care to see that these heavy stones were not placed and kept in a dangerous condition, so that persons, and especially children congregating there, might not be injured. In the case of Bransom's Adm'r v. Labrot, &c., 81 Ky., 641, which was a case where a child was killed by a heavy piece of timber falling on him, the timber having been negligently piled in an unsafe manner, the court said: "It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine, which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion." And also, on page 645 of the same opinion, the court said: "It was, therefore, the duty of appellees, in placing this timber upon the lot, to do it in such manner as to make it reasonably safe and secure against injury to children coming there."

The instructions of the lower court were in accordance with these principles and were unobjectionable.

Perceiving no error prejudicial to the substantial rights of the appellant, the judgment of the lower court is affirmed.

COMMONWEALTH v. BAILEY.

(Filed September 30, 1904—Not to be reported.)

1. Criminal law—Bribery—Sufficiency of indictment—Where it was averred in an indictment for bribery that William Cundiff was under an indictment for murder, that the wife of the deceased was a witness, on the indictment, for the Commonwealth to the killing, and that Cundiff corruptly offered a house and lot to her if she would absent herself from the trial and not testify against him, knowledge that she was a witness for the Commonwealth in the prosecution was necessarily implied from the recitation of these facts in the indictment, and amounted to a charge that he had knowledge that she was a witness for the Commonwealth at the time of the commission of the crime, and it was error for the trial court to sustain a demurrer to the indictment, it being in accord with the requirements of sections 122 and 124 of the Criminal Code.

2. Same—One of the essential elements of the offense of offering to bribe a witness is, that the accused should know that the person to whom the bribe was offered was a witness; but it is not essential, in all cases, that the in-

dictment should contain the express allegation to this effect, as in many cases it is implied from the circumstances surrounding the commission of the offense, or a statement of the acts constituting them.

Joseph Huffaker for appellant.

Aaron Kohn and Morton K. Yonts for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Chief Justice Burnam.

A general demurrer, filed by the appellee, L. H . Bailey, was sustained to the following indictment returned against him by the grand jurors of Jefferson county: "The grand jurors of the county of Jefferson, in the name and by the authority of the Comomnwealth of Kentucky, accuse said L. H. Bailey of the offense of bribery, committed in manner and form as follows to-wit: That heretofore, one, William T Cundiff, being at that time under an indictment in this court for wilfully killing and murdering one Thomas Bishop, and Lulie Bishop, widow of the said Thomas Bishop, being a witness on the said indictment for the Commonwealth to the said killing, he, the said L. H. Bailey, did, on or about November 18, 1908, in the county of Jefferson, State of Kentucky, and within one year prior to the finding of this indictment, offer, corruptly and feloniously, to the said Lulie Bishop a certain reward or thing of value, to-wit, a house and lot in the city of Louisville, if she, said Lulie Bishop, would absent herself from this court and not testify as a witness on the trial of the said Wliiam T. Cundiff under the said indictment, all of which tended to the obstruction of the administration of justice, and is against the peace and dignity of the Commonwealth of Kentucky.

"Witnesses: LULIE BISHOP,
"KATIE BISHOP."

It is urged for appellee, upon this appeal, that this indictment is fatally defective because in the naming or accusative part the offense is bribery, while the specific description of the alleged offense only set out a case of attempted bribery. Second, that the indictment does not specifically allege that the witness sought to be bribed, had been summoned or recognized as a witness, or that her testimony was material, and also because it fails to aver specifically, knowledge on the part of the defendant that Lulie Bishop was a witness for the Commonwealth at the time the alleged offer was made. There can be no doubt that at common law an indictment would lie for bribery or attempting to bribe or dissuade a witness from appearing before a court, pursuant to a subpœna. (22 Encyclcpædia of Pleading and Practice, 1351, and authorities there cited.) And it is equally certain that the offense of bribery embraces any attempt to bribe. (2 Whartons' Criminal Law, 9th Ed., 1857: E. Greenleaf on Evidence, 71; A. Fook, 62 Call, 493; United States v. Worral, 2 Dallas, 384.)

Section 120, of the Criminal Code, provides: "When an indictment is found, the names of all the witnesses who were examined must be written at the foot of or on the indictment."

The placing of the name of Lulie Bishop on the indictment was a sufficient designation of her as a witness. (United States v. Bettinger, 15 Am. Law Rep., 49:; U. S. v. Kee, 39 Fed. Rep., 603.) If the defendant knew that

her name was on the foot of the indictment, he was charged with knowledge that in due course of law she would be subpœnaed, and he could not anticipate the issuing and service of the subpœna upon her. Bribing and intimidating or persuading witnesses not to testify, or not to attend court, are among the easiest and most corrupting of this class of misdemeanors, and it will not do to say that a defendant could escape responsibility for attempting to bribe a witness because she had not actually been subpœnaed to attend a trial. (State v. Keys, 80 Am. Dec., 454; Curran v. Taylor, 92 Ky., 537.)

It must be conceded that one of the essential elements of the offense of offering to bribe a witness is, that the accused should know that the person to whom the bribe was offered was, in fact, a witness. But it is not essential in all cases that the indictment should contain express allegation to this effect, as in many cases it is necessarily implied from a statement of the acts constituting the offense. In discussing the question of scienter, Wharton, in his Criminal Pleading and Practice, used these words: "This is so whenever knowledge is an essential ingredient of the offense and not implied in the statement of the act itself."

The averments of the indictment in this case are that Willlliam Cundiff was under indictment for the murder of Thomas Bishop, and that Lulie Bishop, his widow, was a witness on the indictment for the Commowealth to the killing, and that the defendant corruptly offered a house and lot in the city of Louisville to her, if she would absent herself from the court and not testify as a witness on the trial of Cundiff.—Knowledge that Lulie Bishop was a witness for the Comonwealth in the prosecution is, we think, necessarily implied from the recitation of the above acts contained in the indictment, and amounted to a charge that he had knowledge that she was a witness for the Commonweath at the time of the commission of the alleged offense. In our opinion the indictment substantially conforms to the requirements of section 122 and section 124 of the Criminal Code, and the trial court erred in sustaining a demurrer thereto. An interesting discussion of the question is found in Pettibone v. United States, 148; U. S., 305, and in 15 Encyclopædia of Pleading and Practice, 19.

The judgment is, therefore, reversed and cause remanded for proceedings consistent with this opinion.

LUTTER & VOSS, &c. v. GROSSE, &c.

(Filed September 30, 1904—Not to be reported.)

Assignment—Attachment—In this action a contractor, in building a schoolhouse, sub-let most of the work to different persons, and when the work was completed was indebted to his sub-contractors in a much larger sum than the Board of Education, with whom he had contracted, was indebted to him, and gave orders to certain of his creditors to the Board of Education for amounts due them. Other contractors, who had not been paid in full, instituted suits of attachment and garnished the funds in the hands of the Board of Education. These suits were consolidated and referred to the master commissioner, who reported that these contractors who held the orders, were entitled to priority, and this report was properly approved and confirmed. The orders constituted an equitable assignment of the fund at their date, which preceded the issuing of the attachments.

M. L. Harbeson for appellants.

S. D. Rouse, D. A. Glenn and J. W. Bryan for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

In 1895, the appellee. C. Chas. Grosse, contracted with the Board of Education of Ludlow to construct a school house. He sub-let most of the work to different parties whom he failed to pay in full. At the completion of the building there was due him, from the Board of Education, $3,800, and he was indebted to his sub-contractors in a much larger sum. Before the completion of the work he had given to the J. M. Blair Brick Co., orders directed to the Board of Education requesting them to pay to the brick company $546. He had also given similar orders in favor to Mitchell Bros. for $450, who had a claim for brick furnished to a sub-contractor, and to Foyle & Aspey for $164. The other sub-contractors, who had not been paid in full the amount due them, instituted attachment suits in the Kenton Circuit Court against Grosse, seeking to garnishee in the hands of the Board of Education, the respective amounts due to them, to-wit, T. W. Spinks, $113; James Farrel, $170; Lutter & Voss, $711.20; Carl Bros., $1,569.58; J. H. Lutter, $1,931.53; Frank Voss, $478.45.

All these cases were consolidated and referred to the master commissioner to ascertain the claims and to report liens on the $3,800 due Grosse, and their priority. In the commissioner's report, the sub-contractors, who held orders on the Board of Education, were given priorities over the attaching creditors upon the theory that these orders constituted an equitable assignment of the fund coming to Grosse at their date, which, preceeding the issuing of the attachments, and the attaching creditors were given liens in the order in which they were sued out.

The report of the commissioner was approved and confirmed and the judgment entered in accordance therewith. To reverse judgment a part of the attaching creditors have appealed, claiming that they should have been adjudged a priority in the distribution of the amount found due Grosse.

In our opinion the judgment of the chancellor is in accordance with the law and former adjudications of this court, as in a contest between equities merely, that which is prior in time must prevail. Newby v. Hill & Million, 59 K., 530, where this question is decided in a well-considered opinion by Judge Duvall, and which has since been followed in numerous decisions of this court.

Judgment affirmed.

ASHER v. JOHNSON, &c.

(Filed September 29, 1904.)

1. Lease—Tenancy—An agreement, in writing, by which "C. agreed with A. to allow A. to enter C.'s field at the lower end of the meadow, on the left side of the creek, coming up the creek and proceed up through the field to the upper end thereof, to build a tramway through the field to be operated with tram-cars, pulled by mules and horses over which to haul logs, lumber, feed and goods, in consideration of $35 per year, not to exceed three years," is a lease, under which A. was C.'s tenant, and gave A. the right to

enter upon and take possession of a strip of C.'s land and occupy it with his tram-road for three years for the agreed rental.

2. Expiration of lease—Holding over for 90 days—Effect—Under Ky. Statutes, section 2295, providing that if proceedings to dispossess a tenant are not instituted within 90 days after the expiration of his tenancy then none shall be allowed for one year, A. having remained in possession for 90 days, after his lease expired, he was entitled to remain for one year, after the expiration of his lease by paying the rental for said year.

Hazelrigg, Chenault & Hazelrigg and W. R. Ramsey for appellant.

Logan & Jeffries for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, Asher, was largely engaged in the timber and lumber business. He desired to construct a tram-road, about seventeen miles long, for the purpose of hauling his lumber products to a railroad for shipment. To do so it was necessary to secure the right to construct the tram-road over the lands of the appellee, Carnes; thereupon, Carnes executed and delivered to the appellant a writing which reads as follows:

"Pineville, Bell County, Ky., May 22, 1900.

"I, J. L. Carnes, this day agree with A. J. Asher and obligate myself to allow A. J. Asher to enter my field at lower end of meadow on the left side of the creek, coming up creek and proceed up thorugh field to the upper end of same and out. Asher is to be allowed to build a tram-road through the field, to be operated with tram-cars, to be pulled by mules and horses, over which to haul logs lumber feed and goods. Asher is not to put any rocks in said road and is to put a gate at each end of field and is to pay any damage done to Carnes' land or crops by said gates being left open, and to be allowed to pass up creek to Botner Bingham's land. Consideration for said privilege to be $35.00 per year. Time of lease not to exceed three years.

"J. L. CARNES."

Asher constructed his tram-road covering the distance of seventeen miles, which in part was over the land of Carnes mentioned in the contract. He continued to use his tram-road for the purpose of transporting his lumber until September, 1903, when the appellees prevented him from using it over the Carnes land, necessitating the unloading of the cars at the point of entry upon the Carnes land, and hauling it by wagons around it to the tram-road and again loading it upon the tram-cars to be carried to the railroad, thus causing loss and damage to the appellant.

The appellant paid the stipulated rent for three years and avers that he is ready and willing to pay for the year beginning May 22, 1903.

The facts detailed are substantially averred in the petition, to which the court sustained a demurrer. To review that action of the court the appeal is prosecuted. The theory of the appellee is, that the writing which Carnes gave Asher is a license, but, if not that, it is an easement for the period of three years, determinable at the will of the appellee. The appellant claims that it is a lease, therefore, having remained in possession from the date of its expiration, May 22, 1903, until September, he was, by virtue of the statute, entitled to hold it for one year after the expiration of the lease.

5 Lawson on Rights and Remedies, section 2668, defines a license as follows: "A license is an authority given to do some act or acts on the land of another, without giving any estate in the land itself. It differs from an easement in that the latter is a permanent interest, with a right at all times to enter and enjoy it, while the continuance of the former depends on the will of the person who has created it."

There is a distinction between an "easement" and a "license" although in some cases it is difficult to see a substantial difference between them. An easement is a privilege in land founded upon a deed or other writing or upon a prescription. (Hazelton v. Putnam, 54 Am. Dec., 158.) An easement is a permanent interest in another's land with the right to enjoy it fully and without objection. An easement may attach to the land and pass with the dominant tenement as an appurtenance thereto. The writing in question gave Asher the right to enter upon and take possession of a strip of the grantor's land, and occupy it with his tram road for a period of three years, at a stipulated rental. Asher had the actual possession of the strip of land so occupied, as completely as he would have, had he raised corn or other products upon it. He enjoyed the profits of the strip occupied by him as much as he would have done if he had cultivated it.

Bouvier defines a lease to be:

"A species of contract for the possession and profits of lands and tenements, either for life or for a certain term of years, or during the pleasure of the parties."

In Waller v. Morgan, 18 B. M., 186, the court said:

"To create the relation of landlord and tenant, no particular words are necessary; but it is indispensable that it should appear to have been the intention of one party to dispossess himself of the premises, and of the other to enter and occupy as the former himself had the right to do, pursuant to the agreement between them."

In order that Asher might have become Carnes' tenant, it was not necessary for him to take possession of Carnes' entire farm. He could become a tenant on a part of it as well as of the whole, depending upon the terms of the contract. The contract contemplated that he should take possession of the land for three years at a fixed rental. We conclude that the contract was a lease, and Asher was Carnes' tenant.

Section 2295, Kentucky Statutes, reads as follows:

"If by contract a term or tenancy for a year or more is to expire on a certain day, the tenant shall abandon the premises on that day, unless by express contract he secures the right to remain longer. If, without such contract, the tenant shall hold over, he shall not thereby acquire any right to hold or remain on the premises for ninety days after said date, and the possession may be recovered without demand or notice, if proceedings are instituted within said time. But if proceedings are not instituted within said time, then none shall be allowed until the expiration of one year from the day the term of tenancy expired; and, at the end of said year the tenant shall abandon the premises without demand or notice, or stand in the same relation to his landlord that he did at the expiration of the term or tenancy aforesaid; and so from year to year, until he abandons the premises, is turned out of possession or makes a new contract."

Asher having remained in possession of the land for ninety days after the expiration of his lease, he was entitled to remain for one year thereafter. It is suggested that the statute was intended for the benefit of the tillers of the soil, as it would be supposed that if the tenant remained on the premises during that period, he would have pitched his crop; therefore, should not be disturbed, in the enjoyment of the premises for the year ensuing the expiration of the lease. This may have been the consideration which induced the enactment of the statute, but its terms are broad enough to cover other leases. It applies to a case where a house is rented without a foot of ground attached to it, susceptible of cultivation. It necessarily applies to the case under consideration. In our opinion the court erred in sustaining the demurrer to the petition.

The judgment is reversed for proceedings consistent with this opinion.

ÆTNA LIFE INSURANCE CO. v. MILWARD.

(Filed September 30, 1904.)

1. Accident policy—Death—Proof—Circumstantial evidence—Suicide—Verdict—Decedent held a $10,000 accident policy, payable upon the condition that he came to his death by "violent external and accidental means." He was found dead from the effect of a pistol shot wound in his head, his body partially disrobed as he had slept, lying in a small entry at the rear of his residence. By his side were two pistols, both loaded, but in one a discharged cartridge. The shot entered his head on the left side behind the ear and passed through, nearly in a straight line. The pistols were lying rather to his right side. He was right handed. His domestic relations were pleasant, being happily married, with two young children, good health, prosperous in business, 34 years old, of good habits and character and no taint of insanity. The loaded pistol was his, the owner of the one with the discharged cartridge was unknown. The question being submitted to the jury, whether his death was caused by suicide or by accidental means, they found the latter—Held, That the jury were warranted, under the evidence, in finding that the death was not by suicide.

2. Pleading—Necessary allegations—Negative averments—In an action upon an accident policy it is necessary to allege and prove that the insured came to his death by violent, external and accidental means, within the time covered by the policy; but it is not necessary to negative any of the provisions of the policy not made conditions precedent to his right to institute the suit. It is enough for the plaintiff to declare, upon the clause of the contract under which he deems himself entitled to recover, stating the facts, showing prima facie such right.

3. Evidence—Verdict of coroner's jury—In an action to recover upon a policy of insurance, payable upon the death of the insured, caused by violent, external and accidental means, the finding of a coroner's jury that the death of deceased was caused by suicide, was properly rejected as irrelevant and incompetent evidence.

4. Proof of death—Notice to the company—Decedent's death having occurred November 21, 1900, an averment in the petition "that on December 11, 1900, the plaintiff made out and presented to defendant proof of the death of deceased, and that said death was the proximate and sole result of violent external and accidental means, to-wit, a gunshot wound, and within ten days thereafter defendant acknowledged having received such proof, and

that same was in due and proper form," was a sufficient allegation as to furnishing proof of death.

Breckinridge & Shelby for appellant.

C. J. Bronston and John R. Allen for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

This is an appeal from a judgment for $5,000, in favor of the appellee (plaintiff below), as the designated beneficiary in a policy insuring her husband, Charles S. Milward, against accidental death. The defense, as made by the answer, consists of a denial that the death was the result of an accident, and a claim that it was due to suicide. The principal points of complaint presented on this appeal are, that the verdict was unauthorized by the evidence; that the petition was insufficient, and that competent evidence on appellant's behalf was rejected by the trial court.

The insured was found dead from the effects of a pistol shot wound in the head. His body, partially disrobed as he had slept, was discovered lying in a small porch or entry, which was partially enclosed, at the rear of his residence. By his side were two pistols, both loaded, but in one a discharged cartridge. The shot entered his head on the left side, behind the ear, and passed through in nearly a straight line. The two pistols were lying rather to his right side. He was right handed. His domestic relations were apparently pleasant, being happily married. He had also two young children. His health was good. His mercantile business was prospering satisfactorily. He was about 34 years old, and a man of good habits and character. The shot which killed him was fired about dawn November 21, 1900. It was heard by but one person, who testifies in the record. The tragedy was unseen by any witness in the case.

Appellee, widow of deceased, and her two infants, slept in an up-stairs room, but were not aroused by the shot. There were no other evidences of violence, nor of the presence of another person at the scene of the killing. The back yard where it occurred, had walks leading to it which were paved, and would not, for that reason, have shown tracks.

One of the pistols probably belonged to deceased, or had recently been in his possession. It was a nickel plated Iver Johnson revolver. The other, a blued steel barrel pistol, was not identified as to its ownership. It was from the latter the fatal shot was fired.

There was some evidence that the insured was a man of intense application to business, was of a nervous temperament; that he had, a year or so previous to his death, consulted a physician who advised him to take a rest on account of nervous exhaustion or depression, and that he took a vacation of two or three weeks in the Northwest. After his return the physician found him restored to health and quit treating him. A few days before his death deceased complained of pain in the back of his head.

Appellant argues that the verdict is flagrantly against the evidence, because, it is contended, the evidence, of which the foregoing is a fair epitome, shows clearly that the death was suicide. Or, in any other view of it, it fails to show that the death was caused by accidental means, and, therefore, there was a failure of proof on behalf of the plaintiff.

As indicated, the evidence is wholly circumstantial. It may none the less point as unerringly to a correct conclusion as if detailed by eye-witnesses. It will not do to say that in such case the jury is required to "guess" the cause. It is unlike, when the circumstances do not show the cause of the occurrence, as in Louisville Gas Co. v. Kaufman, 20 Ky. Law Rep., 1069, and Hurt v. Louisville, 25 Ky. Law Rep., 759. The nature of the wound shows conclusively that the cause of the death was both violent and external. The date of the occurrence is within the duration of the policy of insurance. The only remaining question was, whether it was accidental in the meaning of the contract. Aside from legal presumptions, about which the jury were not instructed in this case, though they may properly have been, we are unable to say from the evidence that the verdict is not true. It is reasonably clear, at least most probable, that if decedent had a pistol at all, it was the one, and so far as the record shows, the only one, to which he had access—the nickle-plated revolver, from which the fatal shot was not fired. That it was not fired by him is indicated by the place of the wound, its entry being on the opposite side of the head from that which would have been the easiest and most natural, if suicide had been done. Absence of scorching of the hair and of powder burn in sufficient quantity, also negative the theory that a right handed man had placed the muzzle of the pistol where it must have been done, if done by decedent, to have inflicted that shot. That the pistols were found on the right side of the body seems to refute the theory that decedent, contrary to his habit and instinct of using his right hand, used his left in this act. The instantaneous effect of such a wound is to produce paralysis of the volition. Death was immediate, in so far as the ability to dispose of anything in his hand was concerned. The surrounding circumstances are not in harmony with the view that the insured took his own life. They tend to show that the act was not the probable course of a sane person who was bent upon destroying his life. There was no hint in the evidence of any symptom of insanity. Circumstantial evidence tells the story of a past transaction by the similitude between the things shown to have been done, and what, in the experience of mankind, has been found to be generally the cause or result of similar occurrences. From these the mind deduces the most probable cause of the occurence in question. The result of this process of reasoning has been found to be so unvarying as to justify its adoption as a rule of evidence. The jury were authorized to apply to the facts detailed, their knowledge of human nature, and to indulge, in aid of deduction, predicated upon the established facts, those presumptions which common experience has established, and which therefore, the law allows. The love of life is instinctive; self-preservation is its first, as it is its strongest law. In the absence of mental derangement, of any known fact calculated to unseat the judgment and to overcome the love of life, the inquiring mind naturally and properly looks for other causes of the deed, when death by violence occurs. When all the facts are inconsistent with the theory of suicide, except simply that of the dead body in the presence of its instrument, it would be unnatural and illogical to confine the inquiry to that incident and declare the death suicide. The act of suicide is not only unnatural, but is highly immoral and criminal. The presumption of law is against it. So is the presumption of fact. The jury

ought to have given place to that presumption in determining what, in the light of the evidence, was the cause of the death. By this process they were warranted under the evidence in this case, in saying that the death was not suicide.

Nor does the law presume that murder or other crime was committed. There was not enough evidence probably to say that murder was done. Still, the inquiry had led the jury to logically say that the death was from a cause violent and external, and not purposely self-inflicted.

Such a wound not having been inflicted with suicidal intent, was necessarily done by the decedent unintentionally, or, as the evidence indicated to be more likely, was done by some one else. As the presumption is also against crime, in the absence of evidence of the fact the jury was not authorized to say that the wound was purposely inflicted by another. The conclusion, from this state of the record, inevitably follows that decedent came to his death by an unintentional, that is, an accidental shot, fired either by himself, or by some other person unknown to the jury. Nor does it matter so far as the liability of appellant is concerned, which it was. In either event it was an accidental death within the meaning of the policy of insurance.

2. In an action upon an accident policy of insurance, it is necessary for the plaintiff to allege and prove that the insured came to his death by violent, external and accidental means, within the time covered by the policy. It is as necessary to allege and prove the last as either of the other requisites. Though appellant complains that in this case the burden was not so imposed, we think it was. The petition so charged. The court so ruled in the admission of evidence. In the instructions it was also observed.

The policy of insurance declared upon, contracted against injury and death through external, violent and accidental means. It contained many provisions for graduated indemnity, depending upon the nature and extent of the injury, and the calling and exposure of the insured—more to be paid in certain contingencies than in others. In a suit upon such policy it is not necessary for the plaintiff to state that he was not suing to recover under certain clauses not relied on, or for certain injuries not received, nor to negative any of the provisions of the policy not made conditions precedent to his right to institute the suit. (National Benefit Ass'n. v. Bowman, 110 Ind., 355; Jones v. U. S. Mutual Acc. Ass'n., 99 Iowa, 652; Railway Officials, &c. v. Drummond, 56 Neb., 235; Whitlatch v. Fidelity, &c. Co., 71 Hunn, 146; Employers, &c. Corp. v. Rochelle, 13 Texas, Civ. App., 232; Coolidge v. Continental Ins. Co., 67 Vt., 14; Troy Fire Ins. Co. v. Carpenter, Wis., 32; Coburn v. Travelers Ins. Co., 145 Mass., 226; May on Insurance, 590.) It is enough for the plaintiff to declare upon the clause of the contract under which he deems himself entitled to recover, stating the facts showing prima facie such right. The conditions of the policy that would excuse the insurer from payment, or that would reduce the principal sum insured, are matters of defense. (May on Insurance, 589, etc.) American Accident Company v. Carson, 99 Ky., 441, is relied on as sustaining a contrary doctrine to that announced. That opinion upon first reading, seems to recognize a distinction between conditions endorsed upon the back of the policy "and, therefore, not necessary to be adverted to it in declaring on

the contract," and those upon its face. What other conditions were present "on the face of the policy," other than that of occupation, the opinion does not state. As conditions which would excuse or reduce the recovery, which are, by the agreement of the parties, made part of the contract, whether endorsed in the back or incorporated in the face of the policy, have the same legal effect, we must conclude that the court intended by the distinction noted, to require that the petition should set out a case within those that were precedent to the plaintiff's right of recovery. Such construction is the one in harmony with the weight, and indeed the whole drift of authority on this subject.

In this case the petition charged that the insured was injured on the 21st of November, 1900, by a gunshot wound, and came to his death therefrom immediately on that day; that the gunshot wound was accidental, external and violent, and that the death resulting from it was due solely to external, violent and accidental means.

Without negativing the many conditions of the policy, excusing the insurer in whole or in part from the principal sum insured, the petition stated fully a cause of action upon the policy for the principal sum, $5,000.

3. On the morning of the death of the insured, the coroner of Fayette county empanelled a jury to inquire into its cause. Evidence was heard and the premises examined by the jury, five of whom signed and returned a verdict that the body examined by them was that of Charles S. Milward, who came to his death from a pistol shot wound through the brain, the pistol being fired by his own hand. One of the jury refused to join in the verdict. Appellant offered the record of the coroner's inquest as evidence on its behalf in this trial. It was rejected by the trial court, of which appellant complains.

We are of opinion that the record and the finding of the coroner's jury were irrelevant as evidence. While the coroner's inquest is a public function, made on behalf of the State, and while a record of it is required to be made and kept, it cannot, on any well-grounded principle of American common law, become evidence in another inquiry or suit as to the cause of the death investigated. The business of this tribunal is, by statute, to collect promptly the facts concerning deaths which the coroner has reason to believe were the result of crime. Like the grand jury, it projects an ex parte investigation of supposed or alleged crime resulting in homicide, for the purpose of aiding in the administration of the criminal laws of the State. The accused is neither represented, nor has the right to be, at the inquiry. For even better reasons, other persons who have property interests dependent upon the cause of the death, would not be allowed to participate in the hearing before the coroner's jury, with a view to establishing rights by the verdict. That tribunal is unprovided with much of the necessary machinery for conducting such inquiries. It would, it seems to us, be abhorrent to the principles of the common law as administered in this country, that one not so represented should be bound by the finding of the coroner's jury—his rights concluded without a trial at which he could be heard—a trial "behind his back," as has been said. If such verdict be admissible as evidence, it follows from its very nature that it might alone constitute proof of the main fact, and of every essential fact in issue. It might, for exam-

ple, not only show the fact of death by violent and external means, within a date covered by the policy, but find also that it was accidental, or was not accidental. In either event, a property right of one or the other of the litigants would be determined by a proceeding of which no notice was given to him, upon testimony not preserved, and may be wholly incompetent or insufficient, and without an opportunity to cross examine the witnesses whose oaths established it. Thus he would be deprived of his property without "a day in court," for the first verdict might be enough, if the only evidence offered or obtainable, and the second one would be merely a formal ratification. If the verdict of the coroner's jury is not binding upon the world as a proceeding in rem., it could not be admitted as evidence on any other ground. It might be proof of the fact of the death of the person examined, and of the identity of the body. Further than that we are not prepared to admit it.

In England the coroner is not only a judicial officer as well as ministerial, but his court is a court of record. His jurisdiction there, extended far beyond the possibilities here. His importance and use of that court may have justified its rank in England, and there accrediting its judgments as those of courts of record in proceedings in rem., are usually accorded.

Anciently when the goods of a suicide passed to the crown, and when the property of one attainted escheated to the lord, and when death resulted from misfortune or negligence (until the statute of 10 Vict., 62), the deodand was forfeited to the township for use of the King's almoner, the coroner's verdict and the escheator's inquest were treated as judicial findings in rem. and were conclusive evidence as such, although they later came, mainly through the intervention of Lord Hale, to be admitted as rebuttable evidence only. (Starkie Ev., 289, 404.) Our system of inquests was not designed for such purpose. Neither the ancient prerogatives of these functionaries, nor the presumptions attendant upon their findings, can have a place in our jurisprudence.

Able counsel present the argument in behalf of the admissibility of this evidence with much earnestness, and have cited a number of cases from other jurisdictions in support of their contention. In Ætna Life Insurance Co. v. Kaiser, 24 Ky. Law Rep., 2454 in disposing of an offer to introduce the coroner's inquest as evidence on the trial against the insurance company on the policy, the court said: "We are clearly of opinion that this was incompetent and was properly rejected." As that opinion did not cite or discuss the authorities, it is assumed in argument that it was adopted not after mature consideration of the question.

The leading case in America of the class relied on by appellant, is the U. S. Life Ins. Co. v. Vooke, 129 Ill., 557 (6 L. R. A., 65.) In that case the coroner's jury had found that the insured had come to his death by a pistol shot fired by his own hand while laboring under a fit of temporary insanity. Although a copy of the inquest was furnished to the insurance company by the beneficiary, in the proof of death, the court elected to ignore that fact and proceeded to a discussion and decision of the more difficult proposition, whether the inquest was not competent as original evidence of the manner in which the assured had died. The opinion cites a number of English cases and text writers and English statutes, concerning the juris-

diction of the coroner and the effect of verdicts rendered in his court. It was declared that this ancient office was judicial as well as ministerial, and so recognized by Parliamentary acts, from which it was said the Illinois statute creating the office was not substantially different. From the similarity of the statutes, which the court held to be but declaratory of the common law, it was decided to apply the English doctrine as to the nature of the inquest. People v. Devine, 44 Cal., 452, is the only American authority discussed in the opinion as tending to support its conclusions. The question in Devine's case was, whether the evidence of a witness, given before the coroner, could be used to contradict the same witness when testifying about the same transaction in a trial court. The California court admitted the impeaching evidence on the ground that under, their statute, the coroner's court was a judicial tribunal whose records were to be treated as other judicial records.

In a later case in California, (Walther v. Mut. Life Ins. Co., 65 Cal., 417), accompanying the proofs of death, and being a part thereof, was a copy of the coroner's inquest. These papers were all introduced by the plaintiff, but the trial court refused to consider the inquest as evidence. Upon the authority of Insurance Co. v. Newton, 22 Wall., 32, that action was reversed. It does not seem to have been regarded by the California Supreme Court that the inquest was competent otherwise than as an admission against interest made by the plaintiff. Nor was People v. Devine alluded to in that opinion. Insurance Co. v. Newton, 22 Wall., 32, discusses the admissibility of the inquest only when it was made part of the proof of death by the complainant. The court held that it then became a material statement by the plaintiff, as an admission against his interest, and was relevant on behalf of the defendant on that ground. This was followed in Insurance Company v. Higginbotham, 95 U. S., 390.

In Nutzradt v. Modern Brotherhood, 112 Iowa, 522, the issue was whether the insured had died a suicide. As to the admissibility of the verdict of the coroner's jury and its effect, the court said: "Plaintiff's counsel do not question its admissibility, and, in view of the purpose of the inquest and the manner in which it was required to be conducted, we think it is competent evidence in such an issue as this." Its effect was declared on authority of Greenleaf on Evidence, 556, and Insurance Company v. Kieglast Vocke supra, to be not conclusive.

In Knights of Honor v. Fletcher, 78 Miss., 337, also cited by appellant, the rules of the order required, as a condition precedent to the right of recovery, that in case of sudden death the certificate of the coroner would be invariably required. The proof of death was furnished as required, including the coroner's inquest. The court decided that on that ground, as well as independent of it, the inquest was competent evidence, citing without comment U. S. Life Ins. Co. v. Vocke, supra; Walther v. Mut. Life Ins. Co., supra, and Insurance Co. v. Higginbotham, 95 U. S., 380, supra, with Fien v. Covenant Mut. Ben. Ass'n., 60 Ills. App., 274, as the authority for the conclusion.

Eliminating the cases used in the foregoing citations, which turned upon the peculiar phraseology of local statutes, or were bottomed on other principles, as the 22 Wall. case, and Higginbotham case (95 U. S., 380), we find

the Vocke case (129 Ill., 557) the origin, apparently, of the doctrine in this country for the principles for which appellant contends.

The Supreme Court of Colorado, in Germania Ins. Co. v. Lewin, 24 Colorado, 43 (65 Am. State Reports, 215), holds to the contrary doctrine—that which is applied in this State. The Vocke case, supra, Pyle v. Pyle, 158 Ill., 289, following it, and the California case rested upon it, are analyzed and rejected. As showing the impolicy of the old English rule if attempted to be applied to insurance cases when suicide was a controlling question, that court reasoned thus: "In case of death under suspicious circumstances, or resulting from accident, the rule permitting inquisitions to be used in evidence, would result in a race and scramble to secure a favorable coroner's verdict that would influence, and perhaps control, in case suit should be instituted against life insurance companies upon policies of insurance, and in cases of accidents occurring as the result of negligence on the part of corporations operating railways, street car lines, mining for coal, the precious metals, etc. Law writers of late have frequently animadverted upon the carelessness with which such inquests are frequently conducted, and to allow inquisitions to be used in a suit between private parties upon a cause of action growing out of the death of the deceased, as in this case, would be to introduce an element of uncertainty into the practice which, we think, would be contrary to public policy and pernicious in the extreme, and for these reasons we conclude, upon careful consideration, that the safer and better rule is to exclude such inquisitions." (State v. County Com'rs, 54 Md., 426; Goldschmidt v. Mutual Life Ins. Co., 102 N. Y., 486.)

4. The petition averred the furnishing to the insurer of the proof of death within the period allotted by the policy. The allegation was: "Plaintiff states that on the 11th day of December, 1900, this plaintiff made out and presented to defendant proof of the death of the said Charles S. Milward, and that said death was the proximate and sole result of external, violent and accidental means, to-wit, a gunshot wound, and within ten days thereafter defendant acknowledged having received such proof, and that same was in due and proper form."

The allegation followed substantially the requirement contained in the policy, as to furnishing proof of death. The answer traversed the allegation just quoted. Appellant was ruled on plaintiff's motion to produce the proof that was furnished, which it did. The court alone considered this proof and held it to be sufficient. The proof, as furnished, was substantially of the character of that given for the plaintiff before the jury on this trial, though in more condensed form. The complaint is that it was not "affirmative proof that the death of the insured was the proximate result of accidental means." It was not intended by the parties to the contract, nor would it be permitted to require as a condition precedent to a suit upon the policy, that the complainant should furnish more and a higher grade of proof than would suffice to establish his claim in a court of law. From what has been said in an earlier part of this opinion, it will be seen that the proofs were sufficient for the purpose of recovery. The plaintiff was not bound to furnish more proof to the insurer than was necessary to establish a prima facie case in her behalf. (Insurance Co. v. Rodel, 95 U. S., 232.)

Perceiving no error prejudicial to appellant, the judgment is affirmed with damages.

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COURT OF APPEALS OF KENTUCKY.

DAVIS v. COMMONWEALTH.

(Filed September 30, 1904—Not to be reported.)

Local option—Construction of statutes—Appellant was convicted for violation of the local option statute upon the following state of facts: He sold a case of beer in Providence, a local option town, to Young who paid him $3.50 for it. Appellant kept the beer in the name of Cook Brewing Co., an Indiana corporation, which took out a license under its contract with appellant as wholesale dealer at Providence. He furnished his team, made the sale to whom and in the manner he pleased and reshipped the cases and bottles to the brewery where he was credited with the schedule rate, receiving the difference between that and the selling price. Held—That the court below was justified in finding that the scheme was one to evade the local option law at Providence where the sale was made.

Dorsey & Stanley for appellant.

N. B. Hays, Lorraine Mix and S. V. Dixon for appellee.

Appeal from Webster Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was convicted of a violation of the local option statute under these circumstances: He sold and delivered a case of malt beer to witness, Young, who paid the sum of $3.50 for it. The beer was kept at Providence, which was a local option town, by apppellant in the name of the Cook Brewing Co., a corporation of the city of Evansville, Ind. The usual cost of the same beer at Evansville was $2.25 per case of forty-eight bottles. It cost thirty cents to ship it from Evansville to Providence. It sold at Providence, when saloons were permissible, at the price of $3 per case, or ten cents per bottle. Six extra bottles were put into the case on top of the other bottles, because the forty-eight bottles contained slightly less than five gallons, the minimum, under the statute, constituting a wholesale transaction.

Appellant's contract with the brewery was that it was to and did take out a license as wholesale dealer at Providence, and ship the case to appellant in their name, furnished his own team, at his own expense, made the sale to

whom and in the manner that he pleased, reshipped empty cases and bottles to the brewers, who credited him at schedule rate, the net result of which was that the brewers got their customary price at the brewery for their beer, and appellant got the difference between that and the selling price, after deducting his expenses. The lower court found, and we think was justified under the facts, in finding that this was a trick or devise to evade the local option law in that district. (Section 2570, Kentucky Statutes.) Under the present statute (Act approved March 23d, 1904), no one but a distiller or manufacturer of intoxicants can sell at wholesale within a local option district. This arrangement shows that it was the obvious purpose of the parties to it to defeat the operation of the statute by indirectly procuring the right for appellant to do what the statutes forbid his doing. We do not, however, decide, as it is not necessary for us to pass upon the question in this case, that a non-resident brewer can obtain legally a license to sell beer in a local option district in this State, his brewery and place of business not being within such district.

The judgment is affirmed.

BEGLEY v. COMMONWEALTH.

(Filed September 30, 1904—Not to be reported.)

Criminal law—Principal and accessory—Appellant, who was convicted upon an indictment charging him with being an accessory before the fact to robbery, complains of his conviction and asks a reversal upon the ground that he was tried before the principals, or any of them were either tried or convicted. Held—That under section 1128, Kentucky Statutes. appellant's conviction could not be made to depend upon that of the principals, or any of them, or even upon their being in custody, although in order to convict him it was necessary to establish the guilt of the principals of the crime he procured them to commit.

Lewis & Calvert and W. L. Jett for appellant.

N. B. Hays and Loraine & Mix for appellee.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Jack Begley, Henry Johnson and Farris Feltner, were indicted in the Leslie Circuit Court as accessories before the fact in the crime of robbery. Appellant was accorded a separate trial which resulted in his conviction, his punishment being fixed by verdict of the jury and judgment of the court at confinement in the penitentiary for the period of three yeras.

The persons alleged to have been robbed were Howard and Nelson Hamilton. Sam Begley, Russell Wotan and Ned McHone were the alleged principals in the commission of the crime, it being charged in the inductment, in apt language, that they robbed the Hamiltons of $300, and were feloniously induced and hired to do so by the appellant, Johnson and Feltner. The record shows that one of the principals, Ned McHone, turned States' evidence and was given immunity from punishment for the robbery; that Sam Begley, another of the principals, has never been apprehended because a fugitive from justice, and that Russell Wotan, the third principal, though pres-

ent at the trial of appellant in the lower court, has not been apprehended, tried or convicted. It appears, however, that all three of the principals were indicted for the robbery. The appellant, Jack Begley, complains of the judgment of conviction and now asks its reversal solely upon the ground that he, though only charged in the indictment to be an accsesory before the fact, was tried and convicted before the principals, or any of them were either tried or convicted, and before the latter was in custody or on bail.

Undoubtedly the rule of the common law was, and is, that the principal must be disposed of before the accessory. This rule being founded upon the maxim, "Accessorius sequitur naturam sui principals." An accessory before the fact is he who, being absent at the time the act was committed, procures, counsels, commands, advises or abets another to commit it.

Section 1128, Kentucky Statutes, provides that "In all felonies, accessories before the fact shall be liable to the same punishment as principals, and may be prosecuted jointly with principals, or severally, though the principals be not taken or tried, unless otherwise provided in this chapter."

As said in the case of the Commonwealth v. Hicks, ante, 511, in discussing the purpose and effect of this statute, "The very object of the statute is to make the punishment of the accessory entirely independent of the conviction or punishment of the principal." So in this view of the statute (and we think it susceptible of no other construction), it is clear that the conviction of appellant could not be made to depend on that of the principals, or any of them, or even upon their being in custody, although in order to convict him as an accessory before the fact, it was necessary upon his trial, for the Commonwealth to establish the guilt of the principals, or some of them, of the crime which he procured them to commit. And the evidence in the record seems to have convinced the jury of both his and their guilt.

An examination of the opinion, in Able v. Commonwealth, 68 Ky., 698, relied on by counsel for appellant, will show that it does not conflict with the views herein expressed.

The very elaborate instructions given by the lower court seem to cover every aspect of the case, and no question is raised as to their correctness.

Wherefore, the judgment is affirmed.

BLACK v. COX, &c.

(Filed September 30, 1904—Not to be reported.)

Land—Ownership—Title by possession—Notice—The appellant obtained the legal title to the lot in controversy, in 1869. Nelson Cox, the husband and ancestor of appellees, took possession thereof the same year or the following year, but, whether as tenant or purchaser of appellant, the evidence is silent. Appellant claims that Cox held it as his tenant, which is denied by appellees. Held—As appellant introduced no proof that Cox entered or held the property, under him, and as appellees proved by the neighbors of Cox that he claimed it as his own, occupied and improved it up to the time of his death, which was more than 32 years, and devised it to his wife and children, it is reasonable to presume that appellant must have known of this adverse holding, and the judgment of the lower court adjudging the property to the appellees, will not be reversed.

Frank Chinn for appellant.

Ira Julian for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

The subject of this action is a lot with two small houses on it, situated in the city of Frankfort, Ky., of which appellant and appellees claim to be the owners.

Appellant obtained the legal title to this property by a conveyance from one Baltzell. in the year 1869. The husband and ancestor of appellees took possession of this lot in the latter part of that year, or the first of the succeeding year. The evidence is absolutely silent as to the circumstances under which he took possession, whether as a purchaser or a tenant of the appellant.

The appellant gave his own deposition in his behalf, which was objected and excepted to by appellees, which under section 606, of the Code, was incompetent evidence, as all of the statements in his deposition were with reference to alleged contracts, statements and conversations had with the deceased, Stephen Cox. This testimony being incompetent, leaves the appellant without any proof showing the circumstances under and by which the deceased Stephen Cox, entered upon and occupied this property from the year 1869, to the date of his death, in the year 1901. Not a witness stated that appellant made any claim to be the owner of this property or have any interest therein, from the year 1869, until after the death of Stephen Cox. Appellant's counsel claims that as Stephen Cox entered into the possession of this property and held it by the permission of the appellant and under his title. such holding by Stephen Cox never ripened into title as against the appellant; that it is conclusively presumed, in the absence of proof to the contrary, that Cox's holding continued as it began. This contention can not avail appellant, as he introduced no proof that Stephen Cox entered as his tenant or that he ever recognized appellant's title to the property. On the contrary, the proof shows by the neighbors of Cox, that he claimed it as his own and exercised acts of ownership over it by improving it, from the time he entered on it to the time of his death, which was more than 32 years. That he listed it for taxation and paid the taxes thereon. That during this time it was sold from him for taxes and it was redeemed by him. That just prior to his death he made and executed a will by which he devised it to his wife for life with remainder to his children.

While the proof does not show actual notice to appellant of the adverse claim and holding of this property by Stephen Cox, it does show that the place of appellant's business was within a block and a half of this property, and that it was generally known in that vicinity that Cox was claiming and occupying it as his own during all this time. Therefore, it is reasonable to presume that appellant must have known of the claim of the deceased.

Appellant claimed that he put Cox in possession with the understanding that he was to live there for the remainder of his life by paying the taxes thereon. This is denied by appellees and there was no proof introduced to sustain the allegation.

While the proof in this case leaves the matter in some doubt as to who is the real owner of the property, we do not feel authorized to reverse the judgment of the lower court in adjudging the property to the appellees.

Wherefore the judgment is affirmed.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT v. EDELIN.

Filed September 30, 1904—Not to be reported.)

1. Municipal corporation—Grading street—Injury to private property—Under Constitution, section 242, where a municipal corporation in grading a street, injures private property in any way, compensation can be recovered therefor, although there may be no actual invasion of the claimants property lines.

2. Contemplated improvements by city—Enhanced value of owners property—The fact that the appellees property may be enhanced in value by the contemplated opening of other streets by the city council, is not competent evidence to be considered by the jury to offset the damages done to appellee's property by the grading of the street in front thereof.

Ira Julian for appellant.

R. L. Greene for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, T. L. Edelen, was the owner, prior to 1899, of a lot of ground fronting Ewing avenue, 295 feet, on which he had erected an expensive private residence, and the surrounding curtilage was handsomely improved with outbuildings, flower beds, etc. During the years 1899 and 1900, the appellants graded Ewing Avenue, along the entire front of appellee's lot, and in doing so, cut down the street from two to ten feet, rendering necessary the erection of a retaining wall, and the grading and terracing of the lot, and the construction of suitable avenues of ingress and egress. This suit was brought by appellee to recover damages for these injuries. The answer of appellant admits the grading of the street and does not substantially controvert that appellee's lot was left in the condition described, but denies liability, for the alleged reason that the grading and cutting of Ewing street, in front of plaintiff's lot, was under an ordinance of the city, and the work was done under the supervision and direction of the city engineer, who were alone, under the law, vested with discretion and authority to determine the manner in which Ewing street should be improved. They deny the invasion of plaintiff's property, or that he is entitled to damages by reason of any inconvenience or injury which resulted to the premises from the prudent construction of the street. A jury trial resulted in a verdict and judgment in favor of plaintiff for $500, and the defendant has appealed and asks a reversal on two grounds. First, because there was no actual invasion of the defendant's property lines in the grading and construction of the street. This rule of construction obtained in this court under the old Constitution, but in the case of the City of Henderson v. McLain, 19 Ky. Law Rep., 1450, it was expressly decided that section 242, of our present Constitution had abolished the requirement of direct physical injury to the property in order to estab-

lish a claim for damages; and that where a municipal corporation in grading a street injured private property in any way, compensation could be recovered therefor. This case has been followed so often that it is unnecessary to consider the question further. The next ground of complaint is that the circuit judge erred in refusing to allow appellant to interrogate certain witnesses as to what in their opinion, would have been the difference between the value of appellee's property, if Ewing street had been opened up all the way from Second Avenue to the Louisville pike, as contemplated by the council and ordinance. There is no contention that the street had been improved from these respective terminii. On the contrary it was not opened to Fourth Avenue or to the Louisville pike, but only for a few squares between these two proposed ends. The trial court properly limited the interrogation to the sections of the improvement, which had been completed under the ordinance. No objection is made to the instructions and after a careful examination of the record, we have reached the conclusion that the judgment complained of is abundantly supported by the testimony.

Judgment affirmed.

CLAY CITY v. ABNER.

(Filed September 30, 1904—Not to be reported.)

1. Municipal corporations—Streets—Injury to pedestrian—Liability of city—Appellee was injured by falling into a ditch on Third street, and awarded damages. The uncontradicted evidence shows that the city had not accepted or improved Third street. The court in its instructions to the jury assumed that Third street had been dedicated to and accepted by the city and that it was its duty to keep it in a reasonably safe condition for travel by the public. This was error.

2. City council—Improvement of streets—Conclusiveness of its judgment—We understand the rule to be that it is for the town council to determine whether a public way shall be improved at all, and, if it is, the manner and extent of it. Unless the plan they adopted is one so obviously dangerous as would show a failure to consider, or a purpose to misconstruct the work, the judgment of the governing body of the town as to the plan, is conclusive. The town is not liable in damages for accidents that may occur on the highway because the very best plan or even a better one in view of the jury, was not adopted. A municipality is in no sense a guarantor of the safety of the traveling public, upon its highways. The corporate authority is only bound to use reasonable skill and diligence in making the streets and sidewalks safe and convenient for traveling.

Hazelrigg, Chenault & Hazelrigg and John D. Atkinson for appellant.

W. D. Jackson and C. F. Spencer for appellee.

Appeal from Powell Circuit Court.

Opinion of the court by Judge O'Rear.

Clay City belongs to the fifth class. By section 3643. Ky. Statutes, it is authorized and empowered to order any work its council may deem necessary to be done upon the sidewalks, streets and public places of the city. Some years ago promoters, who planned the town, had recorded a plat, upon which was designated numerous streets and alleys with lots abutting

thereon. When the town came to be incorporated, and its government organized, it does not seem to have accepted all the streets so dedicated, nor to have undertaken the onerous task of grading or paving them all. Fourth avenue and Third street, sometimes called by other names in the record, crossed at about right angles. Fourth avenue had been accepted and improved by the city. The uncontradicted evidence of the city is, that it had not accepted or improved Third street. At the intersection of the two streets a bridge had been built and maintained for several years to accommodate travel along Fourth avenue.

Appellee, on a dark night, in going to his home, which necessitated his crossing this bridge, approached it from what would have been Third street. He fell into a ditch, which had not been filled up in Third street, by the side of this bridge. He sued the city and recovered a verdict for his injuries.

In submitting the case to the jury the instructions assumed that Third street, where plaintiff was traveling at the time of the injury, had been dedicated to, and accepted by the city, and it was under the duty to keep same in a reasonably safe and fit condition for travel by the public. This was error. Under the state of the record before us, plaintiff did not show himself entitled to recover for any injury while attempting to travel upon what would have been Third street.

The court also told the jury that if the bridge at the connection of Third street and Fourth avenue was constructed in such way, or in such condition as not to be in a reasonably safe state for pedestrians, passing from Third street to Fourth avenue, when using due care and prudence, that the city was liable. This instruction is open to the objection above alluded to, as well as the further criticism, that it seems to substitute the judgment of the jury as to what would be a fit and proper improvement for the town, for that of the town council. We understand the rule to be that it is for the town council to determine whether a public way shall be improved at all, and if it is, the manner and extent of it. They are selected particularly with reference to their fitness and interest in such matters. Unless the plan that they adopted is one so obviously dangerous as would show a failure to consider, or a purpose to misconstruct the work, the judgment of the governing body of the town as to the plan, is conclusive. The town is not liable in damages for accidents that may occur on the highway, because the very best plan or even a better one in the view of the jury, was not adopted. A municipality is in no sense a guarantor of the safety of the traveler upon its highways. The corporate authority is only bound to use reasonable skill and diligence in making the streets and sidewalks safe and convenient for traveling. (Teager v. Flemingsburg, 109 Ky., 746.)

The instructions exacted a higher degree of care of the city than is above indicated. The action is not brought because the city has neglected to keep the improvement complained of in repair or for negligence otherwise than in the adoption of the original plan of construction.

For the reasons indicated the judgment is reversed and cause remanded for a new trial not inconsistent herewith.

NELMS, &c. v. COMMONWEALTH.

(Filed September 30, 1904—Not to be reported.)

Accomplice—Homicide—Instructions—Upon the trial of this prosecution, Charles and William Nelms were convicted of the murder of Charles Nelms' wife, and sent to the penitentiary for life. One Joe Brim was jointly indicted with them. The defendants have appealed on the ground that on the trial Joe Brim and one Richard Haines testified against them and the trial judge failed to instruct the jury upon the effect of the testimony of an accomplice, as defined by section 241, of the Criminal Code. Appellants claim that Richard Haines, alone, killed deceased, in a quarrel about some money. Held—The evidence conclusively shows that deceased was killed by William Nelms, by the procurement of his brother Charles. The question was submitted to the jury by proper instructions, whether deceased was killed by Haines or by the appellants, and they found that appellants were the guilty parties. Although Joe Brim was jointly indicted with appellants there was no evidence tending to show his guilt. Neither he nor Haines having been shown to be an accomplice, the instruction complained of was not necessary.

E. N. Ingram for appellant.

N. B. Hays for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Settle.

The appellants, Charles Nelms and William Nelms, together with Joseph Brim, were indicted in the Bell Circuit Court, for the murder of Alice Lamb, who was the wife of Charles Nelms, though living under a different name.

The appellants, the two Nelms, were tried together in the court below, were found guilty by a verdict of the jury and their punishment fixed at confinement each in the penitentiary, for life. The record does not show whether Brim has been tried, or what disposition, if any, has been made of the indictment as to him, but it does appear that he testified as a witness upon the trial of appellants, having been introduced by the Commonwealth.

The appellants complain of the verdict and judgment of conviction, but the sole ground urged by the counsel for the reversal of the judgment is, the failure of the trial judge to instruct the jury upon the effect of the testimony of an accomplice, as defined by section 241, Criminal Code.

The facts as presented by the record are in substance as follows: Charles Nelms desiring to rid himself of his wife, Alice Lamb, without the delay or expense of a suit for a divorce, in the hearing of Richard Haines, employed William Nelms to kill her, and paid him therefor $20 by check, which was afterwards cashed by him, at Pennington, Virginia. Charles Nelms, William Nelms and Richard Haines went to Middlesboro together, upon reaching which place, they walked in the direction of what is known as the "Keg House" saloon; William Nelms and Richard Haines entering the saloon, but Charles Nelms went to another part of the town.

Alice Lamb lived on the second floor of a house, that stands but a few feet from the "Keg House" saloon.

After entering the saloon William Nelms met Alice Lamb there and they drank together. She was then intoxicated, or soon became so. In a short

time William Nelms, Alice Lamb, Jo. Brim, Richard Haines and a woman called Rachel, left the saloon and went to the room of Alice Lamb, in the adjoining building.

After remaining in the room for about half an hour, Alice Lamb asked for a drink, and one of the parties handed Jo. Brim some money, with which to go to the saloon and get drinks for the party. Brim left upon that mission and soon after the woman, Rachel, also went out of the room, leaving Richard Haines, William Nelms and Alice Lamb in the room together.

After some time Haines left the room to find Brim, who seemed to be slow in returning with the drinks. Upon reaching the stairway, opposite the door of Alice Lamb's room, after leaving it, he saw William Nelms, sitting by the side of Alice, saw him draw his hand out of his pocket and strike a lick at her throat, with what looked like a razor. Haines then hurriedly descended the stairs and left the building.

Other witnesses testified that Alice Lamb and William Nelms were drinking together in the "Keg House" saloon, shortly before the murder. While Jo. Brim was at the bar of the saloon awaiting the preparation of the drinks he was to take to the room of Alice Lamb, May Shelton entered the saloon weeping, and said that Alice Lamb was bleeding to death. Upon hearing this announcement Jo. Brim went to Alice Lamb's room and in doing so met William Nelms as the latter was leaving the side door of the house, in which her room was situated, but met no other person on the way to or in her room. Upon reaching the room of Alice Lamb he found her upon the floor dead, or dying, from a wound in her throat, which had almost severed her head from her body.

One Belle Teasley, who had seen William Nelms and Alice Lamb drinking together in the saloon, testified that about thirty minutes after thus seeing them, she entered the room of a sick woman just beneath that of Alice Lamb's. In the room of the sick woman she immediately discovered blood running through the ceiling from the room above, and just before entering the room of the sick woman she saw William Nelms coming down stairs from the direction of Alice Lamb's room; but neither saw or heard any other person descend the stairway after she saw him.

From the testimony of this witness and that of Richard Haines and Jo. Brim, it is reasonably certain that William Nelms was the last person to leave the place of the murder, and that he committed the crime.

It appears from the testimony of Steve Haines that he had a conversation with the appellant, Charles Nelms, a few days after the murder, in which the latter said: "They have Lyddell (William Nelms) in jail." And being asked by the witness why, answered: "Lyddell had said I will get you a divorce for $20, and I gave him $20, and they found the woman with her throat cut; I am afraid it will go hard with him." It further appeared that Charles Nelms also had a conversation with Richard Haines on the day of the murder, which showed his interest in and knowledge of the killing of Alice Lamb by William Nelms.

Appellants denied any connection with the murder, or that the appellant, William Nelms, had been employed to kill Alice Lamb. Upon the contrary William Nelms testified that Richard Haines quarrelled with deceased about some money and killed her in the dispute. In addition three or four other

witnesses introduced for the defense testified that Richard Haines admitted to them that he had killed Alice Lamb.

We are of the opinion that the evidence does not show Richard Haines to have been an accomplice of the appellants, or either of them in the killing of Alice Lamb. "An accomplice is one of several equally, concerned in the commission of a crime. The term is generally applied to persons who are admitted to testify against those concerned with them in a crime" (Robertson's Crim. Law, vol. 1, sec. 86; Sizemore v. Commonwealth, 10 Ky. Law Rep., page 1.)

According to the witnesses for the Commonwealth, including Haines, he could not have been a participant in the murder. That is to say the evidence adduced by the Commonwealth fastens the crime upon appellants, and that of appellants conduces to prove that neither of them was concerned with Haines in the commission of the crime, but that he alone committed it. Unless Haines participated or was concerned in the crime with appellants, he is not an accomplice.

So on this point the issue of fact was, whether the murder was committed by the appellants or by Haines. This issue, with such others as should have gone to the jury, was submitted to them under proper instructions, and their verdict having declared appellants the guilty parties, it is not our province to set it aside.

Though the witness, Jo. Brim, was jointly indicted with appellants, there is no evidence whatever tending to show that he had any connection with the crime, and it is not even contended by counsel for appellants that he was an accomplice, consequently the instruction as to the testimony of an accomplice was not necessary, because he was a witness in the case.

From the foregoing expression of our views it follows that no error is perceived in the rejection by the trial court of the instruction asked for by appellants.

Wherefore the judgment is affirmed.

CITY OF LOUISVILLE v. BUTTON.

(Filed October 6, 1904.)

1. Municipality—Tax levy—Purpose—Designation—Street sprinkling—"General purposes."—The levy ordinance for 1904, passed by the common council of the city of Louisville, made no provision for "street sprinkling," notwithstanding it is alleged that appellant had set apart $15,000, derived from the 86¼ cents levy for "general purposes," to be used for sprinkling the streets. Held—Under constitution, section 180 and Ky. Statutes, section 2980, which require that no tax shall be levied by a municipality without designating the purpose for which it is to be applied, and that no tax levied for one purpose shall be applied to another, and Ky. Statutes, section 2981, providing that "in the ordinance fixing for any year the tax rate, the general council shall subdivide its levy as follows: A levy for schools, a levy for the sinking fund, a levy for police purposes, a levy for fire department, a levy for street and sewer cleaning, a levy for sprinkling streets * * * and a levy for general purposes * * *." Without undertaking to define what may be included in the term "general purposes," we are clear that its being enumerated with some dozen other divisions, each

of which is required to be provided for expressly, if at all, negatives the proposition that one embraces the other. The attempted deflection of the "general purpose" fund complained of, was illegal and was propelry enjoined.

Henry L. Stone for appellant.

Lane & Harrison for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, 1st. Division.

Opinion of the court by Judge ORear.

The levy ordinance, for 1904, passed by the common council of the city of Louisville, made no provision for street sprinkling. Of the total levy of $1.86, on each $100, 33¼ cents was allotted for schools; 25 cents for fire department; 11¼ cents for street and sewer cleaning; 10 cents for reconstruction of streets; 5 cents for street repairs; ½ of one cent for construction and repair of sewers; 4½ cents for the House of Refuge; 9 cents for charitable institutions; 6 cents for parks; 4 cents for library; 86¼ cents for general purposes; ½ of one cent for firemen pension fund, and ¼ of one cent for the Board of Children Guardian. Notwithstanding it is alleged that appellant had set apart about $15,000, derived from the 86¼ cents levy, for general purposes, to be used in sprinkling the streets of the city.

Section 180, of the Constitution, as well as section 2980, Ky. Statutes, require that no tax shall be levied by a municipal legislative body, without designating in the levy ordinance, the purpose for which it is to be applied. They likewise provide that no tax levied for one purpose shall ever be applied to another.

By section 2981, Ky. Statutes, pertaining to cities of the first class, it is provided: "In the ordinance fixing for any year, the tax rate, the general council shall sub-divide its levy as follows: A levy for schools, a levy for the sinking fund, a levy for police purposes, a levy for fire department, a levy for street and sewer cleaning, a levy for sprinkling streets, a levy for reconstruction of streets, a levy for street repairs, a levy for construction and repair of sewers, a levy for the House of Reform, a levy for library purposes, and a levy for general purposes, and a deficit tax. The general council shall cause the foregoing levies to be made for the purposes stated by an ordinance, fixing the tax rate each year."

It is left to the discretion of the council and mayor, as to what levies shall be made each year, for the purposes enumerated (Section 2316, Ky. Statutes.)

In the absence of a legal debt, for which the law compels the council to provide the means of payment, the city would not be bound to furnish many of the governmental facilities which its charter authorizes it to do.

The question then narrows itself down in this case to the one whether "street sprinkling" is embraced in the term "general purposes." Without undertaking to define here what may be included in the latter term, we are clear that its being enumerated with some dozen other divisions, each of which is required to be provided for expressly, if at all, negatives the proposition that one embraces the other. For if that were true, it would be within the power of the council to levy the whole tax under the head of "general purposes," defeating entirely the motive of the legislation requiring a particularization of subjects, for which taxes are to be levied.

The attempted deflection of the "general purpose" fund complained of, was illegal, and was, therefore, properly enjoined.

Judgment affirmed.

BROOKS v. HUNT.

(Filed October 6, 1904—Not to be reported.)

Husband and wife—Deed by husband to wife—Trustee—Death of wife—Right of husband to cancel—Fraud—Appellant in a previous suit, having admitted he knew of the deed he made to his son, in trust for his wife, conveying to her the 400 acres of land on which he and his wife and nine children continued to reside until the death of his wife, and in which former suit the deputy clerk testified that the deed was made to the wife at appellant's instance, and was duly acknowledged by him, is not entitled, after the lapse of 80 years, to have the deed cancelled as against one holding the title to seven shares of the land purchased by him, from the deceased wife's children, upon the testimony of the two subscribing witnesses to the deed, of doubtful veracity, that the deed to his wife was a sham transaction.

M. M. Logan and J. S. Wortham for appellant.

J. S. Lay for appellee.

Appeal from Edmonson Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 12th of March, 1878, a deed was recorded in the office of the county court clerk of Edmonson county, from the appellant, William Brooks, to his son, Solomon Brooks, to a tract of about four hundred acres of land, in trust for the use and benefit of his wife, Susan Brooks, with authority in the wife to dispose of the property by last will and testament. After the execution of the deed, William Brooks and his wife and family of nine children continued in the possession of the land until the death of the wife. The wife died intestate, and after her death, five of the surviving children sold and conveyed their five shares in the land to John Self, subject to a life estate of their father, William Brooks. Self subsequently conveyed the interest so acquired to the appellee, J. T. Hunt, who thereafter acquired two more interests in the land, subject to the life estate of appellant. In 1903, appellant brought this suit for a cancelation of his deed to his son, Solomon, alleging that he never executed it, and that the certificate thereto by L. J. Proctor, deputy clerk, was a fraud.

The defendant controverted all the affirmative averments of the petition, and asked that he be quieted in the title acquired from the children of appellant. Upon final submission it was so adjudged. Appellant's signature to the deed is by mark, which was witnessed by Thomas Saunders and his wife, Rachel Saunders, who testified that appellant was under indictment in the United States Circuit Court for the district of Kentucky, for a violation of the revenue laws of the United States, and anticipating a conviction and the imposition of a heavy fine that he employed Proctor, the deputy clerk, to draw the deed; that the appellant's name was signed to the deed by Thos. Saunders when he was not present; and that the certificate of acknowledgement was also false; that it was well understood at the time,

that the deed was a sham transaction. Appellee, on the other hand proves by a number of witnesses that they had often heard appellant admit his execution of the paper. It also appears that on the 30th of November, 1878, appellant and his wife executed a mortgage on this tract of land to one Miles to secure the payment of $200 borrowed from him; and that in a suit by Miles to enforce the payment of this money in 1880, against appellant and wife, Solomon Brooks intervened by petition and set out the deed of 1872 made to him by his father, and alleged that by virtue of this conveyance he held the legal title to the land; and that the attempted mortgage to secure the payment of the deed to Miles was inoperative to convey the title thereto. In answer to this petition of Brooks, Miles set up substantially the same facts which are now relied on by appellant, for the purpose of vacating the deed at that time, and Brooks admits in his deposition that he knew that the deed to his son, Solomon, was on record for many years. In that case the deputy clerk who had taken the acknowledgement, testified as a witness that he had prepared the deed at the suggestion of Brooks, who signed and acknowledged it in his presence. Besides the characters of both appellant and his witness, Saunders, for truth and veracity are impeached in the record, by a number of witnesses. The decided weight of the testimony, in the record, supports the contention of the appellee as to the execution of the paper, and this would certainly be true after the lapse of more than thirty years.

Judgment affirmed.

CITY OF COVINGTON v. MILES.

(Filed October 7, 1904—Not to be reported.)

1. Damages—Defective condition of streets—Where a man, aged sixty years, at an early hour in the morning, it raining, fell into a hole, sustaining injuries resulting in a money loss of $160 and a doctor's bill of $25, a judgment for $585 was reasonable, it appearing upon the trial that the defective condition in the sidewalk had existed for several months, at the time of the injury, but that its condition was not known to the injured person.

2. Variance—A motion for a peremptory instruction was properly overruled, where, in an action for damages, the place of injury was fixed at one side of the street in the pleadings and on the other side in the proof, the mistake evidently being one that could not have misled the adverse party.

F. J. Hanlon for appellant.

B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

In February, 1903, about six o'clock, a. m., the appellee, James T. Miles, while walking along the north side of Third street in the city of Covington, at a point about sixty feet west of the first alley west of Madison avenue, stepped into a hole in the pavement and fell, severely injuring his side, from which he suffered great pain, and was confined to his bed for several weeks, to recover damages for which this action was instituted. A trial

resulted in a judgment against appellant for the sum of five hundred and eighty-five dollars. On this appeal appellant urges but two grounds for reversal: First, that the damages are excessive, and, second, the error of the court in overruling its motion at the close of appellee's evidence for a peremptory instruction to the jury to find for it.

The evidence shows that the appellee, who is over sixty years of age, was in bed for several weeks, and suffered greatly by reason of the severe fall he sustained; that the hole in the sidewalk was dangerous, and had remained in that condition for several months prior to appellant's injury; that on the morning of the accident it was dark and raining, and he did not know of the existence of the hole before his fall; that he had sustained an actual money loss of one hundred and sixty dollars, by reason of the accident in question, and incurred a doctor's bill of twenty-five dollars. The remainder, four hundred dollars of the verdict, was evidently, given by the jury, because of the pain suffered; and we think that, under all the circumstances the sum awarded was reasonable.

The motion for a peremptory instruction was based on variance between the allegations of the petition and the evidence as to the place where the accident occurred. In the pleading, the point of injury is fixed on the south side of Third street; whereas, the evidence shows that it was on the north side. The mistake was, evidently, a mere slip of the pen, and could not have misled the appellant. Section 129, of the Code provides that, "no variance between pleadings and proof is material which does not mislead a party to his prejudice in maintaining his action or defense upon the merits. A party who claims to have been so misled must show that fact; and thereupon, the court may order the pleadings to be amended upon such terms as may be just." Even if appellant had been misled by the variance in question, his remedy is pointed out in the section of the Code, supra. As he failed to take advantage of this remedy, he waived the variance. (Woodcock v. Farrel, 1 Met., 437; Muldoon v. Meriwether, 25 Ky. Law Rep., 2085; East Jellico Coal Co. v. Golden, Id., 2057; Gaines v. Deposit Bank, 19 Ky. Law Rep , 171.)

Perceiving no error in the record, the judgment is affirmed.

HALL, &c. v. HALL, &c.

(Filed October 7, 1904—Not to be reported.)

Conveyances—Illegitimacy of children—The statute providing that if a man having a child by a woman shall afterwards marry her, such child shall be deemed legitimate, if recognized by him before or after marriage, does not apply to a case where the father was the husband of another woman at the time the child was begotten, and while such a child could not inherit from his father, there is no statute rendering a conveyance from his father to him void, and at common law such conveyances were valid as there was no necessity of consideration to pass title.

Salyer & Baker for appellants.

D. D. Fields & Son for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Paynter.

This case involves the question of the validity of a deed which Allen Hall made to Samuel Hall. Allen Hall had several children by his first wife. While her husband, he became infatuated with Jemima ————, and had two children by her, one of whom is the appellee, Samuel Hall. After their birth he was divorced, whereupon he married Jemima and lived with her until his death. He seems to have owned a large quantity of mountain land. As Samuel was begotten during the time Hall was the husband of another woman, he did not become the legitimate son of Allen Hall, when the latter married his mother, as the statute which provides that, if a man having had a child by a woman shall afterwards marry her, such child or its descendants if recognized by him before or after marriage, shall be deemed legitimate, does not apply to a case when the father was the husband of another woman, when the child was begotten. (Sams, &c. v. Sams' Adm'r, 85 Ky., 396.) It follows that Samuel could not have inherited anything from his father. By the deed in question, Allen Hall conveyed to his son, Samuel Hall, a certain boundary of land, because he evidently knew that the son would not get any of it, unless he gave it to him in his life time. There is no statute rendering such conveyances void. At common law such a conveyance was valid, as no consideration is needed to pass the legal title to land. The grantor owned the land and had the right to dispose of it by deed or will. While the appellants assail the conveyance upon the ground that it was obtained by undue influence of the mother, we think the evidence is not such as to authorize the court to set aside the deed.

The judgment is affirmed.

BOARD OF TRUSTEES OF THE PUBLIC LIBRARY OF COVINGTON v. BEITZER, TREASURER.

(Filed October 7, 1904.)

1. Treasurer of city—Ex-officio treasurer of public library of the city—It is agreed that appellee, as treasurer of the city of Covington, has in his hands to the credit of plaintiff, $5,647.73, which he declines to pay over to the plaintiff, on the ground that as treasurer of the city of Covington, he is "ex-officio" treasurer of the public library board of trustees, and, as such is entitled to the custody of said fund. Held—That under Ky. Statutes, section 3210, as amended by sections 3210a, and 3210b, appellant is clothed with the power necessary to establish and maintain a free public library, and that it is to have the custody, control and management of all funds that have been accumulated or may hereafter be accumulated for pulbic library purposes, and directs that the funds appropriated for the maintenance of the library shall be paid over to appellant's board, each member of which is required to give bond for the faithful performance of his duty, and that they are invested with the power to select a depository or treasurer, for their own convenience, cannot be doubted.

2. Order for fund—Failure to state name of treasurer—Appellant having appointed a treasurer and directed said fund to be paid over to him as such treasurer, the failure to state his name in the order, is immaterial, his designation by title being sufficient. The writ of mandamus should have been awarded.

H. C. Theissen for appellant.

M. L. Harbeson for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

This is a real, but friendly, controversy between the appellant, the Board of Trustees of the Public Library of Covington, Ky., and the appellee, the treasurer of that city. The question involved is, whether or not the latter is ex-officio treasurer of the former. The remedy sought by the petition is a writ of mandamus to compel the appellee to turn over to the treasurer selected by appellant, the money he holds belonging to it, appropriated by law for its maintenance, which it is alleged he refuses to do. The pleadings aptly present the question in issue, and the case was tried upon an agreed statement of facts, which is as follows:

"The plaintiff and defendant agree as to the following statement of facts: There was as of October 1, 1908, in the hands of the defendant, Frank Darenkamp (now John L. Beitzer), as city treasurer, $5,647.73, to the credit of the plaintiff, the trustees of the public library; that all matters of dispute between the plaintiff trustees and the board of education has been finally and completely settled and that the amount, which is now in the hands of the defendant to the credit of the plaintiff trustees, is at all times subject to the order of the plaintiff trustees; that the defendant has at all times honored the order of said plaintiff trustees, except the order to pay to the treasurer of the board of trustees of the public library, plaintiff herein; that said defendant has refused to honor the order to pay to the treasurer of the board of trustees of the public library, on the ground that plaintiff, himself, as treasurer of the city of Covington, was ex-officio treasurer of the public library trustees; that the only question in dispute is a question of law, to-wit: Whether the defendant as treasurer of the city of Covington is ex-officio treasurer of the board of trustees of the public library, or whether the said trustees of the public library can elect their own treasurer, with the right of the custody of all the library funds. In the former case, this action should be dismissed, but in the latter case, the prayer or mandamus should be granted."

Section 3210, of the Ky. Statutes provides for the establishment of a free public library, in cities of the second class, of which the city of Covington is one. This, and sections 3210a and 3210b, which are amendments, constitute the law regulating the subject-matter in hand. By the statute, the trustees, seven in number, are incorporated under the name and style of Board of Trustees of the Public Library of Covington, to have perpetual succession, with the usual powers, and in addition thereto, "may purchase, receive, lease, hold, sell and dispose of real and personal estate for library purposes. Said board shall have the custody, control, management and expenditure of all funds that may heretofore have been accumulated for free library purposes, or that may be hereafter accumulated for or devoted to said purposes. The mayor of the city and the presiding judge of the county court of the county, in which the city may be located, in case the county contributes annually to the maintenance of the public library, shall be officials of said board, and the remaining five members thereof shall be ap-

pointed by the mayor. * * * each shall give bond in the sum of five thousand dollars, for the faithful performance of their duties. Said board shall have the power necessary to establish, and when established, to maintain and conduct said free public library, and may adopt from time to time rules and regulations for the proper conduct of said library. In aid of the establishment and maintenance of such library, there is hereby appropriated, and the general council shall annually direct to be paid over, as the same may be collected, to the board of trustees of the public library, three per centum of the net amount of taxes levied annually in the city for common school purposes, and one-half of the net amount of all fines and costs collected in the police court; and to further aid in the establishment and maintenance of such public library, the general council of the city and the fiscal court of the county, either or both, jointly or separately, are hereby authorized and empowered to accept, by ordinance, resolution, order or contract (and if necessary unite with the board of trustees of the public library), any donation that may have been offered, or may hereafter be offered by Andrew Carnegie, or any other person, association or corporation, and comply with the conditions upon which the said donations may be offered and accepted, and make the terms of said contract perpetually binding upon said city and county; and said general council of the city and fiscal court of the county shall annually levy such special tax as may be necessary to comply with said conditions or terms of contract, and to provide the sums of money agreed therein to be paid annually and perpetually for the maintenance of said public library, and shall cause the same to be collected and paid over promptly to the board of trustees of the public library."

Section 3210 contains the following: "In aid of the establishment and maintenance of such library, there is hereby appropriated, and the general council shall annually direct to be paid over to said library 3 per centum of the net amount of taxes levied annually in the city for school puproses, and one-half of the net amount of all fines and costs collected in the police court."

It will be observed that, by the statute, the appellant is clothed with the power necessary to establish, and when established, to maintain and conduct a free public library, and to adopt, from time to time, rules and regulations for the proper conduct thereof, and that it is to have the custody, control, management and expenditure of all funds that have been accumulated for public library purposes, or that may hereafter be accumulated for or devoted to such purposes; also that the general council of the city shall annually direct to be paid over to the trustees of the library 3 per centum of the taxes levied for school purposes, and one-half of the net amount of all fines and costs collected in the police court. It is difficult to find, in these provisions, any basis for the claim of appellee, that he is ex officio the treasurer of appellant. The law fails to say so, but, on the contrary, in plain terms, directs that the funds appropriated for the establishment and maintenance of the library shall be paid over to appellant, each member of which is required to give bond for the faithful performance of his duty. Responsibility for the faithful care and custody of the funds is with the trustees, and they are responsible for its safe-keeping and proper expenditure. That

they are invested with the power to select a depository or treasurer for their own convenience, cannot be doubted.

If anything is necessary, beyond the mere citation of the language of the statute thus far noticed, to refute the claim of appellee to be ex-officio treasurer for appellant, it is to be found in the provision with reference to the county as distinguished from the city. The statute authorizes the fiscal court of the county, either jointly with the city, or separately, to enter into a contract with Andrew Carnegie, or any other person, association or corporation, to levy such special taxes as may be necessary to comply with the conditions or terms of the contract upon which the donation may be made, and to provide for the sums of money therein agreed upon to be paid annually and perpetually for the maintenance of the public library, "and shall cause the same to be collected as and when other taxes are collected and paid over promptly to the board of trustees of the public library."

It will hardly be contended that appellee, as treasurer of the city of Covington, would have any right, ex-officio, to receive or hold the taxes levied by the fiscal court of Kenton county for the benefit of the library. The county tax, if any, is required to be paid over to appellant, just as the city tax is require to be paid over, and there is no language in the statute which would justify its being paid to appellee.

We are of opinion that the trial judge correctly held that appellee was entitled to receive from appellant all money held by him belonging to it, but erred in holding that the petition should be dismissed because there was nothing in the record to show the name of the treasurer appointed by appellant. The pleadings and the agreed facts show that appellant had appointed a treasurer, and directed appellee to pay over to him the sum in his hands belonging to it, which he refused to do, claiming to be, himself, the treasurer of appellant It was not necessary for the order of appellant on appellee, to state the name of the treasurer who was to receive the money, his designation by title was sufficient. There is no contention on the part of appellee that he had any doubt as to the identity of the treasurer of appellant; his refusal to pay was not based upon any technical defect in the order, but, alone, upon the claim that he was ex-officio the treasurer of appellant and that it had no authority to appoint any other. The writ of mandamus prayed for should have been awarded.

Wherefore, the judgment is reversed for proceedings consistent herewith.

BRADLEY v. CITY OF GEORGETOWN.

(Filed October 7, 1904.)

City treasurer—Election contest—Contestee seated—Reversal—Salary paid to contestee—Appellant was elected treasurer of the city of Georgetown in November, 1901. The canvassing board awarded the certificate to his opponent, Wolfe, as did also the circuit court. On appeal to this court the judgment was reversed in December, 1902, but mandate did not issue until April, 1903. Appellant seeks to recover form the city the salary paid to Wolfe during the time he served, alleging that Wolfe is insolvent. Held—That a general demurrer to the petition setting out these facts was properly sustained, Wolfe having held the office under the certificate of election, not only un-

til the case was reversed, but the issuance of the mandate having been suspended by the filing of a petition for rehearing the judgment of reversal did not take effect, until the petition was overruled in April, 1903.

V. F. Bradley and J. F. Askew for appellant.

Jas. B. Finnell, Jr. for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Barker.

The appellant, A. M. Bradley, was elected treasurer of the city of Georgetown, Ky., at the general election in November, 1901. The canvassing board awarded the certificate to his opponent, George C. Wolfe. A contest before the board of contest resulted in favor of Wolfe, as did also an appeal to the Scott Circuit Court. On appeal to this court, the judgment in favor of Wolfe was reversed in December, 1902. A petition for rehearing was filed, which was overruled in April, 1903, at which time the mandate issued. Upon the filing of the mandate in the lower court, a final judgment was entered in favor of appellant, and he was then inducted into office, and has occupied it since.

Wolfe occupied appellant's office for one year, three months and twenty-one days; the salary, as fixed by law, is $600 per annum, payable monthly. During the time Wolfe was de facto treasurer, he was paid the sum of $786.67; he is now insolvent and appellant instituted this action to recover from the city of Georgetown the salary paid to him during the period mentioned. The petition sets out the facts as herein narrated; a general demurrer was filed by the municipality, which was sustained by the court, and the petition dismissed. This judgment appellant seeks to reverse. Counsel for appellant concedes that, in the case of Nall v. Coulter, Auditor, 25 Ky. Law Rep., 1891, all of appellant's case was decided adversely, except in this:

He contends that, after the case against Wolfe was reversed in December, 1902, the municipality had no right to pay over to the incumbent the salary, and that he is entitled to recover so much of it as was paid after that time. To this we cannot agree. The filing of the petition for rehearing within the time allowed by law, suspended the issuance of the mandate, and the judgment of reversal did not become final until the petition was overruled. (Civil Code, section 760; Cline v. Wrightson, 7 Ky. Law Rep., 215.)

Subsection 12, of section 1596a, Kentucky Statutes, which regulates election contests, after prescribing the mode of contest and appeal both to the circuit court and court of appeals, contains the following: "On the production of a copy of the final judgment, the successful party shall be permitted to qualify, or be commissioned, or a writ of new election shall be issued, as the judgment may require." * * *

The final judgment meant by the statute, as applied to this case, is that entered by the circuit judge in pursuance of the mandate of this court, and it was upon production of a copy thereof that appellant was entitled to be inducted into his office, and from that time on, to demand and receive, the emoluments thereof. Until that time Wolfe held the office under his certificate of election, and the city had the right to regard him as the rightful incumbent, and to pay him the salary. The case of Nall v. Coulter, Audi-

tor, is conclusive of appellants' whole cause of action, and the circuit judge properly dismissed his petition.

Wherefore, the judgment is affirmed.

JONES LUMBER CO. v. GATLIFF.

(Filed October 7, 1904—Not to be reported.)

1. Timber — Trespasser — Conversion— Identity—Value—Appellee, whose timber was cut and removed from his land by a trespasser, is entitled to recover the timber, with its added value, by being converted into saw logs, neither the trespasser nor his vendee having acquired any title to the timber converted into saw logs, so long as the identity of the timber has not been destroyed.

2. Agreement to litigate—Estoppel—Appellee was not estopped from the prosecution of his action by an alleged agreement to litigate his title to the timber in a foreign court with appellant's vendor for appellant's protection and accommodation, which alleged agreement is denied, and the denial is corroborated by the evidence.

Hazelrigg, Chenault & Hazelrigg for appellant.

Tye & Denham for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, A. Gatliff, brought this action against the appellant for $325 in damages, the value of 50,000 feet of timber, which he claims was cut from land belonging to him by J. M. and George Woodson, and which they sold to appellant.

The defendants admit that they purchased the 50,000 feet of timber sued for from the Woodsons', but deny that it was cut from the land of plaintiff, and allege that it was cut from a tract of sixty acres of land owned by one, Bowman, who sold it to the Woodsons; second, that they purchased the saw logs from the Woodsons on the banks of Tackett's Creek, several miles from plaintiff's land, and that before they paid for them, the plaintiff notified them that he claimed the logs; that, thereupon, it was agreed bewteen them that they should refuse to pay the purchase money, and should force the Woodsons to bring suit therefor, in which action when brought, plaintiff was to be made a party and litigate with the Woodsons the title; that subsequently the Woodsons instituted a suit against them in Campbell county Tennessee, for $239, the contract price of the logs; that they notified the plaintiff of the pendency of this suit and called upon them to be made parties thereto, and that the plaintiff failed and refused to defend, and judgment went against them in this action, and they plead and rely upon the alleged agreement as an estoppel. The affirmative averments of the answer were controverted by reply, and the case having been, by agreement, tried by the circuit judge, resulted in a judgment in favor of the plaintiff for the amount sued for.

A new trial was asked on the ground that the finding of the court was contrary to the law and not sustained by the evidence, which the lower court

refused, and the defendant has appealed. The testimony of the two surveyors, Sproul and Snyder, and the witness, Morlow, conclusively establishes the contention of appellee that the logs sold by the Woodsons to appellant were cut from land claimed by appellee, and to which he held title traceable to the Commonwealth. The further contention is made for the appellant that whilst the logs on Tackett's creek were probably worth the valuation placed on them by the trial court, that this was not a just or fair criterion of the value of appellee's timber standing in trees on his land several miles away, and that he could not recover the value added to it by its conversion into saw logs and transportation to the banks of a navgiable stream, even though it be conceded that this value was added by a wanton trespasser. The rule which governs the measure of damages in this case is clearly stated in Strubee v. Trustee of the Cincinnati Railway Co., 78 Ky., 481. In that case it was decided that a wanton trespasser acquired no title to timber converted by him into cross ties, and passed none to his vendee so long as the identity of the aritcle had not been destroyed.

In this case appellant had added nothing to the value of the saw logs after their acquisition, and the principle applicable to cases where there had been large accessions to the value of the converted article by the labor and skill of an innocent vendee, has no application to a case like this. Nor do we think appellee was estopped from the prosecution of this action by his alleged agreement to litigate his title to the logs in controversy with the Woodsons in this suit instituted by the Woodsons against appellant. Appellants admit that they had notice of his claim before they paid for the logs, and if they wish to protect themselves it was their duty to institute proceedings requiring the appellee to set up his claim. He certainly could not be called upon to submit his claim to the jurisdiction of a foreign court for appellant's protection and accommodation. The proof of this alleged agreement rests upon the statement of appellant's manager, and is flatly denied by appellee, and his testimony on this point is corroborated by the fact that he refused to sign a written agreement to this effect, which was prepared and tendered to him by the appellant.

For reasons indicated the judgment is affirmed.

COMBS v. COMBS.

(Filed October 11, 1904—Not to be reported.)

1. Lands—Attorney's fee—John Combs brought an action to set aside a deed made by him to others, on the ground that it was procured by fraud, his condition being such that, at the time, he was not mentally capable of making the transaction. The relief prayed for was rendered by the court below, and the judgment, upon appeal to this court, was affirmed. A fee had been allowed the attorney in the lower court to the amount of $75. Upon the return of the case E. E. Hogg was allowed a fee of $100 for prosecuting the appeal, and this was adjudged a lien upon the land. It was sold, except six acres, for $2s2.90, but appraised at $500. This judgment of sale was unwarranted. No fee should have been allowed E. E. Hogg except upon notice to John Combs, and an opportunity afforded him to be heard as to its reasonableness. The exceptions to the report of sale should have been sus-

tained, and Combs allowed to redeem the land as it did not bring two-thirds of its appraised value.

2. Appeals—Dismissal of—The motion to dismiss this appeal was not allowed because it was shown by affidavits that John Combs was under the control and influence of D. Y. Combs. Ordinarily a party may dismiss his own case, but this rule has no application where the party is in the situation, in which John Combs is shown to be by the record in this case.

R. L. Greene and Wootan & Morgan for appellant.

Hazelrigg, Chenault & Hazelrigg for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Hobson.

John J. Combs brought this suit to set aside a deed made by him to D. Y. and James Combs, on the ground that it was obtained by fraud, at a time when he was mentally incompetent to make it. Some years before the transaction John Combs had received a blow on his head, producing partial paralysis and impairing his mind. His condition was known to defendants, who were his brothers. The circuit court set aside the deed but adjudged the defendants a lien on the land for $60, with interest from January 30, 1898, and also adjudged a lien in favor of John Combs' attorney for $75. John Combs recovered his costs of the defendants. A sale of the land was ordered to satisfy the liens. An appeal was taken from this judgment by the defendants and it was here affirmed. (Combs v. Combs, 28 Ky. Law Rep., 1264.)

On the return of the case to the circuit court the mandate was filed, and thereupon an order was entered by which E. E. Hogg was allowed a fee not exceeding $100, as attorney for John Combs, on the appeal to this court, which was adjudged a lien on the land. The commissioner was directed to carry out the former judgment of the court and to sell enough of the land to pay it and the attorney's fee above referred to and the costs of the action, including probable future costs. All of the tract in controversy except six acres, was sold under this judgment and was bought by D. Y. Combs for $282.90 The land so sold was appraised at $500. Exceptions were filed to the sale which were overruled and the purchaser refusing to accept the money tendered for redemption of the land, it was paid to the clerk; but the court on motion of the purchaser, ordered the land conveyed to the purchaser. From these orders John J. Combs prosecutes the appeal before us.

The judgment selling the land is unwarranted. No fee should have been allowed E. E. Hogg for services in this court on appeal without notice to John Combs and an opportunity afforded him to be heard on the reasonableness of the fee. The fee for the entire services in the lower court in preparing the case was $75, and there is nothing in the record as presented justifying so large an allowance for services in this court.

The costs for which the land could be legally sold were only the costs since the former judgment and the probable future costs. The exceptions to the sale should have been sustained and Combs should have been allowed to redeem the land, as it did not sell for two-thirds of its appraised value.

A motion was made in this court on June 7, 1904, to dismiss this appeal by agreement of the parties. Affidavits were filed on the motion as to the

mental capacity of John Combs, showing that he was under the control and influence of D. Y. Combs. The court, in view of the affidavits filed on this motion and the proof in the record as to the mental capacity of John Combs, reaches the conclusion that John Combs did not know what he was doing when he signed this paper or understand the effect of his act, and that it cannot properly allow the appeal to be dismissed under the paper. Ordinarily a party may dismiss his own case, but this rule has no application where the party is in the situation in which John Combs is shown to be by this record. To allow the appeal to be dismissed would be to allow D. Y. Combs, in substance, entirely to defeat the judgment setting aside the deed which he obtained from his brother.

Judgment reversed and cause remanded for further proceedings consistent herewith.

VANCE v. LANE'S TRUSTEE.

(Filed October 11, 1904—Not to be reported.)

Judicial sales—Exceptions to report of—An exception to the report of sale of real property will not be sustained on the ground that parties in interest were not before the court on the pleadings, when they had entered their appearance by their attorney, which was not complained of by them; nor will exception be sustained on the ground that one of the defendants had been adjudged a bankrupt subsequent to the institution of the proceedings, because the law is well settled that where an action is pending to enforce a lien on property of a debtor, his subsequent bankruptcy will not divest the State court of its jurisdiction, nor is the fact that the trust company which held a lien note changed its corporate name, sufficient where there was no allegation or proof that there was other change in the membership of the corporation, or that it was not the party to whom the debt was due.

Burton Vance for appellant.

H. M. Lane for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, 2nd Division.

Opinion of the court by Chief Justice Burnam.

Certain creditors of the appellees, M. B. and A. P. Houston, sued out attachments which were levied upon a house and lot belonging to M. B. Houston, which fronted eighty feet, on Fourth street, in Louisville, Ky., running back in parallel lines two hundred feet to an alley, on which the Fidelity Trust Co. held a mortgage, as trustee for E. L. Lane, to secure the payment of a note for $10,000. By amended petition the Trust Company was made a party to this proceeding and called upon to set up their debt, which they did, making their answer a cross petition against their co-defendants, the Houstons, and praying for an enforcement of their lien, and the sale of the real estate to satisfy their debt. The Houstons, who were at that time out of the State, entered their appearance to the cross petition of the trust company, and consented to an enforcement of the mortgage lien. Numerous other creditors of the Houstons intervened and were made parties to this proceeding. A judgment was finally entered on the 30th of July, 1904, decreeing a sale of the property to satisfy the debt of the trust com-

pany. At the sale of the property made pursuant to this judgment, the appellant, Mary J. H. Vance, became the purchaser thereof, at the price of $12,000. The sale having been reported to the court for confirmation, exceptions were filed thereto by the purchaser, which were overruled by the court, and the appellant appeals.

The first exception was because the defendants, A. P. and M. B. Houston, were not properly before the court on the cross-petition of the trust company. This exception was properly overruled as the record shows their appearance was entered to the cross-petition, by their attorney, which was not complained of by them.

The second ground of complaint is that subsequent to the filing of the cross-petition of the trust company, on which the judgment was entered, the defendant, M. B. Houston, the owner of the property, was adjudged a bankrupt in the United States District Court, at Chicago, and a trustee in bankruptcy appointed therein for her estate, who was never made a party to this proceeding. The law is well settled that: "Where an action is pending in a State court of competent jurisdiction to enforce a specific lien on the property of a debtor, the subsequent bankruptcy of the debtor does not divest the State court of its jurisdiction to proceed to a final decree in the case and execute the same. The trustee in bankruptcy may if he see proper intervene in such an action, but the jurisdiction of the State court and the validity of its decree are not effected by his failure to do so." (Black on Bankruptcy, 66; Loveland on Bankruptcy, 278; Brandenburg on Bankruptcy, 183; Metcalf v. Barker, 187 U. S., 175.)

The third exception is based upon the contention that the trust company after the execution to it of the note and mortgage by the Houstons, changed its corporate name to the Fidelity Trust Company from the Fidelity Trust and Safety Vault Company, by an amendment to its articles of incorporation. There is no contention that there was any other change in the organization or membership of the corporation, or that it was not the party to whom the debt was due, and no complaint was made that the suit was being prosecuted in the wrong name by the Houstons, or that they are not one and the same company. The trial court had jurisdiction of the parties and the subject-matter, and appellant's purchase at the decretal sale vested her with the complete title to the real estate, sold under the judgment. The case of Senn v. Levy, 23 Ky. Law Rep., 624, has no application.

The fourth exception complains that the cestui que trust, E. L. Lane, was not made a party to the action. Section 21 of the Civil Code, expressly provides that the trustee of an express trust may bring an action without joining with him the person for whose benefit it is prosecuted. We think the trial court properly overruled appellant's exceptions, and the judgment is affirmed.

BEST, BY, &c. v. ROBINSON, &c.

(Filed October 11, 1904—Not to be reported.)

1. Admission of evidence—Signing of bond—Upon the second appeal of this case from the same judgment in the court below, the judgment will not be disturbed where the only matters relate to the admission of testimony.

2. Same—Where the identity of one who had executed a power of attorney was in question, testimony of the defendant in this action, in the lower court to the effect that he did not know Frank Galloway until he came to his office to thank him for permitting him (Galloway) to send the power of attorney to have his name signed as surety to a bond, was sufficient to go to the jury, his testimony being to the effect that he had seen the man afterwards and recognized him as the man who was brought to his office as Frank Galloway.

Wm. Herndon for appellants.

Robt. Harding for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Hobson.

For former opinion in this case see Best v. Robinson, 24 Ky. Law Rep., 767 On the return of the case to the circuit court it was tried anew and the jury, at the conclusion of the evidence was instructed by the court to find for the plaintiff, if Frank Galloway's name was not signed to the bond, pursuant to a power of attorney, given by him by signing his name to it himself or making his mark to it in the presence of an attorney by at least one creditable witness. On this instruction the jury again found for the defendant, and the plaintiff appeals.

No complaint is made of the instructions of the court to the jury. The only matters complained of, relate to the admission of evidence. The defendant, Robinson, stated as follows: "I did not know Frank Galloway, until some time after the execution of the power of attorney and the bond when he came to my office, in the court house, with Mr. Wherritt, the county clerk, who introduced him to me. He, Frank Galloway, seemed to be an old man and said that he came to my office to thank me for permitting him to send the power of attorney to have his name signed as surety to the bond by his son, J. G. Galloway, because, he said, it saved him a long ride. After he was in my office I saw him at his own home, in Madison county, Ky., and recognized him as the same Frank Galloway that Mr. Wherritt had introduced to me. I found that he lived about 20 miles from Lancaster, near Berea."

Wherritt was also allowed over the defendant's objection to make in substance the same statement, except that he said that he had never seen the man since. Plaintiff objected to this evidence; her objection was overruled, and she excepted. The testimony of the defendant, Robinson, was sufficient to go to the jury, on the question of the identity of the man brought to his office as Frank Galloway. If Frank Galloway came to the county judge and ratified the execution of the bond acknowledging that he had signed the power of attorney, it was potent evidence that he had signed the paper, and this fact was admissible in confirmation of the other testimony tending to show that he had signed the paper. If Frank Galloway had made this statement to the county judge before he accepted the bond to induce him to accept it, its competency would hardly be doubted. But, although the county judge had accepted the bond, when the statement was made, the bond was still in his power, as he had authority at any time to require a new bond executed. The statement was made to quiet him and to satisfy him that the bond was all right. The evidence was not merely hearsay, but

was, in effect, an acknowledgement of Frank Galloway, of the genuineness of the power of attorney, made to secure its permanent acceptance and while the matter was still under the control of the county judge.

Judgment affirmed.

BARNETT'S ADM'R, &c. v. ADAMS.

ADAMS' ADM'R, &c. v. BARNETT, &c.

(Filed October 11, 1904—Not to be reported.)

1. Stale claim—Limitation—Decedent's estate—In an action to settle the estate of Miss Lacey Barnett, who died in 1901, at the age of 18, leaving a considerable estate, a claim filed by Mrs. Adams for keeping her and to whom she was given by her mother, when only three years old, was properly rejected; being clearly barred by limitation and no sufficient reason was shown for the delay in asserting it, and it being manifest that she kept the child without any expectation of compensation.

2. Recognized obligation—Just claim—A claim by David Adams for $900, for keeping deceased, was properly allowed, as it is shown that it was not the expectation of the parties that she was to be a charge upon him and his wife, and there is no reason or justice that her estate should not compensate him for what he did for her, even though if she had lived he might not, by reason of his affection for her have presented a claim to her, although it is shown she fully recognized the obligation, and the amount, considering the extent and character of his services, is not excessive.

3. Alleged lien on ancestor's land—The claim of the descendants of Lacey Hibbs, grandfather of decedent, for $1,000, for a lien on land bought by Thomas Barnett, father of decedent, was properly rejected, the proof showing that Hibbs had a lien on same land for about $1,000, which was sold at commissioner's sale and bought by Thomas Barnett in his own name, and Hibbs went on his bond for the price, and while it is clear that Hibbs allowed the $1,000, which he had against the land to go to his son-in-law, Thomas Barnett, it is equally clear that he knew that Barnett had bought it in his own name and was holding and using it as his own. No claim of trust appears ever to have been made from the year 1878, until after Lacey Barnett's death, in 1901, and the weight of evidence shows that the $1,000 was given by Hibbs to Barnett, or at least that it was in no way settled upon Mrs. Barnett.

4. Evidence—Transactions with one since deceased—The court properly sustained exceptions to the depositions of the Hibbs', in so far as they stated transactions with or declarations of the decedent, for they were testifying for themselves. Being jointly interested in the land transaction, one could not testify for himself or for the others.

J. C. Hodge and Hendricks & Miller for Hibbs' Heirs and David Adams.

J. W. Bush and C. C. Grassham for Barnett's Adm'r.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Hobson.

Miss Lacey Barnett died a resident of Livingston county, on August 19, 1901, having an estate worth about $35,000. This controversy arises between her paternal and maternal kindred over her estate. She was born in the year 1883. Her mother died in the year 1886, and on her death bed gave

Lacey, who was her only child, to her sister, Eliza Fleming, who had no children. Mrs. Fleming took the child to her house and kept her there until her husband, Peter Fleming, died in 1888. Soon after her husband's death, her father Lacey Hibbs took her and the child to his house, where they remained, until December, 1890, when she married David Adams and took Lacey with her to Adams' house. Adams was a widower, with six children, all older than Lacey. While she was living thus at Adams' house, her father, Thomas Barnett, died in 1899, leaving an estate worth above his debts about $30,000. Her grandfather, Lacey Hibbs, had died shortly before this. David Adams qualified as her guardian and took charge of her affairs.

Her father was in debt something like $18,000 and $8,000 of this was paid out of his personal estate, leaving about $10,000 to be paid out of the land. The guardian undertook by using what Lacey had gotten from her grandfather's estate and the rents of the land to avoid a sale of any of the land to pay the debts, pledging his own credit when necessary to do this. He was a man in fine financial condition and good business capacity, but while he was carrying out his plans and about to send Lacey to Vassar to be educated, she was drowned on the steamboat Golconda, when it was wrecked in a storm, Mrs. Adams being also on the same boat with her and being drowned at the same time. They were on their way to Paducah to get her clothes to send her off to college.

In the suit to settle her estate, Adams, her late guardian, set up a claim as administrator of his wife, Eliza Adams, for taking care of Lacey for the two years and a half that she lived with her, after her first husband's death. The court disallowed this claim. Adams also set up a claim for himself for taking care of Lacey, from the time she came to his home at $300 a year. The court allowed him about $900 on the claim and rejected the remainder of it. From this judgment he and the administrator of Lacey Barnett each appeal.

The court properly rejected the claim of Eliza Adams. Limitation was pleaded and it was clearly barred by the statute. Besides, the claim should have been presented to Thomas Barnett and no sufficient reason was shown for the long delay in asserting it after the services had all been rendered. As to the claim of David Adams, both sides complain of the action of the circuit court, but in view of the facts of the case and giving the chancellor's judgment some weight, we have reached the conclusion that we ought not to disturb it on either appeal. The rule is that where a man takes a child into his home as a member of his family, not intending to charge the child therefor, he cannot afterwards demand compensation for what was rendered as a gratuity. In this case the father of the child was a man of fortune. She was his only child; he did not marry a second time. The child remained with her aunt because her aunt was very much attached to her and because no doubt her father thought the aunt's home the best place for her. He had the right to his child and this right was not affected by what his wife did. The record shows that Mrs. Adams always recognized this, or at least apprehended that he might assert this right. From time to time he furnished Mrs. Adams with money. It is perfectly evident from the record that he did not intend his daughter to be a burden, and that he intended to pay her necessary expense. While nothing was ever said by Adams to him

about compensation, we think it reasonably clear from the proof, that he did not pay as much as was necessary to make Adams whole. The money which he furnished was paid to Mrs. Adams to spend for Lacey. It was not paid to David Adams on a liability or on account. These payments, therefore, do not stop the running of the statute against Adams, but they do show that it was not the intention or expectation of the parties that Lacey was to be a charge to Adams and his wife. She is dead now, and there is no reason in justice or right that her estate should not compensate Adams for what he did for her, although if she had lived, he might, by reason of his affection for her, never have presented a claim to her. Still, in this event, the obligation would have remained, and this, as shown by the evidence, she fully recognized. Adams' services to his ward, after her father's death, were of great value in the preservation of her estate, and while all of his claim is barred by limitation, except the last five years, we are not prepared to say that considering the tender care he gave her, the solicitude he showed for her welfare, and the skill with which he, as guardian, attended to her affairs, the allowance of $900, made by the circuit court, is excessive; and, while we do not concur in the process by which the circuit judge reached his conclusion, we cannot say, under all the facts that there was any substantial prejudice to the rights of either of the parties by the judgment.

The descendants of Lacey Hibbs, the brothers and sisters of Mrs. Barnett and their children, also set up a claim. In the year 1878, Thomas Barnett bought a farm, known in the record as the Piles place. They insist that this land was bought and paid for with the means of Mrs. Barnett; that her father gave Barnett $1,000, under the promise that the land was to be deeded to her, and that Barnett in violation of the trust, after she was dead, had the land deeded to himself. The chancellor dismissed their claim and the Hibbs' appeal.

There is proof in the record tending to sustain the claim of the Hibbs', in regard to this tract of land, but taking all the facts and circumstances into consideration we concur in the conclusion of the chancellor. The proof shows that Lacey Hibbs had a lien on the land for about $1,000, when it was sold at the commissioner's sale. Barnett bought the land at the sale, in his own name and Hibbs went on his bond for the price. Barnett filed exceptions to the sale and in support of the exception, filed the adffiavit of Hibbs, stating that Barnett was the purchaser of the land. The exceptions were overruled and the sale was confirmed. While the proof is clear that Hibbs paid Barnett $1,000, or allowed the $1,000 which he had against the land to go to Barnett, it is equally clear that Hibbs knew that Barnett had bought this land in his own name and that he was holding it and using it as his own. The weight of the evidence also shows that Mrs. Barnett also knew this. No claim of a trust appears ever to have been made from the year 1878, until after Lacey Barnett's death, in 1901. Mr. Hibbs appears to have been proud of his son in law, Barnett, and that he should have given him $1,000 in this tract of land without requiring the land to be deeded to his wife, is in keeping with his conduct towards his son in-law, as shown by the record. Barnett was a prosperous man and Mr. Hibbs was proud of his success. The preponderance of the evidence does not show that Mrs. Barnett had any other means at the time of the purchase of this land, in

1878, and the weight of the evidence is to the effect that the $1,000, which Hibbs furnished was given to Barnett, or at least, that it was in no way settled upon Mrs. Barnett.

The court properly sustained the exceptions to the depositions of the Hibbs, in so far as they stated transactions with or declarations of the decedent; for they were testifying for themselves. It is insisted that each of them was a competent witness for the others, although his testimony as to these matters could not be considered in his own behalf. (Beach v. Cummins, 13 Ky. Law Rep., 881; Story v. Story, 23 Ky. Law Rep., 1781; Dovey v. Lam, 25 Ky. Law Rep., 1157.) But none of these cases are in point. Here the parties were jointly claiming the Piles tract of land. They were joined necessarily as parties plaintiff, in the cross-petition. One could not succeed if the others failed on the merits of their claim. They all stood or fell together, according as the trust was made out or not by the evidence. Their interest being joint and not several, one of them was not competent as a witness for the others. (Henning v. Stevenson, ante, 159.)

On the whole case we see no substantial error in the record, and on both appeals the judgment complained of is affirmed.

HUGHES, &c. v. HUGHES, TRUSTEE, &c.

(Filed October 11, 1904).

Wills—Devise to two sets of children—Per capita or per stirpes—The 7th clause of testator's will is as follows: "The remainder of my estate shall be equally divided into two parts, one part (or ½ of the entire amount) I give to my nephew, Francis Bernard Hughes, the son of my brother, James, and the other half is to be equally divided between the children of Barney and James Hughes, the share that may be due the heirs of Barney, is to be given to the Fidelity Trust Co., of Louisville, and the widow of Barney is to have the net income of same, as long as she remains his widow. Should she die or cease to remain his widow, then the trust is to be equally divided between the children of my brother, Barney." James and Barney Hughes were both dead at the date of the execution of the will. James had four children, including Francis Bernard. Barney had a wife and six children. Held—That, excluding the one-half devised to Francis Bernard Hughes, the remainder should be divided per capita, excluding said Francis, or in other words the children of Barney are entitled to six-ninths of the remainder, subject to the life estate of their mother, and the three children of James (excluding Francis) are entitled to the remaining three-ninths.

Forcht & Field for appellants.

Gibson, Marshall & Gibson for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch 1st. Division.

Opinion of the court by Chief Justice Burnam.

We are asked to decide upon this appeal whether the nephews and neices of Edward Hughes take per capita or per stirpes, under the seventh clause of his will, which reads as follows: "Being in good health, sound mind and of a disposing disposition, I make this my last will and bequest. 1st. I desire that all my just debts and funeral expenses shall be paid, and that a

suitable monument be erected over me to cost not less than $1,500. 2nd. I give to Mrs. Elizabeth Jenkins three Louisville Railway 5 per cent. bonds, par value, one thousand dollars each, or their value, also my cottage and lot on the east side of 18th, between Main and Rowan streets, in this city. 3d. I give to F. R. Bishop my diamond studs, collar buttons and sleeve buttons, also my gold watch. 4th. I give to my old friend, Wm. Shryock, three thousand ($3,000) dollars, in cash; I also release him from all money that he may owe me at the time of my death and the same must be cancelled. I also give him the use during his natural life, the sum of five thousand ($5,000) dollars, free from all security, nor is he to be charged interest of any kind on the above amount. Should any of the $5,000 remain at the time of his death, it is to be returned to my estate for distribution as shown later in this will. 5th. I give to my nephew, Francis Bernard Hughes, son of James Hughes, my diamond fire badge, and all other badges and medals or souvenirs that may have been presented to me, also all my real estate that I may possess at the time of my death that has not previously been given away in this writing. 6th. I give to my niece, the daughter of Pat Hughes, the sum of one hundred ($100) dollars. 7th. After the above bequests have been complied with, the remainder of my estate shall be equally divided into two parts, one part (or one half of the entire amount) I give to my nephew, Francis Bernard Hughes, the son of my brother, James Hughes, and the other half is to be equally divided between the children of Barney and James Hughes, with the exception of Francis Bernard Hughes. The share that may be due the heirs of Barney Hughes is to be given to the Fidelity Trust Co., of Louisville, Ky., and the widow of Barney Hughes is to have the net income of same as long as she remains his widow. Should she die or cease to be his widow, the trust is to be equally divided between the children of my brother, Barney Hughes." James and Barney Hughes were both dead at the date of the execution of the will. The family of James Hughes consisted of four children, two sons and two daughters, one of whom, Francis Bernard Hughes, has no interest in this controversy. The family of Barney Hughes consisted of a wife and six children, four sons and two daughters. Appellants, the children of Barney Hughes, contend that it was the intention of testator to devise the residuum of his estate per capita between his nine nephews and nieces. Whilst the children of James Hughes insist that it should be divided per stirpes.

Numerous authorities are cited by counsel on both sides, which seem to sustain these respective contentions. But whatever may be the rule in other States, it seems not to be an open question in this jurisdiction. In Joseph Brown's Executor v. Joseph Brown's Devisees, 69 Ky., 648, the court had for construction the following clause in the will of Joseph Brown: "The rest and residue of my estate I will and bequeath to the descendants of my three uncles, Benjamin, William and Thomas Brown. My three uncles above named are all dead, and their children or descendants are unknown to me, at least some of them. My desire is that this bequest shall go to such of their children as are living, and where a child or either of the three has died, leaving children, the children of such deceased child shall take such part as their parent would take if alive."

One of the uncles left three children, another four, and the other seven.

The question was whether they took per capita or per stirpes. It was decided that the fourteen children were each entitled to an equal part of the estate which passed under this will. This case was followed by Purnell, &c. v. Culbertson, 75 Ky., 369. In that case the clause under consideration reads as follows: "At her death, I wish the real estate and such personal property as my wife may not have disposed of, divided equally between my nephew, Charles Culbertson, of this county, Mattie Ervine, Ettene Case and the two children of Thomas. T. Purnell, nephews and nieces of mine."

The circuit court had decided that this devise went per stirpes. Upon appeal the judgment of the lower court was reversed, this court holding that the property should be divided per capita between the devisees. In the opinion in that case the court quoted with approval from 9 S. C. Eq., 459, as follows: "The words equally to be divided, when used in a will, mean a division per capita and not per stirpes, whether the devisees be children and grandchildren, brothers and sisters, nephews or nieces, or strangers in blood to the testator."

This case was followed by McFatridge v. Holtzclaw, 94 Ky., 353. The provision under consideration was as follows: "After the death of my wife I wish my property disposed of and equally divided between the heirs of my brothers and sisters, share and share alike as though my brothers and sisters were alive."

At testator's death his own brothers and a sister were alive, one brother had four children, the other had two, and the sister one. The question was how the children of the brothers and sister, took per capita or per stirpes. It was decided that the property should be divided among them per capita, and the judgment of the circuit court was reversed.

In the recent case of McIntyre v. McIntyre, 192 U. S., 116, the clause under consideration read as follows: "The remainder, if any, is to be equally divided between my brothers', Edwin and Charles, children." At the date of the will Charles was alive and had two sons, one of whom died before testator, Edwin, had died, leaving six children, one of whom died before the testator. The court said: "The argument for a division per stirpes is this: Earlier in the paper the testator had used the phrase 'nephews and nieces,' which it would have been natural to repeat had he intended to make a division per capita. But instead of that he says 'my brothers,' Edwin and Charles children, which is not very different from 'my brother Edwin's children and my brother Charles' children,' and order an equal division 'between' them. 'Between,' if accurately used, imports that not more than two persons or groups are set against each other, and those groups are earmarked and shown to be regarded as groups by naming the parents from which respectively they come. The equality of division is an equality between the groups. This mode of distribution has recommendation that it follows the rule in cases of intestacy. But the court is of the opinion that the general rule of construction must prevail, according to which, in the case of a gift to the children of several persons described as standing in a certain relation to the testator, the objects of the gift take per capita and not per stirpes."

The case of Fields, &c. v. Fields, 93 Ky., 619, is not in conflict with the other Kentucky cases cited above, as the opinion in that case rested in large

degree upon other clauses of the will, showing an intention on the testator that the devise should go per stirpes and not per capita.

We have reached the conclusion that the half of the residuum of th of testator devised to the children of his brothers, Barney and Hughes, should be divided per capita, excluding Francis Bernard H or, in other words, the children of Barney Hughes, are entitled to six of this remainder, subject to the life estate of their mother, and th children of James Hughes (J. E. Hughes, Mary Ellingsworth and I. Whallen) are entitled to the remaining three-ninths.

For reasons indicated the judgment is reversed and cause remar proceedings consistent with this opinion.

STONESTREET, &c. v. JACOBS, &c.

(Filed October 11, 1904.)

Deed—Boundary—Stream as division line—Where a stream is nam deed as a boundary between the adjoining tracts of land, the thread ter of the stream is the division line between the two tracts, and case, as the spring in controversy, known as Blue Lick spring, is or lee's side of a center line of the stream, it was properly adjudged to property.

H. G. Botts, G. B. Winslow and Winslow & Howe for appellants.

J. S. Gaunt and J. A. Donaldson for appellees.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Hobson.

The question to be determined in this case is whether the spring in the record as Blue Lick spring is on the land of appellant or that pellee. Both parties claim under Robert Sanders, who died about th 1850. After his death, in a suit to settle his estate, eighty (80) acres improved land was laid off as dower to his widow and the remainde tract was sold for the payment of debts. Appellant claims under th chaser at the decretal sale; appellee claims a part of the boundary lai the widow for her dower. The court ordered all of the land sold at cretal sale except that set apart to the widow for dower. So the cont here turns upon what was set apart to the widow for her dower. The dary of this land, as given in that proceeding, is as follows: "Begin the mouth of the lane, near the bank of Eagle creek; thence with t N. 55 W. 105 poles to a stake opposite the house; thence S. 25½ W. 1 to a stake; thence S. 87 W. 28 poles to a large elm tree on the bank creek; thence down said creek with its meanders S. 21 W. 48 poles; S 14 poles; N. 73 W. 16 poles to a stake on the bank of the creek; the 34 E. 120 poles to a beach, elm and sycamore in the bank of Eagle thence up Eagle creek with its meanders N. 63 E. 10 poles; N. 30 E. 5 N. 58 E. 40 poles; N. 41 E. 36 poles to the beginning."

The spring in controversy is in the bed of Lick creek and near th next to appellee or the dower land, which for convenience we will c east bank. The contention of appellant is that the line runs from t

tree the courses and distances given above to the stake on the bank of the creek. If run in this way the line does not run in the creek at all, but on the east bank, and will not include the spring. The position of appellee is that the thread or center of the stream is the line between the parties, and that the spring, being on the east side of this line, is her property. The whole case turns on the proper construction of the following calls in the deed: "Thence S. 87 W. 28 poles to a large elm tree in the bank of Lick creek; thence down said creek with its meanders S. 21 W. 48 poles; S. 63 W. 14 poles; N. 73 W. 16 poles to a stake on the bank of the creek."

In Berry v. Snyder, 66 Ky., 266, it was held that the owner of land bounding on the Ohio river held to the center of the stream, and in that case the court quoted with approval from 3 Kents' Commentaries, 527, as follows: "Where a stream is used in a grant as a boundary or monument, it is used as an entirety to the center of it, and to that extent the fee passes."

The calls of the patent considered in that case were substantially the same as the calls in the case before us. This case was followed and approved in Williamsburg Boom Co. v. Smith, 84 Ky., 372, and in Kentucky Lumber Co. v. Greene, 87 Ky., 257. These cases were since followed in Sweatman v. Holbrook, 18 Ky. Law Rep., 870; Runion v. Alley, 19 Ky. Law Rep., 268, and Vaughn v. Foster, 20 Ky. Law Rep., 682. Appellant relies upon the cases of Sanders v. McCracken, Hardin, 267; Fleming v. Kenney, 4 J. J. M., 155, but both of these cases were made to turn on the language of the grant and the facts there shown. In the case before us there was a division of the lands of Robert Sanders. Part of the land was laid off to the widow and part was sold. If no part of Lick creek or Eagle creek passed to the widow, then she was cut off from both of these streams for water. In making the boundaries on either side of her tract the commissioners had in view that the two streams would make a convenient boundary, and there is no reason why they should have had in mind allotting the entire stream to either of the owners On the contrary, we think it reasonably clear that they contemplated that the stream should be the boundary, and in that event the thread of the stream is the dividing line. This conclusion is in accord with the current of authority. In 3 Washburn on Real Property, side page 632, it is said: "In respect to streams and rivers which are not navigable—that is, in which the tide does not ebb and flow—the rule seems to be universal that describing land as running to the stream or the bank, and by it or along the stream or the bank, extends to the middle or thread of the stream, the filum aquæ, unless there is something in the description clearly excluding the intermediate space between the edge of the bank of the stream and its thread."

So in 5 Cyc., —, the rule is thus expressed: "A grant or conveyance of land bounded by a non-navigable stream carries with it the bed of the stream to its center, unless a contrary intention is manifest from the grant or conveyance itself." (Page 897.)

"The stream, or other body of water, and not the meander line as actually run on the ground, is the boundary." (Page 899.)

The mere mention of a monument on the bank of a stream as the place of beginning or end of a line is not of itself sufficient to control the ordinary presumption that the grantee will hold to the thread of the stream, or in the case of navigable rivers, in some jurisdictions, to low-water mark. Where,

however, the intention is clearly apparent to limit the boundary by the monument, the instrument will be so construed." (Page 904.)

The later cases decided by this court above cited are in conformity with these principles, and the older cases, which are relied on for appellant, are to be considered as resting on the ground that the intention was there apparent to limit the boundary by the monument. (Cookrell v. McQuinn, 4 T. B. Monroe, 61; Bruce v. Taylor, 2 J. J. Marshall, 160.)

We, therefore, conclude that the thread of the stream is the boundary line between the parties, and that as the spring was on the appellee's side of that line, it was properly adjudged to be her property.

Judgment affirmed.

HATHAWAY v. COMMONWEALTH.

(Filed October 11, 1904—Not to be reported.)

1. Murder—Death penalty—Evidence—Confession made in custody—Competency—In a prosecution, where the accused had been indicted, tried and convicted of murder and his sentence fixed at death, and relies for a new trial on the ground that on the trial evidence was admitted of confession made by him while in jail. Held—That confessions not having been obtained by the allurements of hope or the agony of fear were competent, and the fact that the accused was at the time in custody does not vitiate them.

2. Instructions—"Malice"—"Aforethought"—Failure to define—The fact that the court in its instructions to the jury failed to define the words "with malice" and "aforethought," as used therein, did not prejudice the accused by such omission.

P. J. Altizer and V. W. Bush for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Barker.

John Hathaway and Etta Thomas lived in a state of concubinage in Jackson, Ky. For some reason, not fully explained in the record, she announced to him her intention of leaving and going to Winchester, Ky. To prevent her carrying out this plan he opened her trunk and cut up all of her clothes. But in spite of this she did leave him and went to Winchester, taking her abode in a brothel conducted by Alice Bean.

In January, 1904, the appellant went to Winchester, located his former mistress and sought an interview with her, for this purpose sending an emissary, one Kid Hite. The two women being in fear of violence at the hands of Hathaway, refused to receive him, and so sent him word. On receipt of this message he, on Monday, January 4th, 1904, went to the house for the purpose of interviewing Etta Thomas. He assured Alice Bean, who came to the door, that he would not harm either of them; that he had come to see Etta, to make amends for cutting her clothes, and that he had with him $65 to remunerate her for her loss. To prove that he meant no evil he turned his pockets wrong side out to show that he had no weapon of any kind. After this was done he was admitted into the house, held an interview with his victim, and undertook to persuade her to return to him and

take up the old life. To this proposition she refused to accede, whereupon, without warning or the utterance of an angry word, he drew a revolver, which he had concealed in the fob pocket of his trousers, and shot her several times, from which she almost instantly died.

Being indicted for murder by the grand jury of Clark county, appellant, upon the first trial of his case, pleaded guilty, but the jury, being unable to agree as to the punishment, were finally discharged and the case re-assigned for trial, whereupon he withdrew his plea of guilty, and entered instead a plea of not guilty. Upon the second trial he was found guilty as charged in the indictment, and his punishment fixed at death. From the judgment entered in pursuance of this verdict he is here on appeal. The assignments of error are, first, that the jury were improperly selected; second, that the court erred in refusing to discharge the panel after an improper statement had been made by one of the jurors, who was being interrogated as to his qualifications; third, error of the court in admitting incompetent confessions said to have been made by the accused; fourth, that the verdict is contrary to the evidence; and, fifth, that the court erred in the instructions given. Of these in their order.

For the first two errors assigned we have no authority to reverse. This court has so often decided this question that it seems needless to cite the cases. One of the last utterances on the subject is contained in the opinion in Turner v. Commonwealth, 25 Ky. Law Rep., 2161. On the subject in hand the court said: "In Curtis v. Commonwealth, 23 Ky. Law Rep., 276, it was held that the manner of selecting the jury in that case was unlawful. But as section 281, Criminal Code of Practice, provides that 'the decisions of this court upon challenges to the panel and for cause, upon motion to set aside an indictment, and upon motions for a new trial, shall not be subject to exception,' this court is without power or jurisdiction to revise such an error, and though in one or two cases previously decided the court appeared to have held otherwise, it has, since the decision in Curtis v. Commonwealth, supra, uniformly adhered to the rule therein expressed."

The confessions claimed to be incompetent and illegal are contained in the testimony of James H. Boone, the jailer of Clark county, and one Doc Pigg, who visited the accused in jail. Both of these witnesses testify that the confessions complained of were not procured under the excitement, either of hope or fear, on the part of the prisoner. Boone said: "I went to the jail where John Hathaway was locked up, and asked him how he came to do what he had done, and he said he came here for that purpose; that he came to kill this woman; that he completed the job, and he did not care what was done with him. He says: 'Here I am, you can do what you please with me.' He said he aimed to kill himself, and I said to him that he was as big as the woman and why didn't he, and he said that he didn't know why."

Doc Pigg testified, after stating that he went to the jail to visit the prisoner: "I said to him when I first went in, 'It looks to me like that you got in bad,' and he said, 'I don't know; I got no defense to make; I came here to kill a woman, and done that all right enough, but failed on myself.' "

It is urgently insisted by counsel for the accused that the prisoner being in custody, his confessions were incompetent. We are unable to agree to the soundness of this proposition if the confessions be made under the resrtic-

tion that they are not obtained by the allurements of hope or the a
fear. And it may be said that if such a principle is admitted into
more than half of the confessions which are used as evidence in
cases would be excluded, as a great majority of them are made a
criminals are arrested and placed in custody. This very question, h
was decided by this court in a manuscript opinion in the case of Davi
son v. Commonwealth, the syllabus of which is to be found
Ky. Law Rep., 67. The court, speaking through Chief Justice
said: "Where a record does not disclose the circumstances under
confession was made, which was afterward admitted in evidence
trial, the Court of Appeals will presume the evidence of the confess
competent. The mere fact that the prisoner was in custody at the ti
not vitiate such evidence." (Brown v. Commonwealth, 20 Ky. La
1552; Portwood v. Commonwealth, Id., 680; Laughlin v. Commonw
Ky. Law Rep., 640.)

The accused made a similar confession to Alice Bean, which is no
by him. On this subject she said: "He said, after he shot her, '
my intention.'" The accused was not in custody when this staten
made. We have uniformly held that we could not reverse a crimi
because the evidence preponderates in favor of the accused, if there
cient evidence against him to warrant the submission of the case to
but from respect to the zeal of counsel we will review the evidence
case.

There were but two witnesses to the killing, Alice Bean and the
Alice, after narrating the facts which led up to the murder, as h
stated in this opinion, said: "He told her that he was going to le
and said, 'if anything happens to me, won't you see that my mot
the money from the lodge? Do that much for my mother's sake,'
said 'yes.' He was making one cigarette after another and smokin
He smoked four or five, I reckon. I didn't notice what pockets he
cigarettes from. He was laughing and talking and seemed to be in
humor. I don't remember what was the last thing said. He made
mark before he got the gun, that he had lost his tobacco, and he felt
like he was hunting for his tobacco, and he come out with his pi
shot her. She was sitting down when he shot her the first time. I
John after the first shot, and Etta fell over and put up her arms a
'Oh, John, please don't;' that was the time he shot her the second ti
then he shot her the next time, down here lower, down on the sa
She never spoke but one word and that was, 'Oh John, don't.' T
all she said. * * * After he shot her he said 'that was my inte

In his testimony the accused failed to contradict Alice Bean in a
tial statement. He details how he sent his emissary, Kide Hite, to
and tell her that he had money for her; that Kid returned and repo
they were afraid of him. He then went to the house himself, rang
and, upon Alice Bean coming to the door, said: "I asked her to let
into the house, and told her that I would not hurt either of the
came out into the hall. There was a glass in the door. I told Etta
need not be afraid of me; that she was the last woman in the worl
would hurt. I told her I was mad up there in the mountains when

but I was not angry with her now. 'I feel like I done wrong in cutting up your clothes. I have got some money. You can take what money I have got and buy some more clothes with it, and come back to the mountains to live like we have been living.' I wanted to persuade her to come back and live with me in the mountains and to take the money and buy some more clothes. They seemed to be afraid of me, so I told them I would not hurt them, and showed them my pockets to show that I didn't have the pistol. I had the pistol in the fob pocket of my trousers. I always carried it there. They opened the door, and we went through the hall into the kitchen."

He then detailed some conversation he had with her on the subject of her returning to the old life with him, and said: "I asked Etta if she wouldn't go back to live with me like we had been living; told her we had a good place there and could live well, and that in the spring we would go to St. Louis to the fair and then to California. She then said to me, 'I am not going to live with another black son of a b— as long as I live; I have got a white man, and I am going to live with him.' There I lost my mind and shot her. I don't know what I did after I shot her. Tried to shoot myself. I didn't want to live without her."

The evidence, including his own testimony, shows that he went to his interview with his former mistress with his mind fully made up, either that she should return to him or die; and to carry out the latter half of the alternative, if necessary, he placed his revolver in the fob pocket of his trousers, went to the house, lured the inmates from their fears by earnestly protesting that he had no thought of hurting them, and turning wrongside out, in their presence, all of his pockets except the one containing the weapon to convince them that he was unarmed. Under this false pretense as to his real design he was admitted into the house to have an interview with his sweetheart. Having tried in vain to persuade her to return, he set about carrying into effect the second half of the predetermined alternative. That there might be no miscarriage in the final denouement of the tragedy, by attempted escape or unseemly screams on the part of his victim, he pretended that he had mislaid his tobacco, and appeared to be searching for it through his pockets, in the meantime soothing any premonition of fear that she might have by smiling lips and glozing words, until his hand reached his fob pocket, and rested upon the weapon he had concealed there, with which to do the bloody deed; and then, despite her prayer of "Oh, John, please don't," he shot her to death.

Great stress is placed by counsel upon the vulgar epithet which Hathaway said his victim applied to him as constituting an extenuating circumstance, by so enraging him as to reduce the quality of his crime from murder to manslaughter. Whether she said this was a question for the jury, and as the existence of the epithet rested alone upon the statement of the accused, it might well be that an intelligent jury would reject it as false; or, perhaps they knew that such epithets are used by the low criminal classes not always as terms of insult, but frequently as expressions of friendly familiarity, applying them equally to their friends and their enemies. Upon the whole case we have been unable to discover one extenuating circumstance in favor of the accused.

The criticism of the instructions given by the trial court is that there was

no definition given of the words "with malice" and "aforethought" therein; and reliance is placed upon the opinion in the case of Jolly monwealth, 22 Ky. Law Rep., 1622. The opinion in that case cont following: "In addition to the instruction we have indicated th should, on another trial, instruct the jury that the words 'with in their legal sense, denote a wrongful act done intentionally, with cause, and that by the term aforethought is meant a predeterminati the act, however sudden or recently formed in the mind before t done."

There can be no doubt that the definitions given in the case c sound and proper, but we fail to see how the accused has been preju their omission in this case. As very correctly said in the brief, n the lay mind signifies personal hatred or ill-will, and doubtless man so understand its meaning; it is, therefore, much to the interest Commonwealth that the jury should be told that "malice" in the tion is used in its technical sense, and denotes a wrongful act don tionally, without just cause, and that aforethought means a predet tion to do the act, however sudden or recently formed in the m resolution to do it has been made. An ardent Commonwealth's would sincerely desire these definitions given in every murder cas would not be to the interest of the defendant so to do.

Judgment affirmed.

MURPHY v. RONEY, &c.

(Filed October 12, 1904—Not to be reported.)

1. Bill of exceptions—Verity—Motion to correct—Affidavits—Wh bill of exceptions, though awkwardly prepared, does not on its face the omission of any part of the evidence heard on the trial in t below, and it appears to have been approved and certified by the tria the presumption must be indulged that it contains all the evidenc case, and its verity cannot be assailed by affidavits filed in the a court.

2. Verdict—Motion to set aside—Conflicting evidence—Where t issue in the case was whether the possession of appellant and her to the land was amicable or adverse to the vendees, and as to this i evidence was conflicting, but there was some evidence to sustain the the lower court properly refused to set it aside on the ground tha unsupported by the evidence.

3. Instructions—Possession—"Permission" of defendants—The ins is held to be misleading and erroneous. Although the plaintiff vendors may have had the lot enclosed for 15 years continuously, or prior to the institution of this action, yet if they should further beli such possession was held with the "permission" of defendants or th dors only, then the law is for the defendants and the jury should The instruction should have been more specific by adding after th "permission of defendants or their vendors only," the following "a the recognition upon her part of the title or ownership of appellees vendors."

Sims & Grider, G. W. Whitesides and E. J. Hobdy for appellant.

Geo. C. Harris and L. B. Finn for appellees.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Settle.

By this action in ejectment appellant sought to recover of appellees a parcel of ground thirty feet in width, situated in the city of Franklin, and $200 damages for its detention.

From the pleadings we find that appellant's contention is based upon a claim of title and alleged continuous, adverse possession for more than 15 years before appellees took possession of the lot in controversy by enclosing it, and the further claim that the purchase of the lot by appellees was champertous, as she was then in possession thereof. Upon the other hand, it is appellees' contention that appellant has no title to the lot in controversy, but that it is in them; that though the lot was used by appellant for more than 15 years, and was even enclosed by her fence during that time, she was a mere tenant of their vendors, and that when they took possession of and enclosed the lot by their fence they were only retaking their own ground, to which appellant at the time consented.

The trial resulted in a verdict in favor of appellees, upon which judgment was duly entered, and it is now complained by appellant that the lower court erred in refusing her a new trial upon one or both of the following grounds: 1st, because the verdict and judgment are not sustained by sufficient evidence and are contrary to law. 2nd, because the trial court failed and refused to properly instruct the jury. It is insisted for the appellees that the first of the foregoing grounds cannot be considered by this court, because the bill of exceptions found in the record, does not contain all the evidence heard upon the trial. Indeed, a motion has been made in this court to strike the bill from the record upon that ground, in support of which the affidavits of two persons have been filed, wherein it is stated that they testified upon the trial in behalf of appellant, but that no mention of them or their testimony appears in the bill of evidence.

It has been repeatedly held by this court that the verity of a record certified by the court below cannot be assailed by affidavits filed in the appellate court. In Garrett, &c. v. Ratliff, 83 Ky., 389, it is said: "A positive or direct statement in a bill of exceptions that it contains all the evidence, or all the instructions given or refused, is not essential to make the bill complete. * * * This court has no right to say, upon reading a record containing a bill of exceptions, that the court below has failed to certify a complete bill, unless it so appears upon the face of the record."

Section 339, Civil Code, provides: "In cases in which, by sub-section 2, of section 335, the evidence is required to be stated in full, the judge shall certify in the bill of exceptions that it contains all the evidence. In all other cases he shall certify that the bill of exceptions is true. The signing by the judge in either case at the foot of the bill is, in substance, certifying that it contains all the evidence, or that the bill of exceptions is true. The judge below, and the counsel for each litigant, look to the preparation of the bill of exceptions with a view of presenting the exceptions in a proper form to this court, and when coming here with the signature of the judge and nothing to show an omission from the record of a part of the evidence, or a part of the instructions (when all should be embodied in the bill) the bill will be regarded as in compliance with the provisions of

the Code." The bill of exceptions in this case, though awkwardly prepared, does not on its face indicate the omission of any part of the evidence heard upon the trial in the court below, and, as it appears to have been approved and certified by the trial judge, the presumption must be indulged that it contains all the evidence in the case; hence the motion to strike it from the record is overruled.

The strip of ground in controversy lies on the south side of a lot conveyed to appellant by W. M. Atkinson, December 12th, 1881, but though the ground in controversy was bought by appellant of Atkinson, with the lot described in her deed, and is enclosed by her fence and used as part of her yard, it is clear that it is not included in the deed made her by W. M. Atkinson, and the same is also true of the deed from H. C. Atkinson to W. M. Atkinson. It seems, however, to be equally clear that the title to it passed from Finn through the Knapps to appellees. It therefore, follows that appellants' claim of ownership of the ground in controversy must be made to depend on whether her possession thereof was actual and adverse to all others, and whether such possession lasted continuously for as much as fifteen years next, before the lot was enclosed by appellees, in September, 1902.

It is apparent that while the legal title to the lot in controversy was in John A. Finn, it was intended to be used as a street or passway, to and from several acres of land which he owned west of the lot of appellant, to what is known as the old Lick road. George B. Knapp, Sr., testified that the thirty foot strip was opened by himself and John A. Finn, in the belief that during a boom that seemed to have reached the town they might be able to sell some lots, but that after the collapse of the boom he and Finn consented that H. C. Atkinson, who then owned appellant's lot, might set out his fence and thereby enclose the strip now in controversy, which he did.

It is not clear from Knapp's testimony what the agreement between himself, Finn and Atkinson was, but Atkinson in testifying claimed to have acquired the ownership of the lot when he enclosed it by his fence, and that it was given him by Finn, the then owner, in consideration of his abandoning to Finn a right of way which he (Atkinson) had to the railroad; at any rate, it does not appear from the testimony of Knapp or any other witness that Atkinson took possession of the strip in controversy as a tenant of the then holder of the legal title, or with any understanding that its possession would thereafter be surrendered to him, or upon his order. Furthermore, we have been unable to find in the record any evidence which tends to show that H. C. Atkinson's vendees, W. M. Atkinson and appellant, at the time of their purchase of the lot conveyed by their respective deeds, knew that his possession of the ground in controversy was amicable as to Finn or the Knapps, if it was so.

There is some testimony on the part of Knapp, to the effect that appellant, during her possession of the lot in controversy, by permitting him to make a new fence on the east end of his strip at his own expense, recognized his right to the parcel in controversy, all of which she, in testifying, denied. It was also testified by Knapp that he had a conversation with appellant's invalid husband, in her presence and that of her son, in which he (Knapp) told the husband that his (Knapp's) wife had bought the lot in controversy

from Patterson and Knapp who had previously bought it from Mrs. John A. Finn, whereupon appellant's husband said he knew that to be a fact.

Will Larue testified that he tried to get assistance from appellant in repairing the fence, on the north line of his lot where it joined that inclosing the lot in controversy, and she told him that Mr. Knapp claimed the ground and he would have to get Knapp to help him, which he did.

Appellee, J. W. Roney testified that he went to see appellant, after he bought of Knapp the lot, of which the ground in controversy is a part, and talked with her about building his fence through her yard so as to include the lot in controversy, and that she admitted his ownership of it, and consented to his enclosing it, but afterwards withdrew the consent and claimed the ground as her property.

Appellant upon the witness stand denied all these alleged admissions and statements attributed to her by Knapp, Larue, Roney and others, in which denial she was supported by her son-in-law, Scherbert, who said he was present at the time of the conversation between Knapp and appellant's husband, and also at the first interview between her and the appellee, Roney, testified to by the latter.

As to the actual adverse character of appellant's and her vendors' possession of the lot in controversy, for more than fifteen years, many witnesses testified in her behalf, among them the two Atkinsons, her vendors, and several others, to some of whom she had rented her house and lot from time to time.

But while the evidence as to whether appellant's possession was amicable or adverse to appellees and their vendors was conflicting, it is admitted by appellees' pleading, and shown by the evidence, that it was actual and for more than fifteen years. Indeed, the ground in controversy was inclosed by H. C. Atkinson thirty-one years ago, and appellant's possession thereof began with the date of the deed to her from W. M. Atkinson, which was more than twenty-one years before the institution of this action.

Although it seems to have originally been the purpose of J. A. Finn and Knapp to make a street of the parcel of ground in controversy, which then belonged to Finn, it unquestionably appears from the evidence that it was never dedicated to such use, or accepted by the city of Franklin. Upon the contrary, it was agreed by all the witnesses who testified on that point, that its contemplated or actual use as a street was in fact abandoned, and that H. C. Atkinson, appellant's remote vendor, with J. A. Finn's consent, took possession of the ground, now in controversy, by changing his fence so as to enclose it. If, as testified by Atkinson, the ground thus enclosed was given him by Finn in consideration of his (Atkinson's) agreeing to surrender his right to the use of a passway over the land of Finn to the railroad, such agreement, though in parol, would seem to establish the fact that his possession and continued occupancy of the lot was adverse instead of amicable, and this would also be true if the lot was given him without consideration. Although appellant, while in possession of the lot in controversy, may have made admissions apparently inconsistent with her ownership thereof, such admissions, if made after the right of appellees, or their vendors, to recover the lot, was barred by adverse possession, as seems from the evidence to be the case here, do not constitute an estoppel, but were properly allowed to go

to the jury, and what they amounted to as evidence on the issue of fact was for them to determine. (Thompson v. Thompson, 98 Ky., 435.)

The vital issue in the case was and is whether the possession of appellant and her vendors was amicable, or adverse to appellees, and as to this issue the evidence was conflicting, but as there was some evidence to sustain the verdict, the lower court properly refused to set it aside upon the ground that it was unsupported by the evidence.

In considering the second ground of complaint urged by appellant, we find that she makes no objection to instruction No. 1, and we think it free from criticism, as it confines the appellant's right of recovery to the question of possession, and in appropriate language tells the jury what it takes to constitute such possession as in law would authorize them to find for appellant. But objection is made to instruction No. 2, which is as follows: "The court further instructs the jury that although the plaintiff, Mrs. Murphy, and her vendors, may have had the thirty feet of ground under enclosure for fifteen years consecutively, or longer, prior to the institution of this action, yet if they should further believe that such possession was held by her with the permission of defendants, or their vendors only, then the law is for defendants, and the jury should so find." Obviously this instruction is misleading and otherwise erroneous, as by it the jury were told that if appellant's possession of the lot was permitted by appellees or their vendors, they should find against her.

The word "permit" means "to resign," "to allow," "to suffer," "to put up with," "not to prohibit."

Appellant could have held the lot in controversy with appellees' "permission," or that of their vendors, and yet have had in her own right a perfect legal title thereto. Upon the other hand, she could also have held the possession of the lot with the "permission" of appellees or their vendors, though neither she, appellees, or the vendors of the latter, were the holders of the legal title thereto.

The instruction in question should have been made more specific by adding after the words "permission of defendants or their vendors only," the following: "And with the recognition upon her part of the title or ownership of appellees or their vendors," then the law is for defendants, and the jury should so find.

We will not take time to discuss refused instructions 3 and 4, as it is not seriously contended that they should have been given, and besides they do not in our opinion correctly state the law. But as we think instruction No. 2 was prejudicial to the rights of appellant, the judgment is reversed and cause remanded with directions to the lower court to grant her a new trial, and for proceedings consistent with this opinion.

MONTGOMERY v. CHELF.

(Filed October 12, 1904.)

1. Appellee, Weed S Chelf was elected circuit judge of the 9th judicial district, at the November election, 1903, having been previously nominated for said office by a primary election. Appellant, James Montgomery, was also

a candidate but declined to enter the primary by reason of the assessment made by the district committee on the candidates to pay the expenses of the primary. After the election of Judge Chelf, appellant Montgomery filed this suit to have his election declared void, on the ground that he was not legally nominated in said primary election. (1.) Because one of the four members of the committee calling the primary, acted by proxy. (2.) Because the committee was not sworn. (3.) Because the call allowed minors, who would be of age at the date of the regular election to vote in the primary. (4.) Because the expense of holding the primary was assessed against the candidates, which if not paid, prevented their name going on the ballot. Held—Proxy—In calling a primary election the committeemen cannot act by proxy unless the party law expressly authorizes it, but where the committee is composed of four members, three of whom were present in person, the fact that the fourth member was represented by proxy, did not make the act of the committee illegal or void.

2. Sworn—Allegation—Denial—Presumption—Burden—Effect—Where the petition alleges that the committee calling a primary were not sworn, and this allegation is denied in the answer, the presumption in the absence of evidence is, that they complied with the law and were sworn and the burden is on the plaintiff to show, affirmatively, that they were not sworn. Admitting, however, that they were not sworn, it did not have the effect to invalidate the primary as no fraud or wrongful act or intent was shown or attempted to be shown on the part of the committee or any one interested in the election.

3. Minors—Voting in primary—The fact that the call of the committee for a primary election permitted all youths of the party, who would be of age at the regular election, for which the pirmary was to nominate a candidate to be thus voted for, did not make the primary invalid. It is not shown that any minors voted in the primary, yet if it had been shown it could not have affected appellant who was not a candidate in it. It is elementary that no one can complain of a failure to comply with a law unless he has been prejudiced thereby.

4. Cost of primary—Assessment of candidates—Under Ky. Statutes, section 1564, providing that all expenses of holding primaries shall be borne by the political party holding same, and shall be defrayed in such manner as may be prescribed by the committee, and section 1561, providing that any person desiring to submit his name to the voters in the primary shall * * * notify the committee that he is a candidate, and, upon complying with the conditions prescribed by the committee * * * shall be declared to be a candidate, and any person who has not complied with the conditions prescribed by the committee * * * shall not have his name printed on the ballot used in such primary, the committee has authority to prescribe conditions to be complied with and one of these conditions may include the payment by the candidate of a due portion of the costs of holding the primary.

5. "Free and equal elections"—The provision of the Constitution that "all elections shall be free and equal" applies only to general elections. The Constitution makes no provision for holding primary elections.

6. Conclusion—Even admitting that the statute did not authorize the assessment on the candidates, and that it was a violation of the Constitution, yet appellee, with other candidates, submitted to it and paid it and had their names placed on the ballot, and appellant declining to submit, and failing to proceed by mandamus to compel the committee to place his name on the ballot as he had the right to do if the committee's action was

illegal, we are unable to see how it rendered appellee's election i
mary void.

James Montgomery, W. S. Montgomery, Hazelrigg, Chenault & I
and Strother & Hardin for appellant.

L. A. Faurest, Sprigg & Holbert and O'Meara & James for appe

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Nunn.

In the month of June, 1902, the county chairmen, the governin
ity of the Democratic party, in the ninth judicial district of Kentu
at West Point and called a primary election for that district to b
the 20th of September of that year, to determine the nominees of
for the offices of circuit court judge and Commonwealth's attorne
the same time the committee fixed $800 as the probable amount ne
pay all expenses of the primary and determined that the candidat
two offices should pay this sum, a candidate for circuit judge, was
to pay double as much as a candidate for Commonwealth's attor
the names of only such as paid the assessment should be pl
the ballot to be voted for at the primary. At the time this call
there were three candidates for circuit judge, appellant, appellee
T. R. McBeath; the last two paying the assessment and having th
placed upon the ballot. Appellant did not pay, and his name wa
upon the ballot, and he was not voted for in the primary. Appell
ing the highest number of votes cast, his name was duly certifi
Secretary of State, and by that official to county court clerks of t
tive counties of that judicial district, with directions to place
name on the ballot as the Democratic candidate and under the
that party.

At the election in November, 1903, appellee received over 8,000 v
appellant received less than 20 votes, as certified by the electio
Appellee was given a certificate of his election Then appellant i
this action against appellee seeking to deprive him of the office a
tain it for himself. The issues were made, the proof heard, and t
judge who tried the case dismissed appellant's petition and adjud
he should pay the cost, and he has appealed.

Appellant contends that appellee's nomination was illegal and
for that reason there was not a legal vote cast for him at the electi
objections urged by him to the primary election are: First, at the
of the committee which called the primary, one of the membe
was not present in person, but acted by proxy; second, that the c
was not sworn before making the call; third, the call provided
Democratic youths who would become of age by the November
1903, could vote in the primary; and, fourth, that the cost of the
was assessed against the candidates, and it was provided that no ca
name should be printed on the ballots unless he paid his part of t
ment.

We will consider these objections in the order stated.

We are of the opinion that in calling and conducting a primary
under the statutes, the members of the committee whose duty it

in the matter, can not delegate this authority to others, i. e., can not perform this duty by proxy, unless the party law expressly authorizes it, which was not shown in this case. But it appears that there are four counties in the ninth judicial district and that the regular chairmen of three of these counties were present and made this call and the presence of a proxy, representing the chairman from the other county, did not have the effect to make their acts illegal or void.

This court, in the case of Young v. Beckham, 24 Ky. Law Rep., 2135, in construing the statutes governing primary elections, decided that it was required of the committee calling a primary election to first take the oath required by the statute. Appellant alleged in his petition that this committee made this call without taking the required oath. This was denied by the answer and the proof is silent upon the question. These committeemen were acting in this matter as the officers of the law and subject to all the penalties prescribed by statute, and the burden devolved upon appellant to show affirmatively that they did not take the oath. The general presumption is that officials in the exercise of their duties have been duly sworn. (Gilbert v. Huston, Litt. selceted cases, 223, Am. & Eng. Enc. of Law, 2 ed., vol. 23, 354, and Jones on Evidence, vol. —, sec. 28). Admitting, however, that the oath was not administered to the members of this committee before they called this primary, it did not have the effect to invalidate the primary election, as no fraud or wrongful act or intent was shown or attempted to be shown on the part of the committee or any one interested in the election. (Am. & Eng. Enc. of Law, 2 ed., vol. 23, 355; Mechem on Public Officers, sections 255 and 262; 24 Ky. Law Rep., 548; Lunsford v. Culton, 15 Ky. Law Rep., 504.) In this last case the court said: "The law requires that the officers of an election should be sworn; yet, when there has been a fair election, the voter will not be deprived of his vote or the candidate for the office of his election, if the legally qualified voters have voted for him."

This primary election was fairly held; there was a full expression of the popular will of the party. If the officers were not sworn, the omission was by inadvertence, and not by design, and the people who voted ought not to be deprived of their votes, and the successful candidate of the office, because of such an oversight. Supposing it to be true that the call which permitted youths to vote was illegal, this did not have the effect to make the whole void and render the primary invalid. (Eagan v. Gerve, 23 Ky. Law Rep., 1495.) Again it is elementary that no one can complain of a failure to comply with a law unless he has been prejudiced thereby. (Graham v. Graham, 24 Ky. Law Rep., 549.) It was not shown that any person under age actually voted at the primary, and if it had been, it could not have affected appellant, because he was not a candidate in it. We now consider the last proposition, that the assessment laid upon the candidates to pay the cost of the primary was contrary to law and rendered the primary void.

Section 1564, Kentucky Statutes, provides: "All expenses of holding such primary election shall be borne and paid by the political party holding same, and the pay of the officers, cost of publishing and circulating notices, and all other expenses shall be defrayed in such manner as may be provided for by the committee or governing authority of the political party holding such primary."

Section 1561, Kentucky Statutes, provides: "Any person desiri
mit his name to the voters in a primary election shall, not later t
days next preceding the holding of such primary election, appris
mittee or governing authorities of the political party holding su
of the fact that he is a candidate, and upon complying with the
prescribed by the committee or governing authority for the reg
candidates, shall be declared to be a candidate by the committee
ing authority of such political party, and any person who has not
notice to the committee or governing authority, or who has no
with the conditions prescribed by the committee or governing au
the government of candidates, shall not have his name printed o
lots used in such primary elections."

These sections clearly recognize that the committee has the au
prescribe conditions to be complied with before the candidate is
have his name printed on the ballot, in addition to the submis
name to the committee. We are unable to perceive what these
could be, except the payment of a due portion of the cost of th
But it is urged that if the statutes mean this, it conflicts with the
tion, which provides that: "All elections shall be free and equa
section of the Constitution has no reference to primary elections, b
only to general elections. Section 148 of the Constitution provid
more than one election can be held in any district in each year,
otherwise provided in the Constitution. The Constitution nowh
provision for holding primaries. Therefore, if the word "election
in the Constitution, includes primary elections, the Constitution
prohibits the holding of primary elections at all. There is a ge
tion every year, and if a primary can not be held in the same ye
general election, it can not be held at all. To make it more pl
Constitution only authorizes one election to be held within a y
primary election is an election within the meaning of the Constitu
to hold a primary election and a general election the same year,
volative of this provision of the Constitution.

But even admitting that the statutes did not authorize the co
make this assessment on the candidates, and that it was also in
of the provisions of the Constitution referred to, yet appellee,
candidates, submitted to the assessment and paid same and had th
placed upon the primary ballots; appellant declined to submit,
to proceed by mandamus to compel the committee to place his na
ballot, as he had the right to do if the committee's act was illegal.
v. Beckham, supra.)

It is not shown, nor attempted to be shown, in the record, tha
or any candidate, in any way induced the committee to make th
ment, and, if illegal, it operated against his rights as well as the
didates who entered the primary. Appellee submitted to the wr
was a wrong, and won the nomination, and we are unable to perc
it rendered appellee's election in the primary void.

Wherefore, the judgment of the lower court is affirmed.

SOUTHERN RAILWAY IN KENTUCKY v. FORSYTHE'S EX'OR.

(Filed October 12, 1904.)

1. Second appeal—Circumstantial evidence—Consistent with verdict—Where, on a former appeal the judgment was reversed because in the opinion of this court the verdict was palpably against the weight of the evidence, on this appeal the evidence being wholly circumstantial, and supports a theory of the killing of the colt consistent with the jury's finding, and tends to refute any other reasonable theory of the occurrence, the jury having again found for the appellee, the cumulative verdict clears away the former doubts and establishes the actionable facts in the case, and the judgment is affirmed with damages.

E. H. Gaither and Humphrey, Burnett & Humphrey for appellant.

J. T. Wilson and W. C. Bell for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge O'Rear.

On a former appeal the judgment was reversed because in our opinion the verdict was palpably against the weight of the evidence. Upon the next trial the jury again found for appellee. On this appeal the court is asked to reverse the judgment for the same reason.

Whether or not the evidence is exactly the same we have not thought necessary to examine into, although we notice on this hearing certain facts not adverted to before which, from their nature, must have had an appreciable and proper effect upon the jury. It would not be profitable to go into a minute review of the evidence. It was wholly circumstantial. It supports a theory of the killing of the colt consistent with the jury's finding and tends to refute any other reasonable theory of the occurrence. Even as the case appeared to us when here before, we thought the question one properly for the jury, and would not say that a peremptory instruction, because of a total failure of evidence, should have gone. It is the business of the jury to try the fact. That of the judge is to see that none but competent and relevant evidence tending to establish or disprove it, is admitted to them, and to give them information, in the way of instructions, as to the law under which they must apply the evidence.

In common law trials the jury is not regarded as helpers to the judge. When all the facts at all admit of a conclusion to which the jury comes, and which is permitted by the law, their finding is more than persuasive. It is obligatory upon the judge. Except that if he should believe it against the weight of the evidence he may order another trial. This court can do this only if the verdict is palpably against the evidence. So that when two or more verdicts agree in establishing a disputed fact, and the trial judge who heard the case, refuses to set the verdict aside on the ground that it is against the weight of the evidence, thereby concurring in the jury's conclusion, it is harder for the appellate tribunal to say that the verdict is palpably against the evidence.

Under such conditions, the court derives material help from the repeated verdicts of juries; they show that the same circumstances have impressed the minds of at laeast twenty-four impartial triers of the fact in the same way; that all these men have, from their common experience as practical

men of affairs, found that the circumstances given in evidence us sulted from or lead to the fact established by the verdict in the ca this practical experience, and the kind of judgment it begets, th of the most valued aids of trial by jury. If we could say there wa dence to support the verdict we would unhesitatingly set the ver again. But there is a wide difference, one easily seen, between no and conflicting evidence. Under the conflict of evidence, and from ture, the cumulative verdict clears away the former doubts and es the actionable facts in this case.

Judgment affirmed with damages.

HELY, &c. v. HOERTZ & CO, &c.

(Filed October 12, 1904—Not to be reported.)

1. In this action by appellant, Hely, against appellees for work appellant for appellees on the "clear water reservoir and filter hou appellant claims as follows:

1st. For work performed under contract, $455.22.

2d. Extra work in removing from the basin earth which had slid foundation for the retaining walls, $2,109.34.

3d. Extra rock excavations, $171.13.

The appellees admitted the first item and denied the 2d and 3d it pleaded as a counterclaim as follows:

1st. Amount paid out for cleaning basin, removing debris, muck, r and caused by appellee which he contracted to do but failed to do,

2d. For 930.75 cubic yards of concret, placed in bottom of reservoi by failure of appellant to comply with contract, at $3.20 per cub $3,010.40.

3d. For 71.62 cubic yards concrete curbing placed and used as pede columns, by failure of appellant to comply with contract, at $3.20 $911.05.

4th. For 854.78 cubic yards of concrete, placed in division wall voir, by failure of appellant to comply with contract, at $3.20 p yard, $2,671.27.

5th. For 45.73 cubic yards of concrete placed in retaining walls voir, by failure of appellant to comply with contract, at $3.20 per cu $146.30.

Evidence considered and held—that items No. 2 and 3 of appellant are not supported by the evidence. Item No. 1 for $455.22, is admit

Of appellees' counter claim items No. 1, 2 and 3, are disallowed No. 4 and 5 are allowed but the price for the work done should be cubic yard instead of $3.20 claimed.

2. The trial court properly refused to transfer this case to the law docket, as any verdict which might have been rendered there jury, would, on account of the complicated nature of the accounts the parties, have been mere guess work.

Thos. W. Bullitt and Samuel Kirby for appellants.

Dodd & Dodd, Burnett & Burnett and Forcht & Field for appelle

Appeal from Jefferson Circuit Court, Chancery Branch, 2nd. Divi

Opinion of the court by Chief Justice Burnam.

On the 6th of October, 1898, the appellee Fred Hoertz & Co., contracted with the Louisville Water Company for the construction for the water company of a "clear water reservoir and filter house" in accordance with certain plans and specifications, and drawings, which were made a part of the contract. The work was to be performed in the most skillful manner. The plan of the reservoir was in the form of a quadrangle, approximately three hundred and ninety-two feet wide by four hundred and sixty feet long. The corner and lines of which were to coincide with the four cardinal points of the compass, and the basin was to be divided into four equal compartments, by three division walls traversing it from north to south. The bottom of the excavation was to be a plane 122 feet and 9 inches above low water, in the Ohio river, and it was estimated that it would be about 19 feet deep, of which 12.53 feet would be through earth and 6.35 feet through solid rock, or 68.5 per cent. of earth and 31.5 per cent. of rock. The specifications required that the margins of the excavation, where the earth was loose, should be made with slopes one to one, but where firm they should be made vertically. Retaining walls built of concrete were to be erected on the outer margins of the reservoir and entirely around it. The bottom of the basin was to be level, and not vary more than four inches in any place from a true plane. Under the exterior walls and under each of the division walls the solid rock when reached, was to be left intact so that the concrete walls should be erected thereon, and it was provided that along the margin of these rock foundations a vertical channel should be cut to the bottom of the basin; and that they should not be shattered by heavy blasting. The eleventh specification provided that: "All seams, fissures, faults, caves, cavities and openings in the natural rock, whether under the retaining walls or in the floor of the basin, should have all contained earth, slides, muck, broken stones, etc., removed and cleaned out, and made water tight by the use of concrete."

Hoertz's contract provides for the performance of a large amount of work connected with the erection of the filter plant, in addition to the excavation of the basin. On the 11th of October, thereafter, Hoertz & Co. sub-let the work of excavating the basin to the appellant, Edward Hely. About the first day of June, 1900, the appellant, Hely, claimed to have completed the work contracted for by him and quit work, and on the 14th day of February, 1902, brought this suit against the appellee, Hoertz & Co., in which he alleged that there was due to him and unpaid thereon the following sums:

1. For work performed under the contract, $4,55.22.

2. For extra work in removing from the basin earth which had slid in over the foundations for the retaining walls, $2,109.84.

3. For extra rock excavations, $171.13.

Hoertz & Co., admitted liability for the item of $455.22, but controverted all the other items, and their answer is made a counter-claim against Hely and cross petition against the American Surety Co., in which he claims that Hely is indebted to him, for failure to perform all of his undertakings in a balance of $7,681.40. The items of which are as follows:

Claim No. 1. Paid out by Fred Hoertz & Co., for and on behalf of Edward Hely, for cleaning four basins and removing the debris, muck, rock, etc., contained in said basins, which debris, muck, rock, etc., was caused by said Hely in performing his contract, which cleaning and removing said

Hely agreed to do, according to his contract and specifications, the sum of $3,131.94.

Claim No. 2. 940.75 cubic yards of concrete placed in bottom of the four divisions of the reservoir, exclusive of concrete placed in pedestals for columns within the contract limits for the floor, caused by reason of the failure of Hely to properly comply with his contract and specifications, at $3.20 per cubic yard, $3,010.40.

Claim No. 3. 71.62 cubic yards of concrete, curbing, etc., placed and used in pedestals for columns, caused by reason of the failure of Hely to properly comply with his contract and specifications, to cost of which amounted to, $911.05.

Claim No. 4. 834.78 cubic yards of concrete, placed in the division walls of the reservoir, caused by reason of the failure of Hely to properly comply with his contract and specifications, at $2.20, per cubic yard, $2,671.27.

Claim No. 5. 45.73 cubic yards of concrete, placed in retaining walls of reservoir, caused by reason of the failure of Hely to properly comply with his contract and specifications, at $3.20 per cubic yard, $146.30.

The reply of Hely and answer of the American Surety Company controverted all the affirmative allegations of the cross-petition and counter-claim. The case was referred to the master commissioner to ascertain and settle the mutual subsisting demands between the parties growing out of the contract, who found in favor of the contention of Hoertz & Co. The report was confirmed and judgment given for appellees on their counter-claim for $7,681.40, the amount claimed, and plaintiff has appealed.

We will first consider the claim of Hely against Hoertz & Co., for extra work, in removing 2,109.34 cubic yards of earth, at one dollar a cubic yard. Appellant insists that the removal of earth slides was extra work, and not a part of his original undertaking, and for which he was entitled to be paid. Appellant in his contract, expressly agreed to pefrorm his work as required in the specifications, and specification twelve provides "that the vertical faces or cuts resulting from such excavation shall be sustained by the use of braces until the concrete walls are put up." It is perfectly clear that under this specification appellee undertook to excavate the entire basin. And whilst he did not undertake to build the concrete retaining walls, he did undertake to have the basin in condition for the erection of these walls by others, and we are of the opinion that it was necessarily a part of his contract that if the vertical walls before the completion of his work on the basin caved in, that he should have taken out this earth, or to have prevented its sliding, by proper braces. But this obligation on his part only continued until he had completed the excavation in accordance with his contract. Any subsequently caving or sliding of the banks after he had finished his work, was not his concern. But under the proof in the case we are of the opinion that the court properly refused to allow this item. We are also of the opinion that the several small claims made by Hely for extra rock excavation aggregating $171.13 were properly rejected.

We will next consider claims Nos. 1 and 2 asserted by the appellee against the appellant. The first is for $3,131.94 for failing to clean the four basins, into which the reservoir was divided, and to remove therefrom certain shattered rock and debris resulting from the blasting which were below the bot-

tom plane of the reservoir, and intimately connected with this claim and growing out of it is another for $3,010.40 for 940.75 cubic yards of concrete which appellee alleges he was compelled to place in the bottom of the reservoir outside of the pedestals for the columns, in order to make the bottom of the reservoir comply with specification 7, in the contract with water company, which reads as follows: "The excavation shall extend down to a plane of 122 feet 9 inches, plus P. R., must be excavated level and not vary more than four inches at any place from the true plane."

This claim rests upon the contention that appellant excavated the bottom of the basin below the contract plane in some places, thereby subjecting appellee to the expense of restoring it to its proper level. It is shown that the bottom of the reservoir terminated in a very thick ledge of rock, and that no crack or seam extended through this stratum of stone. It is also shown that the removal of the stone required the use of the very heaviest explosive, which ordinarily shattered the stone below the point where the explosive was placed, as well as above, and upon both sides of the blast. There is nothing in appellants' contract providing that the rock below the bottom of the basin would not be shattered, nor did he covenant or undertake to remove such broken rock and to clean out or make water-tight all seams and openings in the natural rock below the floor of the basin, as was assumed by appellee in his contract with the water company. In fact there was no stipulation in Hely's contract with reference to the condition in which the rock was to be left beneath the plane of 122 feet, 9 inches, outside of that portion of the natural rock which was to be retained as a foundation for the concrete division walls and columns. Specification 9 provides that there shall be no heavy blasting near the kerfs made by the channelling machines so as to disturb the natural rock which was to be left as a foundation for the division walls and columns, and this would seem to imply that it was anticipated that in other portions of the excavation there would be shattered rocks below the bottom of the reservoir. Nor is there anything in appellants' contract which looks to the construction of any cement or concrete work in his original contract. The proof as to these items is largely made up of the testimony of expert engineers. Those introduced by appellant testified that in the absence of an express stipulation in the contract, it was not the duty of appellant to clean up the bottom of the reservoir after he had gotten the required depth with his excavation, or to bring it up on a level by the use of concrete; that his work was complete when he turned over the basin excavated to the required depth. On the other hand, appellee introduced a number of witnesses who expressed a contrary opinion. We have reached the conclusion, however, that in the absence of an express covenant requiring appellant to perform this work, that he was improperly charged with the two items of $3,131.94 and $3,010.40, aggregating $6,142.34.

Appellees' third claim is that by the failure of appellant to leave the bottom of the reservoir, on which the columns required by specification 13 were to be erected, in the condition required, that he was compelled to expend $911.05 in preparing the foundation for these columns. Specification No. 13 provided for the erection of between three and four hundred columns 3.4 inches in diameter and about twenty-one feet, eleven inches high, which were to be used for the support of the groined concrete arches covering the

reservoir. The columns were to be erected at intervals of ap
twenty-two feet by twenty-two feet square. The foundation fo
is substantially the same as that relied on to support claim N
the same reason we think it should have been disallowed. Ther
in the specifications or contract which authorized this charge.
No. 13 provides that these "columns must be correctly and unifo
erected plumb, constructed absolutely solid, uniform in compos
terial, and each one built from beginning to completion as a co
uninterrupted process."

There is nothing in the contract about the construction of fo
the erection of these columns. Nor is there anything in appella
with appellee by which he bound himself to do any part of this
pellee's claim, No. 4, for $2,671.27 grows out of a supplemental
tween appellant and appellee entered into on the 10th of July,
is based upon the following communication from appellant to a

"Crescent Hill, Ky., Ju

"Mr. Fred Hoertz & Co.,

"Gentlemen:—I hereby agree, if the Louisville Water Compa
mit Fred Hoertz & Co. to blast out the division walls, or any p
instead of channeling them, that I will excavate this rock free
pay for the concrete necessary to replace the rock so excavat
Edward Hely will be paid for channeling, the same as if actuall

"EDWARI

Appellee, with the consent of the water company, accepted
proposition, who, thereupon, instead of cutting the vertical ke
nels on each side of the three division walls, blasted out and
natural rock down to the bottom of the reservoir. As appella
for the channeling along the walls at the contract price, a rea
struction of his proposition to appellee required him to repla
crete the natrual rock foundations which he blew out. But he
be charged with the actual cost of erecting these concrete found
pellee, which the testimony in this case shows to have been $2.
yard, and not $3.20 per cubic yard, which was the price whic
company agreed to pay appellee for other concrete work.

For the same reasons we think the trial court properly charg
with the item of $146.30 set out in claim No. 5 asserted by appel

We are of the opinion that the trial court properly refused to t
case to the common-law docket, as any verdict which might ha
dered thereon by a jury would, on account of the complicated n
accounts between the parties, have been mere guess work, but fo
pointed out, the judgment of the trial court is reversed, and t
manded for proceedings consistent with this opinion.

CRUTCHER'S ADM'R v. STUART.

(Filed October 7, 1904—Not to be reported.)

1. Evidence—Province of jury—Under our system of jurispr
the province of the jury to weigh the evidncee and determine it
a verdict for appellee for $675 for the care and nursing of a man

of age from June until December, a period of twenty-seven weeks, will not be disturbed, although there was a sharp conflict in the testimony as to the terms of the contract and the value of the services rendered.

2. Competency of witness—In this action to recover of decedent's administrator for services rendered deceased in nursing and caring for him, appellee was a competent witness, under section 606 of the Civil Code, where it appears that she made the contract with the daughter of deceased, who was alive when appellee testified.

3. Instructions—In this action to recover for care and nursing of appellant's decedent, an instruction to the jury that, although they may believe from the evidence that Mrs. Bradford, a daughter of deceased, had no express authority to make the contract claimed by appellee, if they believe from the evidence that such contract was made and entered into as claimed, and was received in acceptance of services rendered, they should find for plaintiff, should not have been given because it was averred in the answer that a contract was made for the services rendered, but if the instruction had any effect it was favorable to appellant, the defendant in the court below.

Sweeney, Ellis & Sweeney for appellant.

Miller & Todd for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Mrs. Stuart, instituted this action to recover $675, as compensation for services rendered by her to B. H. Crutcher, now deceased, in nursing and caring for him, from June 3, 1901, to December 3, 1901, a period of twenty-seven weeks, at $25 per week, and also for a balance of $100, on a contract for boarding him from February 11, 1901, to December 3, 1901. The jury seems to have disallowed the claim for $100 for board, as they rendered a verdict for $675, the exact amount of the claim for nursing. The plaintiff claimed that there had been no contract as to the amount of compensation which she was to receive for nursing, but that there was an express contract for boarding, and the amount she was to receive therefor. The defense was, that the plaintiff agreed to do the boarding and nursing for a stipulated amount, which had been paid.

The principal ground relied upon for a reversal is, that the verdict is flagrantly against the weight of the evidence. There was a sharp conflict in the testimony as to the terms of the contract and the value of the services rendered. Under our system of jurisprudence, it was the peculiar province of the jury to weigh the evidence and determine its effect. Mr. Crutcher was a man 96 or 97 years old and needed great care and attention, and Mrs. Stuart seems to have been in better condition to render this service than were the members of his family. He lived at the house of which she had possession. We think that Mrs. Stuart was a competent witness under section 606 Civil Code of Practice. Mrs. Bradford was the daughter of the decedent and as his agent made the contract with the plaintiff and is interested in the estate. She was then over fourteen years of age, besides, she was living when Mrs. Stuart testified in the case. In addition to that, she testified for the defendant.

Among others, the court gave instruction No. 3, which reads as follows: "Although the jury may believe from the evidence that Mrs. Bradford had

no express authority to make the contract claimed by the plaint
H. Crutcher, if they believe from the evidence that said contrac
and entered into as claimed by the plaintiff and was received by
by accepting the board and services of plaintiff, in nursing him
charged, or for any time, the jury should find as directed in p
structions one and two." It seems to us that this instruction
have been given at all, because it was expressly averred in the a
a contract was made with the plaintiff for the services rendered.
tion at issue was as to the terms of the contract. If the instr
any effect at all, it was favorable to the appellant.
The judgment is affirmed.

BAILEY v. BAILEY, &c.

(Filed October 11, 1904—Not to be reported.)

Wills—Undue influence—Conrad Bailey, owning about $4,000 o
died, leaving a last will which bequeathed all of his estate to his w
was a second wife, he had been married to her after having bee
from his first wife. He had two children by his first wife to wh
always been attached, but had no children by his last wife. Th
showed that he had made two wills before the last one, in both of
gave his wife a life estate in his property with remainder to his
It appears that a year before his death he suffered a stroke of para
which he never recovered. He was 64 years of age. It was in pro
wife stated upon one occasion that the former wills did not suit h
intended to persevere until one was written that conformed to h
Held—That the jury were peculiarly adapted to the trial of the
questions of fact, and having found against the will, this court is n
ized to disturb their verdict.

Simms & Grider for appellant.

John B. and W. O. Rodes for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Barker.

Conrad Bailey died domiciled in Warren county, Kentucky, leav
will and testament, which was duly probated in the county court,
as follows:

"Bowling Green, Ky., March

"This being my last will and testament, and renouncing all o
prior to this, March 4, 1902, being of sound mind and disposing
after all of my just debts are paid and funeral expenses, my grav
with a plain stone, I give and bequeath to my wife in fee (Closi
all of my property, real and personal, that I now own or may at m

"CONRAD BAI

The testator had been married twice; by his first wife (from
was divorced) he had two children, the appellees, George and Lizzi
both of whom were grown at their father's death.

After the order of probate in the county court, the appellees ap
the Warren circuit court, where a trial by a jury resulted in a ve
verse to the will; from the judgment based upon this verdict, the

the decedent, and sole devisee under the will, Mrs. Chloe Bailey, has appealed to this court.

There are but two errors insisted on by appellant as a basis for reversal; first, the verdict is contrary to the weight of the evidence, and, second, error of law embodied in the instructions given by the court, and refusal to give instructions offered by appellant. Of these, in their order.

The grounds for setting aside the will of the decedent were undue influence and mental incapacity. Conrad Bailey was over sixty years of age. He was a German by birth, and had all the characteristics of that industrious, economical and strong-willed race. He was exceedingly happy in his second marriage, the appellant being a faithful, loving and exemplary wife; but he also loved the children of his first marriage, and two wills written before the one in question, in which he made them tenants in remainder of his whole estate, subject to the life estate of appellant, testify to his fixed intention to provide for them as well as her, at his death. About a year before his death, the testator had a stroke of paralysis from which he never entirely recovered, and the extent of his mental incapacity by reason of the stroke is one of the issues in the case.

At the outset, we may as well say that we are deeply impressed with the hardship of the verdict on appellant; the dower interest in the small estate left by her husband (about four thousand dollars) will not support her, and she is left at the age of fifty-three years, when the power to labor is gone, without a maintenance. But there is evidence that the will was procured by the influence of appellant at a time when the mind of the testator was greatly weakened by disease, and when he was entirely dependent upon her love and care. While he was in this condition, some of the evidence shows that she was bringing to bear her influence to procure the making of a will along the lines upon which this is written, and that she said the former will did not suit her, and she intended to persevere until she obtained one that conformed to her wishes. Three wills were written by the testator between the stroke of paralysis and his death; two of them gave appellant the life estate in the whole, with remainder to appellees; the last gave it all to her in fee. We think, if the jury believed appellees' evidence—and this was their province—there is enough in the record upon which to predicate the conclusion that the will was procured by the undue influence of appellant. Undue influence is a relative term; what would rise to that dignity under one condition, might sink far below it under another. The exerted influence of a wife on a strong, vigorous husband might be only modest persuasion; that same influence upon him when weakened by disease, and dependent upon her loving ministration, might be irresistible. The jury are peculiarly adapted to the trial of these delicate and perplexing questions of fact, and whatever we may think of their conclusion, unless it be flagrantly contrary to the evidence, we are not authorized to substitute our opinion for theirs. The same reasoning applies to the question of mental competency. There was evidence of the want of capacity on the part of the testator to make a valid will, and whether he was competent or not was for the determination of the jury.

The court did not err in refusing to admit evidence that half of the Indianola street property, which was exchanged in part for the farm, belonged

to appellant. In the first place, the deed was the best evidence, and this was not offered; in the second, the fact that she owned half of the town property threw no light upon the issue being tried, which was will or no will. If the husband invested his wife's property in land, taking the title to himself against her consent, her remedy is in the enforcement of the resulting trust under the exception of section 2353, Kentucky Statutes.

The instructions given by the court are in legal substance the same as those offered by appellant. There is some difference in verbiage and in the construction and finish, but the central principles are the same. The fact that the first two directed the attention of the jury to the condition of the testator's mind at the date of the will, rather than the time of its execution (there being about two months difference), is immaterial under the facts shown. The testator's mind, whatever its condition, was uniformly the same. There was no evidence tending to show that it was better at one time than another; if there had been, the criticism of the instructions would be sound, but, under the evidence as given, no substantial injury was done appellant by the error indicated.

Judgment affirmed.

RADFORD v. RADFORD.

(Filed October 11, 1901—Not to be reported.)

1. Husband and wife—Contracts between—Where a husband and wife entered into articles of separation to the effect that they should no longer live as husband and wife, and each renounced all right which might prevail against the other in such regard, further providing that no restriction should exist against the other as to place of residence. After the separation the husband becoming suspicious of the wife as to her chastity, employed detectives to discover and bring to light misconduct upon her part should any exist, and being furnished by them with evidence which appeared to him conclusive of her unchastity, instituted suit for divorce, alleging that she was guilty of such lewd and lascivious conduct as rendered her unchaste. Held—That if the testimony of the witnesses for the husband was true, it established his contention, but the testimony of the wife was of such a character as to equal in importance the testimony of the husband, and if true established the good name and conduct of the wife. The chancellor dismissed the petition and this court cannot say that he erred in his finding.

2. Officer in service of the government—Residence of such officer—Where the residence of appellant was shown to have been in Christian county, that he owned property and paid taxes there, and had never claimed a legal residence elsewhere, and that he is a naval officer in the service of the government, obeying the orders of his superiors, going when and where they direct, he cannot be said to have a home elsewhere than the one he left when he entered the service of the government, and Christian county must be held to be the legal residence of appellant.

James Breathitt and Hazelrigg, Chenault & Hazelrigg for appellant.

Downer & Russell for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Barker.

The appellant and appellee are husband and wife, and lived together as

such until the 23d of June, 1900, when they entered into articles of separation, by which it was agreed, among other things, as follows: "Upon the execution of these articles, we shall no longer live together nor cohabit as husband and wife, and each does hereby renounce all right or privilege which might otherwise prevail against the other in such regard. Each shall be at liberty to hereafter reside and remain at such place or places as we may respectively determine, being free to change such abiding place or places as necessity or caprice may require."

The appellant is a naval officer in the service of the United States, and was, at the time of the institution of this action, in active service in the Philippines. The appellee is the daughter of a naval officer, and after the execution of the articles of separation by herself and husband, took up her abode with her mother at a boarding house in the city of New York, being No. 144, West Sixty-fifth street conducted by a Mrs. Humphries.

After the separation from his wife, the husband becoming suspicious of her chastity, employed professional detectives through the Metropolitan Detective Agency, to discover and bring to light, if it existed, evidence of her guilt. As a result of the report of the agency, he instituted this action in the Christian Circuit Court for a divorce, charging his wife with having been guilty of such lewd and lascivious behavior as proved her to be unchaste, and also with adultery, naming one Crane as co-respondent. The answer placed in issue all the allegations of the petition, including the residence of appellant in Christian county, Kentucky.

The testimony in this case is exceedingly voluminous, making a transcript of some six hundred pages and anything like an analysis of it would extend this opinion beyond all reasonable bounds. It is sufficient to say that the testimony of the detectives and their friends, which constitutes appellant's (plaintiff's) evidence, if it is true, abundantly establishes the allegations of the petition; according to it, appellee is little better than a common prostitute, and the house in which she boarded not many degrees above a brothel. The detectives obtained lodging in the house where appellee lived, and have detailed with precise circumstantiality saturnalian orgies, in which she and her companion participated, which would disgrace the dissolute degeneracy of the orient This evidence tends to prove that the keeper of the boarding house, appellant's mother and all the boarders in the house, at least acquiesced in the crimes of appellee, for it was impossible for the noisy revelries and open prostitution by Mrs. Radford, her female friends and their paramours, described in this record, to have taken place in the house without the knowledge of every inmate. Opposed to this, on behalf of appellee, is the testimony of her mother, Mrs. Emma Robinson, the keeper of the boarding house, Mrs. Humphries, and all of the boarders, who contradict the witnesses for appellant in every essential particular. While this evidence is, necessarily, negative in character, it is, for the reasons given, as potent as if it was affirmative; for, as said before, the debauchery described was of such a nature and duration as to preclude the possibility of its having been done without the knowledge of the boarders; and they say it could not have taken place without their knowledge, and that they never heard anything of the kind, or saw any conduct on the part of Mrs. Radford in consistent with that of a virtuous and upright woman.

The chancellor dismissed the petition, and we are asked on this app reverse his finding of the facts. This, we are disinclined to do. A c reading of this record makes it impossible for us to say, with any dee viction of being right, that he has erred in the conclusion he reached the innocence of appellee of the grave charges made against her good The witnesses for her stand as fair and disinterested as those for he band. The judgment of the chancellor on the facts is entitled to weight and respect in every case, and it is none the less so in this, wh are brought face to face with the proposition, that, to reverse it is t appellee out into the world, perhaps, without a dollar for her support certainly, without a character which any decent person could respect.

The evidence shows the residence of appellant to have been in Ch county, Ky. He is a native of that county, owning property and p taxes there, and has never claimed either a legal or actual residenc where. Being in the naval service of his country, he is, necessarily, his native State, whenever his duty calls him. He obeys the orders superiors and goes when and where they direct. It has never bee policy of the law to add to the burdens of one serving his country army or navy, the loss of residence in his native State, from his const and involuntary absence therefrom. Such an one cannot be said, proper sense of the term, to have a residence anywhere other than the he has left, since he has no choice as to where he goes, the time he main, or when he shall return. In order to gain either an actual or leg dence there is, of necessity, involved at least the exercise of volition i lection, and this cannot be affirmed of the residence of either a soldier o in active service. The principle in Tipton v. Tipton, 87 Ky., 243, reli does not govern this branch of the case. Tipton had left his native gone to the West India Islands, in the employment of a phosphate com and resided there several years. He afterwards returned, and institu action for divorce against his wife, whom he had abandoned in M county, Ky. It was decided that, under the facts as given above, gained an actual residence out of Kentucky, though he had retai legal residence here, and that the Code required an actual residence State for one year next, before the institution of an action for divorce principle has no application to a soldier or sailor in active service. T ter leaves his home involuntarily in the service of his country, and be said, in any sense, to have lost either his actual or legal residenc doing.

The judgment is affirmed.

PHILLIPS, &c. v. WILLIAMS.

(Filed October 12, 1904.)

1. Homestead—Sale by widow—Infant child—Action for rents—R of guardian—Where the owner of a homestead worth less than $1,00 leaving a second wife and infant child by her, and four adult childr former marriage, and the widow sold the homestead and left the St an action by the guardian of the infant child of decedent claiming th and profits of the homestead, it was error in the court upon ex pa

davits filed to the effect that the guardian of said infant was not a proper person to be guardian, to summarily remove him as such guardian against his objection without proceedings instituted for that purpose, and such order of removal was void.

2. Guardian ad litem—Conflicting interest between guardian and ward—Where it appears that the interest of the infant and guardian are in conflict, it was proper for the court to appoint a guardian ad litem to look after and aid in the protection of the infant's interest.

3. Fraud in purchaser of homestead—Receiver—Authority to appoint—Premature action—The guardian ad litem having filed a plea alleging a fraudulent transfer of property by appellant to his wife, to cheat the infant appellee, it was error in the court to make an order directing the receiver of the court to take possession of the homestead lot, rent it out and collect the rents, and apply them to the maintenance of the infant, and then continue the case without ascertaining what interest the infant or other parties had in the property, and without giving the occupant of the homestead an opportunity to execute a bond for such sum as might be hereafter adjudged to be due the infant, if any.

J. M. Roberson and R. L. Greene for appellant.

A. J. & N. J. Auxier and Jas.. Soward for appellee.

W. C. Marshall, Warning order attorney.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Nunn.

It appears that one William Williams died a few years since, leaving surviving him a second wife, Harriet Williams, an infant son by her, the appellee, and four children by a former marriage, all of whom were over the age of twenty-one years at the time of his death.

He was the owner at his death of a house and lot in the town of Pikeville, upon which he was residing at the time. His widow and infant child remained in the possession of this property for a year or two, when she sold her interest to appellant for the price of $150 and left the State and went to the State of West Virginia. Appellant took possession of this property under his purchase, and occupied it until the time when the judgment complained of herein was rendered.

U. K. Williams, a son of the deceased, purchased the interests of his three sisters in this property and instituted this action against appellant by which he sought to recover from him $85 as his share of the rent of this property while appellant occupied it. Appellant answered, controverting the claim, and alleged that he was the owner by purchase of the widow's homestead in the property, and that she was still living. He afterwards amended his answer and withdrew his claim that he had purchased her "homestead," but alleged that he had purchased her "life estate" without stating whether it was her dower or homestead.

One D. C. Steele filed a petition asking to be made a party to the action, claiming that he was the duly appointed guardian of appellee Willie Williams, who was an infant under nine years of age, and that by reason of the widow's election of homestead in this property and the sale to appellant, it amounted to an abandonment thereof, and that his ward was entitled to the use, rents and profits of same until he arrived at the age of twenty-one

years, but he did not state the value of the property. He also alleged in his petition that the four adult children of the deceased had received advancements from their father in money and property to the value of $1,000 each, and he caused them to be made parties to the action.

They answered, denying that they had been advanced $1,000 each by their father, but did not state what they had been advanced. Other pleadings were filed which did not change matters in any material way nor cure the defects in the pleadings previously filed.

On the 2d of October, 1902, the court made the following order: "Affidavit of W. H. Fannery filed, also affidavit of Harriet Williams filed. And upon motion of W. H. Flannery, attorney for said infant's interest, and the court being sufficiently advised, orders that W. T. Phillips, the present guardian of said infant, Willie Williams, is not a proper person as guardian of said infant, and, therefore, removes him as said guardian, and thereupon appoints James Sowards as guardian ad litem for said infant, Willie Williams, who being present accepts said appointment. To this order said Phillips objects and accepts."

This order is the only evidence in the record that appellant was ever the guardian of the appellee and even if he was the guardian, the court had no power or jurisdiction in this summary way to remove him. Section 2039 of the Kentucky Statutes, which authorizes courts of chancery to remove guardians for neglect or breach of trust, does not give authority to the court to make the removal on ex parte affidavits nor without proceedings instituted against the guardian for that purpose. He is entitled to his day in court. He should be advised of the charge against him and be given an opportunity to defend himself. That part of the order removing him is without any effect, but it does not follow that the remainder of the order is erroneous or void. The pleadings in this case show that the interests of appellant and the infant appellee are in conflict and it was right and proper in the court to appoint a guardian ad litem to look after and aid in the protection of the infant's interests.

On the 11th of October, 1902, the guardian ad litem filed another pleading in the case, in the interest of the appellee, in which he alleged that the appellant had transferred to his wife several thousand dollars worth of his property and was carrying on his business in his wife's name. He did not state in specific terms that appellant was insolvent, but he did state that this transfer of property to his wife and the conducting of business in her name was for the fraudulent purpose of cheating, hindering and delaying his creditors, and especially appellee. Upon this showing, the court made an order directing the commissioner and receiver to take charge of this house and lot, rent it, collect the rents and apply them to the education and maintenance of the appellee, and continued the case. From this order dispossessing him and the application of all the rents for the benefit of appellee, the appellant appeals.

We are of the opinion that the court erred. The issues between the parties had not been tried, and it was not known or ascertained what interest the appellee or the other parties had in this house and lot. Whether appellee would be entitled to the whole as a homestead or not. The court should have fixed a day in the term giving the appellant until that day, time to

make a bond with good security to pay the whole rent or such portion of it as the court might thereafter adjudge, according to the rights of the parties, and in the event he failed to execute the bond, then to have directed the commissioner or receiver to take possession of the property and rent it, collect the rents and hold same subject to the future order of the court.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

GODSEY v. VIRGINIA IRON, COAL AND COKE CO.

(Filed October 12, 1904—Not to be reported.)

Conveyances—Husband and wife—Appellant in this action seeks to have deed declared void. She is a married woman and some years ago conveye certain mineral rights in her land, her husband joining in the conveyance. She alleges she did not sign the deed and was constrained by the officer and the agent of the purchaser to do so, and further that the acknowledgement was in her husband's presence. Appellee was an innocent purchaser for value; and appellant's contention can not avail for the reason that the section of the statute relating to the execution of deeds, makes such a deed as this, acknowledged and recorded as it was, effective except in a direct attack brought against an immediate vendee. Whether the wife was examined pursuant to section 3760 of the Kentucky Statutes, is a closed question as against innocent strangers to the transaction.

E. E. Hogg for appellant.

B. P. Wooton, Jesse Morgan and R. L. Greene for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, a married woman, and her husband appear to have executed a deed some years ago conveying certain mineral privileges in her land. Her name is signed by mark, thus: "Ursulley $\frac{\text{her}}{\text{mark}}$ x Godsey." To the deed there is a certificate of acknowledgment in due form by the clerk of the county court. This suit is by appellant to have the deed declared void, because, she alleges she did not sign it, and was constrained by importunities of the officer taking the acknowledgment, and by the agent of the purchaser (the remote vendor of appellee) to execute the deed.

She also claims that the acknowledgment was in the presence of her husband, and, therefore, contrary to the requirement of the statute providing for privy examination. Appellee is shown to have been an innocent purchaser for value. It bought the mineral interest in question from the person shown by the records to be its owner, and paid full value for it. It was purchased and paid for after an examination of the record, and without knowledge of the facts relied on by appellant to avoid it. Appellant's contentions are unavailing, for the following reasons:

1st. It is not material whether she signed the deed in person If she authorized another to sign her name to it, and he did it in her presence, she subsequently acknowledging the act to be hers, in the manner required by law, it is as effectual as if she had in fact signed it.

2d. Section 507, Kentucky Statutes, fixes with simple clearness the r ites of a valid deed by a married woman, in as far as its execution i cerned, as being, first, its acknowledgment before some officer stated i chapter, which acknowledgment must be upon privy examination; second, its being lodged in the proper office for record with certificate officer before whom it was acknowledged.

The effect of such deed when so acknowledged and recorded is to p rest forever its execution, except in a direct attack brought against th mediate vendee, or other vendee with notice; and except against the who may falsely certify to the manner of acknowledgment. (Section Kentucky Statutes.) We do not mean by this to decide what effect w be given to a false certificate of an acknowledgment where the feme c neither signed nor acknowledged the instrument.

3d. Whether appellant was examined as required by the statutes, closed question, under section 3760, Kentucky Statutes, as against inn strangers to the transaction, when she has actually acknowledged the and that fact has been duly certified to by the proper officers. (Hall v. ante 553.)

The judgment of the circuit court dismissing appellant's petition is sequently affirmed.

ANDREWS, &c. v. WILSON'S ASS'EE.

(Filed October 12, 1904—Not to be reported.)

Practice—Where the object of an action was not to surcharge or fals former settlement made by an assignee, nor to disturb any judgmen order rendered, but to have the books and claims referred to placed i hands of a receiver or commissioner so that they may be collected and money distributed, there can be no valid objection to the appointmer such receiver and his taking charge of the books and papers, and in case if necessary the court can direct that this be done by the master missioner, and a judgment in denial of this relief is erroneous.

A. D. Cole for appellant.

W. G. Dearing, B. S. Grannis and John P. McCartney for appellees.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal of this case. The opinion on former appeal pears in 24 Ky. Law Rep., 1497. The subject of this litigation is the stated. On the return of the case to the lower court, appellees field t answer in effect stating that all matters connected with the estate of D Wilson and their connection therewith as assignees, were fully settled adjudicated by the Fleming Circuit Court, and that appellants were pa to that action and were concluded thereby. In the former opinion court stated that this was not a proceeding or action to surchange or fal any former settlment made by the assignees (appellees). And we fur remark that it is not an action seeking to set aside, modify or in any disturb the orders and judgments of the court rendered in the action sta The only purpose of this action is to have the books and uncollected cla

referred to, placed in the hands of a receiver or commissioner to the end that such accounts and claims as can, may be collected and the money distributed to the creditors of David Wilson.

This court decided that the effect of the judgment of April, 1901, created a vacancy in the position of assignee. They were discharged from further service and their sureties released from further responsibility. There can be no valid objection to having a receiver or the master commissioner take charge of these books and claims and if possible collect them for the benefit of the creditors of David Wilson. If no competent person will accept the position as receiver, the court can assign the duty to the master commissioner.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

FIELDS, &c. v. FISH & CO.

(Filed October 12, 1904—Not to be reported.)

Mortgage—Description of property in—A statement in a mortgage setting out the description of property as "My entire undivided one-tenth interest in about 265 acres of land, also my entire undivided one-tenth interest in the personalty of E. J. Rawlings, deceased, of Harrison county, Kentucky," was sufficiently descriptive of the mortgagor's property. It was an easily ascertainable matter what the estate consisted of and the mortgage indicated where the land was situated and from whom and how its title was derived.

J. J. Osborne for appellants.

D. Bradley Shawhan for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge O'Rear.

This case turns upon the sufficiency of the following description of property contained in a mortgage: "My entire undivided one-tenth interest in about 265 acres of land, also my entire undivided one-tenth interest in the personalty of E. J. Rawlings, deceased, of Harrison county, Kentucky."

It is contended and was so decided by the circuit court, that the description of the land was too indefinite to admit of any identification; that rights of others have intervened can not affect the sufficiency of the description, because if it is too vague to identify any parcel of land, it could not be notice to intending purchasers or creditors, and for that reason could not be a protection to the mortgagee. After the rights of others had attached, possibly because the description was too indefinite, if it was, it would be too late to make it good by amendment to relate back to the original transaction. Such would be to set traps, against which the most wary could not hope to survive.

"That is certain which can be made certain," does not mean that an imperfect or ineffectual instrument can be made good by the execution of another, based upon the original consideration and transaction. But, if from the information imparted by the document in question, an inquirer could reasonably learn of the truth by investigation aliunde the maxim applies. We construe the language of the description under consideration to

mean that the mortgagor had pledged to the mortgagee the one-te
est of the former in both the real and personal estate acquired f
Rawlings, deceased, whether by devise or descent, and which was
in Harrison county, Kentucky. It was an easily ascertainable ma
certainty, what that estate consisted of. The description in the
in itself indicated where the land intended to be conveyed was loc
from whom and how its title was derived.

The judgment is reversed and cause remanded, with directions
rule the demurrer to appellant's answer and amended answer.

HOUSE v. CITY OF COVINGTON.

(Filed October 12, 1904—Not to be reported.)

Obstruction to street—Damages—In this action for damages sus
falling over an obstruction in a street, the proof was that at the po
appellant fell, a plank was set on its edge at a break or step in the
motion for a peremptory instruction was sustained. Held—That t
of the court to the effect that the defect was structural, which th
exclusive control of, was carrying that doctrine too far. While it is
the plan of improvement is addressed to the council, yet it must
upon a plan not dangerous to life and limb, and moreover, this w
tion that should have gone to the jury.

H. D. Gregory for appellant.

F. J. Hanlon for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant sues to recover for injuries received from falling ove
struction in Madison street in appellee city, December 24, 1901.

The proof for appellant discloses that at the point where she fel
was set on its edge at a break or step in the street, the edge of
extending from an inch to three inches above and across the pav
the higher side and more on the lower. The court granted the
tion for a peremptory instruction at the close of appellant's evide
the ground that the defect, if any, was structural, concerning w
governing legislative body of the city had the exclusive discre
think this was carrying the doctrine invoked too far. While it i
plan of improvement of the streets of the city, and indeed whe
shall be improved at all, is a matter confined to the discretion of
cipal council, yet if they do improve them it must be done upon
not palpably dangerous to life and limb of travelers. The counc
authorize or suffer traps or pitfalls, or such obviously dangerou
tions to exist in the public streets, whether structural or otherw
dicate a disregard of the safety of pedestrians, without making
liable for injuries sustained therefrom. Whether the obstructio
instance was such as to render it actionable under the foregoing
question of fact that ought to have been submitted to the jury.

Judgment reversed and cause remanded for a new trial under p
not inconsistent herewith.

SAMPSON v. COMMONWEALTH.

(Filed October 12, 1904—Not to be reported.)

1. Criminal law—In this action against appellant for murder, where his contention was that the killing was accidental, he complains that the court did not define malice aforethought. This was not prejudicial to him because a definition of this term would have been beneficial to the Commonwealth by calling the attention of the jury to the fact that malice aforethought, as applicable to the facts proven, means something more than malice, ill will or hatred, especially when no ill will or bad feeling had been shown to exist from appellant to deceased.

2. Conduct of Commonwealth's attorney—The criticism of appellant upon the Commonwealth's attorney in reading from law books and a paper in argument, is not borne out by the bill of exceptions, nor does it appear that that officer gave to the jury an erroneous meaning of the term, malice aforethought, as complained of by appellant.

Hevarin & Woodwards for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Nunn.

This is an appeal from a judgment of the Ohio Circuit Court, rendered at its May term, 1904, convicting appellant, Sampson, of the murder of one George Cox, and fixing his punishment at confinement in the penitentiary for life.

Appellant contends that this conviction was erroneous for the reason, first, that there was no evidence showing any ill will or hatred on his part toward the deceased; that the evidence showed that they had been on friendly terms up to the time of the killing; second, the court erred in its instructions to the jury, and, third, on account of the misconduct of the Commonwealth's attorney in his closing argument to the jury.

The substance of the evidence upon which the conviction was had was as follows: That on December 23, 1903, some twenty-five or thirty young men and women attended a dance given at the residence of one Kennedy in Ohio county, Kentucky. Appellant, accompanied by Miss Edith Bryant, arrived at the party about dark. While there he drank some whisky, having brought a bottle with him. According to the testimony of Miss Edith Bryant, appellant was to dance every set with her. She danced a set with him, and when he claimed the next, she informed him that she would dance that time with another young man. He said "if you dance with him I will break up the d—n dance," and then told the girls to get their wraps, that by G—d he was going home. Other witnesses said he said that he was going to break up the G—d d—n dance, and then was going home. Miss Bryant did not dance with the other young man, but took her seat beside the appellant during this set. At this time some of the young men were out in the yard wrestling, and appellant went out to where they were, and some hard words passed between him and some of the young men in the yard. He then returned to the room, which was full of young people, and walked from one side of the room to the other, and then sat down, looking angry. Directly he jumped up, looked at the lamp for a short time, and

then sat down again and said, "by G—d, I will, I have got the th here to do it with, I would as soon eat breakfast in h—l now as an He then stood up and looking in the direction of old man Ge pointed his pistol and fired one shot which struck Cox in the br the collar bone, killing him instantly, and said, "now, by G—d, I have broken up the d—n thing." Mr. Kennedy, the son-in-law said, "you see what you have done, what did you go to shootin house for?" Appellant said, "Get out of here by G—d, what is come on and I will give you some." Kennedy then assaulted hi knife, but they were separated. These facts were proven by som six witnesses for the Commonwealth.

The appellant testified that he did not make the threats attribute that he did not carry the pistol with him to the dance, but that was in the yard where the boys were wrestling, a young man by of Will Hines handed him his overcoat to hold, and he found the Hines' overcoat pocket, took it out and broke it down and to thought, all the cartridges therefrom, and then put it in his own p went into the house; that while he was standing on the floor he pistol from his pocket, with the intention of giving it to Hines, pistol fired, in some way unknown to him; that he was not looki direction of Cox, nor did he have the pistol pointed in his direction and one or two other witnesses corroborated him, in effect, in th ments.

If the appellant's theory in this unfortunate occurrence is co penalty is indeed severe; but it appears that the jury disbelieved h and believed the Commonwealth's witnesses as to the manner of i rence. The court gave instructions in the ordinary form on murde tary manslaughter and involuntary manslaughter. The court told that if it was an accidental shot that they should not find him murder or voluntary manslaughter. Appellant complains because did not define malice aforethought. This was not prejudicial to t lant in this case, because a definition of this term would have been to the Commonwealth by calling the attention of the jury to the malice aforethought, as applicable to the facts proven, means s more than malice, ill will or hatred, especially when no ill will or ing had been proven on the part of appellant against the deceased.

The appellant says the lower court erred in permitting the wealth's attorney to read, from law books and from a piece of pap he held in his hand, the definition of malice aforethought. The bi ceptions does not bear out this statement. There is nothing in t showing that he read from any book or paper, nor does it appear gave to the jury an erroneous meaning of the term malice aforeth applicable to the case at bar.

Perceiving no error prejudicial to the substantial rights of the a the judgment of the lower court is affirmed.

COOPER, SR. v. COOPER, JR, &c.

(Filed October 12, 1904—Not to be reported.)

1. Lands—Ejectment—Proof—Where two brothers in 1890, made a verbal exchange of land, each taking possession of the parcel exchanged for by him, and continued to hold under such exchange for seven years, when one of them, without the knowledge of the other and without his consent, conveyed to a son the part held by his brother, an action in ejectment by the son can not be maintained, the son knowing that his uncle was in possession of the property and that his father had never offered any terms toward rescinding the trade. In this case upon the close of the testimony a peremptory instructon should have been given to find for defendant.

2. Same—In this action, the cause having been referred to equity and proof having been taken by the commissioner, aside from matters of proof as between the brothers as to the status of their accounts, each against the other, the appellee should have been required to pay the costs of the action in ejectment, to the time when the jury were discharged and the action transferred to equity.

B. F. Bennett and W. J. Worthington for appellant.

W. J. A. Rardin for appellees.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Nunn.

R. W. Cooper and J. W. W. Cooper, Sr., are brothers. J. W. W. Cooper, Jr., is a son of R. W. Cooper.

In the year 1890 these brothers made a verbal exchange of land, R. W. receiving from his brother 200 acres of land on the east side of Tygart's creek and J. W. W., Sr., receiving 140 acres on the west side of this creek. Each took possession of the land received in exchange and managed and operated it as if it were his own from that time until this litigation arose.

In the year 1897, R W., without the knowledge or consent of his brother, conveyed to his son, J. W. W., Jr., this 140 acres of land which he had placed his brother in possession of, under the verbal exchange. This son brought an action in ejectment against his uncle, the appellant, although he knew at the time he accepted the deed and brought the action that his uncle was in possession under this verbal exchange made with his father, and also knew that his father was in possession of the premises received from his uncle and had never offered, upon any terms, to rescind the trade. Appellant pleaded that the son had received no title by the conveyance to him, and that the deed, made under the circumstances stated, was champertous and void. He also offered to carry out the trade on his part with his brother, and tendered a deed for the land which he had traded to his brother.

A jury was empaneled to try this action in ejectment. When the evidence was introduced and heard, the appellant moved the court to give a peremptory instruction to the jury to find for him. This instruction the court refused to give, but upon what principle we are unable to perceive. Then by agreement of parties the jury was discharged and the cause was transferred to equity and by proper pleadings R. W. was made a party to the action. The brothers filed pleadings, each claiming that the other owed him a large sum for rent, timber cut and removed, and for valuable and lasting improvements each made on the land received from the other. A great many

depositions were taken by the parties to sustain their claims; the c
ferred the matter to the master commissioner to report on the re
claims, and he reported as follows: That R. W. was indebted to his
J. W. W., Sr., as follows:

To twenty acres of timber cut from new cleared land, at $8 per acre.
To timber cut from woodland on the 200-acre tract outside of the
clearing.....
To rent of the seventy acres cleared land on the 200-acre tract fo
eleven years at $30 per year.....
To rent of the twenty acres of the new cleared land on the 200 acre
for seven years at $20 per year .....
To improvements made by appellant on the 140-acre tract.....

Showing due appellant from his brother.....

He also reported that J. W. W., Sr., was indebted to his brother,
as follows:

To clearing twenty acres of new land on the 200-acre tract at $8 pe
acre.....
To rent of the 140-acre farm for elven years at $65 per year.....

Showing due R. W. from appellant.....

On the trial the lower court overruled all the exceptions filed by th
to the commissioner's report, and confirmed it, and adjudged that a
pays the costs of J. W. W., Jr., and also one-half of the remainin
the other one-half of the remaining costs to be paid by R. W., the b

It is evident from this record that the commissioner so arra
charges against each as to make their accounts balance, and it is bu
him to say that from the mass of testimony before him, he could ha
evidence to sustain almost any state of accounts he might have m
are convinced that the statement of accounts made by him and conf
the court was inequitable and unjust to the appellant. It appear
allowed R. W. $8 per acre, or $160 for clearing twenty acres of l
only charged him $140 for the rent of the land for seven or eig
This, in effect, was allowing him the use of this land for all this t
in giving him $20 in money for the clearing of it; this was unreaso

As stated, the commissioner allowed R. W. $8 per acre for the cl
this land, when the proof showed that $5 per acre was a fair price f
ing land in the ordinary way by leaving the large trees standing d
But as R. W. used this large timber, he was allowed $3 per acre in
for cutting it, yet when the commissioner charged him for the
timber taken off, he only charged him with the value of the timb
ing in the tree.

We are convinced from the proof that there did not exist the diffe
the rental value of these two tracts of land of $245, as the comm
placed it. Without analyzing the facts and figures as presented
record, it is sufficient to say that the appellant should have had j
for at least $100 against the appellee, R. W., and his costs expend
action. And the appellee, J. W. W., Jr., should have been require

the cost of this action in ejectment to the time when the jury was discharged and the action transferred to equity.

For these reasons the judgment of the lower court is reversed and the cause remanded with directions to the lower court to render judgment as herein indicated.

THE U. S. FIDELITY AND GUARANTY CO. v. CARTER, &c.

(Filed October 12, 1904—Not to be reported.)

1. Jurisdiction—Pleading and amendment—In this action the summons upon the original petition was served upon one of the defendants in Jefferson county, he being there temporarily. Subsequently appellant filed what it termed a "reformed and amended petition in equity" and process upon this was issued and served upon all of the defendants at their homes in Morgan and Magoffin counties. In answering the original petition, appellees expressly stated that they were not answering the reformed and amended petition, because of the question of jurisdiction, and moved that service on the latter pleading be quashed, which motion was sustained by the court and the action dismissed as to it.

2. Same—The general rule is that if an amended pleading presents a new and distinct cause of action from that presented in the original pleading, as was the case here, there should be service of process on the amendment, and the action of the court in sustaining the motion to quash the service of summons and dismiss the action as to the reformed and amended pleading, was proper, as the lower court was without jurisdiction upon the amendment.

Bodley, Baskin & Flexner for appellant.

H. L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Nunn.

One John S. Carter was elected sheriff of the county of Morgan for four years, his term begining January, 1898. The appellees became his sureties on his bonds for the first year or two of his term, and the appellant for the remainder. He defaulted by failing to pay to the State of Kentucky its revenue on the assessment for the year 1901. He and the appellant were sued in the Franklin Circuit Court, and the Commonwealth recovered of them about $5,000, which appellant paid. The appellant instituted an action against appellees in the Jefferson Circuit Court, for contribution. All the appellees resided in the counties of Morgan and Magoffin and were there served with process, except appellee J. D. Whiteaker, who was served in Jefferson county, when there temporarily. This petition was filed February 14, 1903. On the 31st of March, 1903, appellant filed what it termed a "reformed and amended petition in equity." In this pleading the statements made in the original petition were reiterated, and another and an additional cause of action was stated, to wit, that the sheriff, John S. Carter, had defaulted in failing to pay out the county revenue collected by him as ordered, to five or six persons, naming them, in all amounting to $1,750, which it had been compelled to pay, and asked judgment against all the appellees for their proportion thereof. Summons were issued on this reformed and

amended petition and served on appellees at their homes in Mo
Magoffin counties, not one of them having been served in Jefferso

Appellees, in answering the original petition, expressly stated
were answering it, and not answering the reformed and amended
and they also made and filed a motion to quash summons issued o
formed and amended petition, for the reason that the court in the
Jefferson did not, by reason of such summons and service, have o
jurisdiction of the appellees on the amended and additional cause

The court sustained their motion and dismissed that portion
formed and amended petition, which sought contribution of app
the $1,750, paid by appellant to county creditors, and expressly st
the dismissal was without prejudice to appellant, and that it mi
its action for contribution on this sum in the proper form.

The only question involved on this appeal is, whether the low
action on this motion was correct. The questions at issue bet
parties on the original cause of action have not been passed upo
lower court. The appellant claims that appellees answered to the
the action and thereby entered a general appearance and were, t
before the court, not only on the original cause of action, but for
pose of the reformed and amended petition as well as all other am
or additional causes of action that might thereafter be presented

The position of appellant's counsel is correct in so far as it a
amendments filed for the purpose of making the petition or cause
attempted to be stated, a good one, or to correct mistakes in the
action stated. But where an amendment is filed setting forth an ad
independent and new cause of action, the case is different. The
rule is that if an amended pleading presents a new and distinct
action from that presented in the original pleading, and of whic
fendant could not be apprised by an inspection of the original
then there should be service of process on the amendment. (6 B. M
Bush, 354, and 10 Bush, 93.)

If appellant's position be correct, that when appellees answered
inal petition it operated to enter their appearance to amended
stating a new and distinct cause of action, then it eliminates the ru
process is necessary in any case on an amended pleading. Suc
would force the defendant to accept the alternative of either sufferi
ment by default on the original cause of action, or answering it an
entering appearance to the amended, new and distinct cause o
Such a rule would be unreasonable and unjust.

We are of the opinion that the lower court was correct, and the j
is, therefore, affirmed.

SOUTH COVINGTON AND CINCINNATI STREET RY. C RIEGLER'S ADM'R.

(Filed October 12, 1904—Not to be reported.)

1. Railroads—Damages—Admissibility of evidence—Upon the tri
action in the lower court in which damages were sought against
for injuries to appellee's intestate, statements alleged to have ma

conductor just after the injuries complained of were inflicted, were competent, because they were a part of the res gestæ; the statements being "Let him lay there and go to h—l."

2. Same—Where the conductor was asked if he had made statements to the effect that he remembered that a man had fallen off the car, and said to him keep still and say nothing about it, and denied having made such statements, but the person to whom they were alleged to have been made stated that the conversation was had as related. This case can not be reversed for this even if it were error for the reason that appellant did not object to its introduction nor move to exclude it from the jury.

3. Same—Instructions—An instruction in this action telling the jury that "unless they find notwithstanding the negligence of the plaintiff, the defendant by agents and servants could have, by the exercise of ordinary or any degree of care, prevented said accident, then they will find for the plaintiff," was objectionable, and the court should have given an instruction defining the degree of care and diligence required of railroad companies in the carrying of passengers.

L. J. Crawford for appellant.

George Washington and Howard M. Benton for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of $4,178 against appellant in favor of appellee on account of personal injuries received by Lambert Riegler while being carried as a passenger on one of appellant's cars.

The evidncee of appellee conduced to prove the following facts: Appellant ran cars on what is known as the "Patterson street line," and ever since its establishment many years ago and up to the date of the injuries complained of, it had been the daily habit of Lambert Riegler, an old citizen of Newport, to ride upon this line morning and evening in going to and returning from his work in Cincinnati, O., the cars stopping at Pearl and Broadway streets in the latter city to let him off when going to work. On the morning in question, Riegler, with three others, stood upon the rear platform, on account of the crowded condition of the car. The conductor was also upon the rear platform. Arriving at a point near Pearl and Broadway, Riegler plainly indicated by words and action, that he desired to get off at his customary place. He took his position for that purpose, with one hand on the lateral bar attached to the car, and with the other grasping the upright bar at the rear of the platform. The car "slowed up" as if about to stop at the usual place, just south of the south intersection of Pearl and Broadway. Just before it reached a full stop, and before Riegler attempted to step from the car, but was merely preparing himself for that purpose, the car gave a sudden "jerk" or "lunge" forward, throwing Riegler to the ground with great violence, and seriously injuring and crippling him; that he was confined to his bed for about three months and walked for a long time thereafter on crutches, and at the time of the trial his right leg was shorter by about an inch than the other, and was smaller in circumference by an inch or more; that his medical bills amounted to more than $50.

Appellant's conductor in charge of the car stated that he did not know that Riegler was on the car, and did not know that he desired to get off at

Pearl and Broadway streets, and did not know that Riegler fell fr
car or was injured. He denied that his attention was called, instan
while Riegler was upon the ground, that he had fallen, or that he
reply, "let him lay there and go to h—l." Two witnesses, one for a
and one for appellee, testified that they did call the conductor's a
to the fact that Riegler had fallen and was then upon the ground, a
he did make this reply to them. Appellant claims that this was er
prejudicial to its interest. We are of the opinion that this was co
as a part of the res gestæ.

This conductor was asked upon cross-examination if upon an o
about three months after Riegler was injured, he did not say to o
Keiper that he remembered of a man falling off the car at Pearl and
way streets, and upon being told by Keiper that the man was stil
from his injuries, he then said to Keiper to keep still and not say a
about it. He denied having any such conversation with Keiper.
was introduced and testified that the conversation was had, as relate
appellant contends that this was error.

We could not reverse for this, even if it was an error, for the reas
the appellant did not object to this evidence or move to have it e
from the jury, but as the judgment will have to be reversed for othe
appearing in the record, which we will mention hereafter, we speak
that it may not be committed on the next trial. While this evidenc
not be admitted as substantive, it was admissible to go to the credi
witness, Howder, the conductor, and the court should have admonis
jury and told them for this purpose alone they could consider it. Ap
introduceed another of its conductors who testified that on his re
Newport on his car, he found Riegler injured at the point stated and
him on his car and carried him home. He stated that Riegler, in
to the question as to how he was injured, said he stepped off of
while it was in motion and it threw him down; that the car was
faster than he thought it was. Appellant proved the same facts
stance by its car inspector.

The court gave three instructions. One of them, the third, on th
ure of damages, is unobjectionable. The first one assumes that the
and servants of appellants were negligent and unskillful in the n
ment of this car from which Riegler fell. The second was as follo
the jury find for the plaintiff under the first instruction, but find t
plaintiff was also negligent at the time of the accident complained
but for such negligence on the part of the plaintiff he would not ha
injured, they will find for the defendant, unless they also find th
withstanding the negligence of the plaintiff, the defendant by age
ervants could have, by the exercise of ordinary or any degree of ca
ented said accident, then they will find for the plaintiff."

The objectionable part of this instruction is all after and includ
word "unless." The latter cause of this instruction should have b
off altogether, except it be contended that the back platform where
lant stood was a place of peril; then the latter clause should hav
framed as follows: "Unless they also find that notwithstanding the
gence of the plaintiff, the defendant, its agents or servants discove

perilous position in time to have and could have prevented the injury to him and failed to do so, then they will find for the plaintiff."

Appellee contends that even if instruction No. 2 on contributory neglect was erroneous, it could not have been prejudicial to appellant, because, as claimed by him, there was not the slightest evidence showing contributory negligence on the part of the appellee. He is correct so far as the eye witnesses to the accident or injury are concerned, but appellee's counsel overlooks the statements of the conductor who carried Riegler to his home, and the car inspector, who claim that Riegler said to them that his injury was caused by his stepping off of the car while it was in motion. Riegler denied these statements, but the jury had a right to consider all the evidence and give it the weight to which it was entitled, and this idea should have been presented to them by an instruction on contributory negligence.

On the next trial, the court should give an instruction defining the degree of care and diligence required of railway companies in the carriage of passengers, as defined in the cases of the Louisville Railway Co. v. Park, 96 Ky., 590; Louisville City Railway Co. v. Weams, 80 Ky., 420, and the same v. Monoque, 90 Ky., 369.

For these reasons the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

LOUISVILLE HOTEL CO. v. KALTENBRUN.

(Filed October 18, 1904—Not to be reported.)

Forcht & Field and O'Neal & O'Neal for appellant.

C. C. Hieatt and H. M. Johnson for appellee.

Appeal from Jefferson Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

The rule is that the promise by the employer to repair within a reasonable time after notice by the servant of the danger, places the risk on the employer and the servant may recover if a reasonable time has not elapsed, unless the danger is so imminent or manifest that one of ordinary prudence would not have continued in service. (McDowell v. C. & S. W. R. R. Co., 10 Ky. Law Rep., 209; Wood on Master and Servant, section 378.) The opinion was not intended to lay down a different rule.

The instructions of the court on the trial, properly followed the rule.

ILLINOIS CENTRAL R. R. CO. v. ELLIOTT.

(Filed October 13, 1904—Not to be reported.)

Railroads—Damages—Fellow servants—Appellee claims to have been injured by Waggoner, a bridge supervisor in employ of appellant. The evidence was conflicting and was properly left to the jury. The men were engaged in clearing a wreck and while Waggoner was Elliott's, the appellee's superior, he was at the time engaged in the same work and the company is not responsible for the injury of Elliott by reason of Waggoner's negligence, unless his negligence was gross. It was error for the court to

allow the jury to find for Elliott if the injury was caused by Waggoner's negligence, and not instruct the jury that there must be gross negligence of the superior to render defendant liable.

H. P. Taylor, Pirtle & Trabue and J. M. Dickerson for appellant.

M. L. Heaverin and E. M. Woodward for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Hobson.

On May 15, 1903, there was a wreck at McHenry, on appellant's road. Appellee Elliott was a carpenter in its service, working under a foreman, and W. C. Waggoner was supervisor of bridges and buildings, and as such had charge of these men, being superior in authority to the foreman.

Waggoner took the men to the wreck and was in charge of them after they reached the wreck, although the wrecking foreman had general charge of the wrecking operations. Waggoner directed Elliott to go under a coach that was off the track, with wrenches and a hammer and disconnect the brake. While Elliott was working under the car, according to his testimony, Waggoner went around to the front of the car to disconnect the brake and in doing this, after he got the nut off of the handle of the brake beam, he snatched the beam four or five time with force, causing it to fly back and strike Elliott violently in the side of his stomach producing hernia. This is Elliott's statement.

Waggoner says that he was simply holding a light and did not snatch the beam at all, and that Elliott was in no way hurt. It is very clear from the evidence that Elliott is very badly ruptured, but there is proof that he was ruptured before, although he testifies that he had been operated on for this and had been entirely relieved. While the evidence was conflicting it was properly left to the jury. Waggoner was not a fellow servant with Elliott. He was Elliott's superior, under whose orders Elliott was working; although Waggoner was himself subject to the order of the wrecking foreman while working at the wreck. But while Waggoner was the superior of Elliott and not a fellow servant, he was at the time engaged in the same work with Elliott and the company is not responsible for Elliott's injury by reason of the negligence of Waggoner, unless his negligence was gross. (I. C. R. R. Co. v. Coleman, 22 Ky. Law Rep., 878; Board v. C. & O. R. R. Co., 24 Ky. Law Rep., 1079, and cases cited.) The court allowed the jury to find for the plaintiff if Elliott was injured by the negligence of Waggoner and failed to instruct them as held in the cases cited that there must be gross negligence on the part of the superior to render the defendant liable. This was error, and we can not say that it was not prejudicial. Whether the negligence of Waggoner was gross is a question for the jury under all facts and circumstances.

Judgment reversed and cause remanded for a new trial.

NUTALL, &c. v. NUTALL.

(Filed October 18, 1904—Not to be reported.)

Lands—Conveyances—Correction of deeds—The appellee purchased from appellants a track of land, paying for it out of her separate and individual funds. The title was conveyed by a deed executed, which provided that the land should be hers during her natural life, but that at her death it should be held by her husband during his life and at his death to descend to her heirs. In an action by her to correct the deed, she alleged that she was not present when it was drawn, and that by mistake of the draftsman she was given a life estate when she should have been given a fee-simple, subject to the life estate of her husband in the event he should survive her. The grantors and the draftsman all testified that the deed did not conform to the intentions of the parties. Held—That the chancellor properly corrected the deed, and that parol evidence was competent to establish the mistake.

Turner & Turner for appellants.

W. S. Pryor for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 15th day of April, 1897, the appellee, Olive Nutall, the wife of W. L. Nutall, purchased from the appellants, M. A. Nutall and J. P. Nutall, the following boundary of land in Henry county on the Newcastle and Carrolton turnpike, bounded as follows: "Beginning at a point in the middle of said pike corner to land of I. W. McGinnis, thence with his line north 56 degrees east 87 poles to a stone corner to same; thence north 31¾ degrees east 108 poles and 22 lengths to a stone corner to same; thence 57½ degrees east 126 poles 17 lengths to a stake corner to same in Cravens line; thence north 37½ degrees west 124 2-5 poles to a stone corner to Cravens in Roberson's line; thence south 51 degrees west 66½ poles to a stake corner to T. P. Foree; thence north 79½ degrees west 87½ poles to a point in the middle of the Port Royal pike; thence with same south 28½ degrees west 20 poles to its junction with the Newcastle and Carrolton turnpike; thence with said latter pike south 4 degrees east 110.58 poles to a point opposite to a walnut tree; thence with same south 8 degrees west 155 poles to the beginning."

There was excepted from this boundary 37¾ acres which had been previously sold and conveyed by the grantors to Mrs. T. D. Cravens on the 7th of August, 1896, leaving 178½ acres which passed by this conveyance. The purchase money, $8,500, was all paid by Mrs. Olive Nutall out of her separate and individual funds. The title to this tract of land was conveyed by a deed executed by the vendors to Mrs. Olive Nutall during her natural life with a provision that at her death it was to be held by her husband, W. L. Nutall, during his natural life, and at the death of both was to go to the heirs of Mrs. Olive Nutall. On the 10th of September, 1904, Mrs. Olive Nutall brought this action against the appellant's, the grantors in the conveyance to her, and her husband, in which she alleged that she was not present when the deed was executed, and that by mistake of the draughtsman, she was only given a life estate in the property instead of the fee-simple, subject to a life estate in favor of her husband, W. L. Nutall, in the event he should survive her, and she filed with her petition a deed drawn in accordance with what was the intention of the parties at the time, and

asked that the grantors should be required to execute same and correct the error made in the orignal deed. The defendants, M. A. Nutall and her husband, J. P. Nutall, answered that it was their intention to have the land conveyed to the plaintiff in fee, subject to a life estate in favor of her husband in the event he survived her and that they were willing to execute the deed tendered with plaintiff's petition, rectifying the mistake, provided they had the power to do so and would not be responsible to the heirs of plaintiff. The deposition of J. P. Nutall, W. L. Nutall and H. K. Bourne, the draughtsman of the deed, were taken and they all testified that the original deed did not conform to the intentions of the parties. Under this showing the chancellor adjudged that the mistake made in the deed of September, 1897, should be corrected and a new deed rectifying the mistake of the old one should be executed by the grantors therein, and the defendants have appealed to this court and raise the question as to whether the chancellor had jurisdiction to correct the mistake of the draughtsman in the original deed, and also as to whether it was competent to establish the mistake by parol evidence. This question was fully considered by this court in the leading case of Worley v. Tuggle, &c., 67 Ky., 168, and it was decided that when by mistake, oversight, or fraud a deed did not conform to the real contract of the parties, the chancellor could reform it on satisfactory parol evidence, and then enforce a specific performance of the contract according to the real intention of the parties. Numerous authorities were cited to support the conclusion there reached and this case has since been uniformly followed by this court;. the last case in which the question was passed upon being Kendall v. Crawford, 25 Ky. Law Rep., 1224.

Judgment affirmed.

COMMONWEALTH v. ILLINOIS CENTRAL R. R. CO.

(Filed October 13, 1904.)

1. Indictment—Nuisance—Obstructing street—The circuit court sustained a demurrer to an indictment which alleges that in the county of Carlisle, and in the town of Bardwell, "at the time of committing the nuisance hereinafter complained of, there was, and yet is, a certain public street, same being a common highway in said town, called Jennings street, and which is the first public street in said town which crosses the Illinois Central Railroad Co.'s railroad tracks on the north side of the passenger depot of said company in said town * * * and that said railroad company on February 20, 1904, before the finding of this indictment, and on divers other days and times within twelve months last past, unlawfully and injuriously did put and place its freight cars in and across said street and did then and on other days and times there unlawfully and injuriously permit and suffer the said freight cars to be and to remain in and upon said public street and common highway at said crossing of said railroad tracks, for an unnecessary and unreasonable length of time, to wit, for the space of half an hour on each of the days aforesaid, whereby the public street and common highway aforesaid for and during the whole time aforesaid, was wholly obstructed, so that the citizens of this Commonwealth were prevented from passing and using said street * * * to the great injury of and common nuisance of all the citizens of the Commonwealth," etc. Held—That the indictment is good, and that although the charge in the indictment is general, the Com-

monwealth must, on the trial, be required to elect to prosecute for the obstruction on a certain occasion, and that it can not prove a number of obstructions on different days, and submit them all to the jury. The indictment is certain that the offense was committed on Jennings street at a certain point, and by the placing of freight cars across said street.

2. Election—When to be made—The rule seems to be that the election should be made before the defendant opens his defence. If the defendant is surprised on the trial, or if before the trial opens he is unable to know what he is to meet, the court, in the exercise of its discretion, can require the election to be made in advance, so that no injustice may be done and a fair trial had on the merits of the case.

W. H. Hester, N. B. Hays and L. Mix for appellant.

Pirtle & Trabue and Robbins, Thomas & Bridgewater for appellee.

Appeal from Carlisle Circuit Court.

Opinion of the court by Judge Hobson.

The circuit court sustained a demurrer to the following indictment and dismissed the prosecution: "The grand jurors of the county of Carlisle, in the name and by the authority of the Commonwealth of Kentucky, accuse the Illinois Central Railroad Co. of the offence of 'committing and creating and maintaining a common and public nuisance,' committed in manner and form as follows, to wit: The said Illinois Central Railroad Co. in the said county of Carlisle on the 20th day of February, 1904, and before the finding of this indictment is and was for many years, a corporation duly incorporated by the laws of the State of Illinois, and that on said day and on divers other days and times and for many years continuously and habitually did operate, maintain and run a railroad in and through the corporate limits of the town of Bardwell, in the county aforesaid, that at the time of committing the nuisance hereinafter mentioned there was and yet is a certain public street, same being a common highway in said town aforesaid, called Jennings street and which is the first public street and common highway in said town of Bardwell which crosses the said Illinois Central Railroad Co.'s railroad tracks upon the north side of the passenger depot of said company in said town; that said street is a common highway used for all the good people of said State, with their horses, buggies, wagons and carriages, to go, return, pass, repass, ride and labor, at their free will and pleasure; and that said railroad company, on said day and times aforesaid, and within twelve months last past, unlawfully and injuriously did put and place its freight cars in and across said street aforesaid, and did then and on the other said days and times there unlawfully and injuriously permit and suffer the said freight cars to be and to remain in and upon the said public street and common highway aforesaid, at said crossing of said railroad tracks aforesaid, for an unnecessary and unreasonable length of time, to wit, for the space of a half an hour on each of the days aforesaid, whereby the public street and common highway aforesaid for and during the whole time aforesaid was wholly obstructed, so that the citizens of this Commonwealth were prevented from passing, and repassing and using said street and common highway aforesaid, as they have a right and have the wont to do; to the great injury and common nuisance of all the citizens of

the Commonwealth having occasion to pass, repass and use the way aforesaid, against the peace and dignity of the Commonwealth of Kentucky."

The ground upon which the demurrer was sustained was that the indictment does not identify the offense charged sufficiently. It has been held by this court in several cases that every obstruction of a highway is a separate offense, and that although the charge in the indictment is general, the Commonwealth must, on the trial be required to elect to prosecute for the obstruction on a certain occasion and that it can not prove a number of obstructions on different days and submit them all to the jury. (L. & N. R. R. Co. v. Commonwealth, 25 Ky. Law Rep., 1452, and cases cited.) The statement in the indictment that the offense was committed on the 20th day of February, 1904, is immaterial under the Code and the Commonwealth should not, on the trial, be confined to that day. The statement that the offense was committed on divers other days is also immaterial. The indictment is certain that the offense was committed on Jennings street at a certain point, and that it was committed by the placing of freight cars across this street.

We do not see that greater certainty should be required. Certainty to a common intent only is necessary, and so far as we know indictments similar to this have been commonly sustained. Thus in charging a man with carrying concealed deadly weapons, it is common to do no more than to name the weapon; as, for example, to say that it was a pistol, without specifying the place or circumstances under which it was carried. So an indictment for incest was recently held good by this court although it did not identify the particular act of carnal knowledge which would be relied upon, and in fact the Commonwealth undertook to show several distinct acts. (Smith v. Commonwealth, 109 Ky., 685.)

In that case it was held that the Commonwealth should be required to elect which act it would prosecute the defendant for. The authorities are conflicting as to the time at which this election should be made, and in such matters the trial judge has a discretion. The rule seems to be that the election should be required before the defendant opens his defense, and there is no reason why it should not be made earlier if it is shown that the ends of justice so required in the particular case. It is not presumed that the defendant's conduct has been such as to lay him open to a number of charges, or that he will be unable to prepare his defense where the charge is stated in general terms, as in the indictment before us.

If the defendant is surprised on the trial, or if before the trial opens he is unable to know what he is to meet and the ends of justice so require, the court, in the exercise of his discretion, can require the election to be made in advance so that no injustice may be done and a fair trial had on the merits of the case.

The case of Shackelford v. Commonwealth, 25 Ky. Law Rep., 1830, is not in point. That was an indictment for false swearing. The ruling in that case rests on the rule that in such indictments it must not only be alleged that the defendant's testimony was false, but the actual truth must be averred, so as to inform him what the Commonwealth relies on.

Judgment reversed and cause remanded, with directions to overrule the demurrer to the indictment.

ILLINOIS CENTRAL R. R. CO. v. McMANUS' ADM'R.

(Filed October 18, 1904.)

1. Witness—Disqualification—Convicted of burglary—Instructions—Where a witness who had been convicted of burglary, testified in a case, it was error in the court to instruct the jury that "the unsupported testimony of an infamous witness was not sufficient upon which to found a verdict." A conviction of one for burglary does not disqualify him as a witness, and while it was competent to prove the fact of his conviction, for the purpose of discrediting him, the jury were the sole judges of the weight to which his testimony was entitled.

2. Two new trials—Verdict not sustained by the evidence—Under Civil Code, section 341, prohibiting the granting of more than two new trials on the ground that the verdict is not sustained by the evidence, this being the third trial and verdict for appellee, we feel constrained to affirm the judgment and it is so ordered.

Wheeler & Hughes and Pirtle, Trabue, Doolan & Cox for appellant.

J. W. Worten for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Burnam.

The opinion in this case upon the former appeal, reported in 24 Ky. Law Rep., 81, contains a full statement of the pleadings and testimony upon the first trial of this action, and it is unnecessary to state them again. A judgment in favor of the appellee was reversed on that appeal upon the ground of insufficient evidence, and the failure of the trial court to grant a new trial upon the ground of newly discovered evidence. Upon the return of the case to the lower court the trial again resulted in a verdict for the appellee, which was set aside and a new trial granted, chiefly upon the ground that it was not sustained by the evidence. A third trial also resulted in a verdict for appellee, but for a smaller sum, which we are again asked to reverse upon the ground that it was the result of passion and prejudice and not sustained by sufficient evidence.

In both of the last trials, Sam Hooks, one of the parties who was on the train at the time of the death of plaintiff's intestate, was introduced as a witness for appellant and testified in substance that one of appellant's employes came to the point where he and decedent were on the train, and asked them if they had any money; that he responded that he had 25 cents; that decedent, replied that he had none; that he then told him he must be off the train by the time he came back; that the train slowed up and decedent stepped off, saying that he could get into an empty box car. The testimony of this witness flatly contradicts the other testimony introduced by the defendant that they did not know of the presence of either of the parties who boarded the train that night. The instructions given upon the last trial were made to conform to the suggestion in the former opinion, and we think correctly stated the law of the case. In addition thereto in instruction No. 5, the court told the jury that the "unsupported testimony of an infamous witness was not sufficient upon which to found a verdict." It developed upon this trial that Robert Craig, plaintiff's chief witness, subsequently to the first trial of the case, had been convicted and sentenced to

the penitentiary for burglary. His conviction of the crime of burglary did not disqualify him as a witness.

While it was competent to prove the fact of his conviction for the purpose of discrediting him, the jury were the sole judges of the weight to which his testimony was entitled. Section 1180 of the Kentucky Statutes provides "that if any person be convicted of either of the offenses described in the seven preceding sections that he should ever afterwards be disqualified from giving evidence in any judicial proceeding, or from being a witness in any case whatsoever."

The offenses described in the seven preceding sections are perjury, false swearing, subornation of perjury, or a school officer who makes a false report, or a notary a false statement as to the notice in a protest. Burglary is not one of the offenses, and subject to these exceptions and the exceptions and modifications contained in section 606 of the Civil Code, every person is competent to testify for himself or another, unless he is incapable of understanding the facts concerning which his testimony is offered. We think the trial court erred to appellee's prejudice in the 5th instruction. And as section 341 of the Civil Code prohibits the granting of more than two trials upon the ground that the verdict is not sustained by the evidence, we feel constrained upon this appeal to affirm the judgment appealed from, and it is so ordered.

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COURT OF APPEALS OF KENTUCKY.

CITY OF COVINGTON v. KENTON COUNTY, &c.

SAME v. SAME.

(Filed October 13, 1904—Not to be reported.)

The first of these actions is an agreed case filed in the Kenton Circuit Court in these words: Is the city of Covington required to provide and maintain suitable offices for the use of the county judge, county clerk, county jailer, sheriff, assessor and other county officials, without expense to the county of Kenton; or, conversely stated, is Kenton county liable to the city of Covington for rent of offices provided for its officials by the city of Covington within said city? In the second case, the city filed an ordinary action against the county, alleging that it had furnished the circuit court room and the offices connected therewith for two years, which were of the reasonable rental of $6,000 per annum, and prayed for a mandamus against the fiscal court, requiring them to levy a tax to pay the city $12,0 0 rent therefor. Upon due consideration of all the statutes, general and special, bearing upon the questions involved, the court, Holds—That the city of Covington not being the county seat of Kenton county, the fiscal court is a body of limited jurisdiction, and is only authorized to secure a sufficient jail and a comfortable place for holding court at the county seat, and is without authority to levy a tax to pay rent for buildings used for public purposes at Covington, or to provide a court room or the necessary offices for the public county officials at Covington, by buying land there or erecting them.

F. J. Hanlon for appellant.

F. M. Tracey for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

The first of these actions is an agreed case filed in the Kenton Circuit Court in these words:

"The question submitted to the court for decision is as follows:

"Is the city of Covington required to provide and maintain suitable offices for the use of the county judge, county clerk, county jailer, sheriff, assessor, and other county officials, without expense to the county of Kenton; or,

conversely stated, is Kenton county liable to the city of Covington for rent of offices provided for its officials by the city of Covington within said city?

"FACTS.

"By the act of the general assembly of January 29, 1840, the county of Kenton was established, and in pursuance of the provisions of said act, the county seat was located at Independence, a small town about ten miles from the city of Covington. Said town of Independence has been, since the establishment of the county, and still is, the county seat of Kenton county; by an act of the general assembly of December 20, 1851, and February 13, 1858, certain terms of the county court are held in Covington; said officers hereinabove mentioned are at present occupying offices in the city building erected by the city of Covington. By the acts of the general assembly of 1850, 1851, 1858, 1860 and 1886, copies of which acts are hereto attached as part hereof, the city of Covington was required to provide and maintain offices for county officials in the city of Covington, and pursuant to these enactments, the city has, until the early part of the present year, provided and maintained offices for these officials without expense to the county. The city of Covington is now claiming that these old acts have been repealed by the acts of 1891-2 3, said acts being now contained in sections 1833 to 1885, inclusive, of the Kentucky Statutes, and that it is entitled to rent from the county for the offices which it has provided for its officials. An agreement has been reached, fixing the amount of rent to be paid in the event that the county is legally obligated to maintain these offices in the city of Covington.

"Upon these facts the judgment of the court is prayed upon the question submitted, with such orders as may by the court be deemed proper."

In the second case the city filed an ordinary action against the county alleging that it had furnished the circuit court room and the offices conneected therewith for two years, which were of the reasonable rental value of $6,000 per annum; that the house was built by the city at the cost of $225,000, and that the third floor was occupied by the circuit court room and the other offices referred to; that the county had paid the city no rent thereon and judgment was prayed for a mandamus against the fiscal court requiring them to levy a tax to pay the city the sum of $12,000 for the rent of the circuit court room and offices referred to.

The circuit court gave judgment in favor of Kenton county in both cases, and the city of Covington appeals.

All the courts were held at Independence, the county seat, from the establishment of the county until the year 1850. By the act of February 21, 1850, three terms a year of the Kenton Circuit Court were required to be held in the city of Covington, when the city council of Covington provided a court room, a clerk's office and jail, and the judge upon personal inspection was satisfied therewith. By the act of December 20, 1851, the presiding judge of the Kenton County Court, in addition to the terms held at Independence, was required to hold four terms a year in the city of Covington. By the act of February 13, 1858, it was provided that the judge of the Kenton County Court should annually hold twelve terms in the city of Covington, to be held at the courthouse there, at certain times. It was also provided that the county court should keep a distinct docket at Covington, and that the clerk

should keep an office there at such place as the city might provide, in which office he should keep the records of the county court. It was further provided that every process should be returned at Covington. By the act of February 2, 1858, offenders charged with violating the law, when the offense was committed in Covington, should be committed to the Covington jail, and by the act of February 16, 1860, the county clerk was required to record in the office at Covington, deeds, mortgages, etc., of real estate situated within a certain part of the county. The people of Covington desired the court held in the city, and to secure this were willing to furnish the court room and necessary offices so as to avoid objection by Kenton county to the additional expense that would have been entailed on it, if it had been required to furnish two sets of public buildings. It was also provided the certain cost of conducting courts there should be paid by the city so as to impose no additional burden in this regard on Kenton county. Taking all the acts together, we think they necessarily meant that the county court was to be held at the courthouse in Covington; that the courthouse and jail were to be furnished by the city and that the offices necessary for the county officials to perform the duties required of them were also to be furnished by the city. For something like forty or fifty years the city has acted upon this construction of the acts; for it has furnished the county officials with these offices and the court room, but it is now contended that these acts are repealed by the act of 1893 in reference to fiscal courts. (Kentucky Statutes, sections 1838-1885.) By section 1839 the fiscal courts shall hold their sessions at the county seat of their respective counties and shall have jurisdiction to levy each year, for county purposes, a poll tax on each male and an ad valorem tax on all property subject to taxation. By section 1840, the fiscal court has jurisdiction, among other things, "to erect and keep in repair necessary public buildings, secure a sufficient jail and a comfortable and convenient place for holding court at the county seat." By section 980, Kentucky Statutes, it is also provided as follows: "That in counties having a population of less than one hundred and fifty thousand, and which constitute separate judicial districts, the circuit courts shall be in continuous session, and shall be held in cities of the second class, where there be such cities, but the judge of such courts shall hold part of such sessions at the county seat of the county where the same is not such city, such part not to be less than two weeks, if the business of the court require so long, in February, June and October of each year."

Whether the local acts referred to are repealed or still in force is not a new question in this court. In Nienaber v. Tarvin, 104 Ky., 149, the circuit court had made an order requiring the city council to make certain alterations in the courthouse building in Covington. They disobeyed the order, and one of the questions raised on the appeal was whether there was a legal obligation on the city to provide and keep a suitable court room, clerk's office and other offices necessary for the holding of the circuit court in that city. The court, after considering the previous legislation, held that the city of Covington was legally bound to keep the court room and offices connected therewith in proper condition. This case arose in 1898 under the present statutes. The city, however, relies on the case of Richardson v Boske, 111 Ky., 893, as laying down a different rule. In that case the ques-

tion was what taxes persons living in Kenton county outside of the city of Covington were liable for; and the court, after quoting from section 1851, Kentucky Statutes, providing that both the city and county shall each pay its proportionate part of all expenses common to the city and county, said "Certainly the salaries of the county officers, cost of maintaining and providing suitable buildings for county purposes, wherever located, and the payment of the expenses of holding elections for State and county officers, are all expenses which are common to the whole county."

In using this language the court had in mind only the provision of the statute as to "expenses common to both said city and county," and when it referred to "suitable buildings for county purposes, wherever located," it had in mind only such buildings for county purposes as the fiscal court is authorized to provide for. The salaries of the county officers, the expenses of keeping the roads in order or providing for the poor or of holding elections and all those things which are to be provided for by the fiscal court at the expense of the county, may properly come out of the county treasury. But the fiscal court is a body of limited jurisdiction. It has no power except that conferred on it by law. It is only authorized to secure a sufficient jail and a comfortable place for holding court at the county seat. There is no authority for the fiscal court to spend the money of the county for these purposes at any point other than the county seat, and we have been unable to find any provision or statute authorizing it to pay rent for such buildings at any other point than the county seat. By section 3950, Kentucky Statutes, the county judge, during the period the courthouse is being built or repaired or can not be used, may rent another house not further than a quarter of a mile from the public square in which the courts of the county may be held for the time, and he may also rent a house within the same distance of the public square for the clerk's office or jail, the rent to be paid out of the county levy. This is the only statutory provision authorizing the renting of buildings for county purposes, so far as we can find. The fiscal court of Kenton county is, therefore, without authority to pay rent for the buildings used for public purposes at Covington, or to levy any tax for this purpose. The power to tax can only be exercised pursuant to statutory authority. For the same reason the fiscal court is without power to provide a court room or the necessary offices for the public officials at Covington, by buying land there or erecting them. If the city of Covington is not to furnish the necessary buildings for the holding of the courts there, then there is no authority of law for the furnishing of these buildings. The present statute requires the court to be held there (section 980, Kentucky Statutes), but in so enacting, the legislature, as it made no other provision, evidently had in mind the local acts referred to, under which the city was to furnish the buildings, thus recognizing these acts as still in force; for otherwise the courts could not be held there at all. Under the present statute all those expenses of the county which are to be provided for by the fiscal court must be paid out of the county levy made by the fiscal court of Kenton county as held in Richardson v. Boske. But this rule can have no application to things which the fiscal court, under the statute, has no power to provide. The legislature in the new statute has simply recognized the old status in which the plain purpose was to provide Covington, at its request and at its ex-

pense, with the additional court facilities which it desired. To obtain these facilities, the city agreed to furnish, and did furnish, the necessary court room, jail and public offices for the transaction of the public business. By the present statute the benefits which the city thus received, and the burdens which it thus assumed as to these buildings, are left as they were before. If, in the future, hardship or inequality of burdens results calling for legislative action, it is within the legislative discretion to give a remedy by repealing the local acts placing the burden on the city and enlarging the powers of the fiscal court in the premises; but this so far it has not done.

The judgment in each case is, therefore, affirmed.

TOMLIN v. MORRIS.

(Filed October 18, 1904—Not to be reported.)

1. Contracts—Usury—Appellant and appellee entered into a contract by which the former deeded to the latter certain lots for a recited consideration, and the further consideration that the former should purchase another lot from Lizzie Cotton, in order that appellee might purchase same in installments, and it was further provided that certain installments should be paid without interest, a certain sum payable monthly, which he paid until he had paid $1,150, when he filed this action charging that the contract was usurious, and praying that appellant be required to convey the property to him. The relief was adjudged and properly so, as it seems that it was a contrivance to evade the statute against usury.

2. Same—The rule is that as part of the consideration for the sale of property any rate of interest which may be agreed on may be charged and enforced until the maturity of the debt, after that, only legal interest shall be collected. The contract in this case was terminable at the pleasure of either party because, by the giving of the notice provided for in the contract, the $700 provided for could have been required to have been paid and the contract terminated.

J. S. Gaunt and James Hemphill for appellant.

Glore, Dickerson & Clayton for appellee.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Hobson.

On May 10, 1893, appellant and appellee entered into the following written contract:

"Know all men by these presents, that Elmer E. Morris having this 10th day of May, 1893, deeded to J. G. Tomlin, lots 1715 and 1716 in South Erlanger subdivision, Kenton county, Ky., for the sum of $200, being a nominal consideration, and the further consideration that said J. G. Tomlin should purchase lot 1717 adjacent thereto from Lizzie Cotton on which is situated one three room frame dwelling house, in order that said Morris might have the privilege of purchasing same in installments, the conveyance to said J. G. Tomlin of lots 1715 and 1716 being made by said Morris to indemnify said Tomlin against loss should said Morris fail or refuse to meet the obligation of this bond hereinafter set forth: Now, therefore, and in consideration of $700 to be paid the said J. G. Tomlin in installments of $10

per month, without interest, beginning May 15, 1893, and continuing each month thereafter, one-half of which installments, or $5 per month, shall be rent in lieu of interest, and the other one-half shall be a credit upon said purchase price of $700.

"In case said Morris fails or refuses to meet his said monthly payments of $5 rent and $5 upon said purchase price of $700 for two months in succession, then this bond and the privileges thereunder shall stand forfeited.

"But nothing herein contained shall prevent said Morris from requiring a conveyance of the entire property, that is to say, of lots 1715, 1716 and 1717, by paying or causing to be paid to said Tomlin balance at any time remaining unpaid upon said $700 purchase price, after deducting said monthly payments of $5 each after giving said Tomlin thirty days' notice of such intention. Nor shall anything herein prevent said Tomlin from terminating this bond by offering to convey this property herein mentioned to said Morris upon thirty days' notice, in which case said Tomlin shall be entitled to notes bearing legal interest for the unpaid portion of said $700 purchase price after deducting said monthly payments of $5 each. For the performance of the conditions of this bond the said Elmer E. Morris and J. G. Tomlin hereby bind themselves, their heirs, executors and administrators.

"Dated at Erlanger, Ky., May 10, 1893.

"J. G. TOMLIN,
"ELMER E. MORRIS."

Morris made Tomlin payments from time to time aggregating $1,150 He then filed this action charging that the contract was usurious and that his payments had more than paid the debt by several hundred dollars. He prayed judgment for the excess and that Tomlin be required to convey the property to him. The circuit court adjudged him the relief sought, and Tomlin appeals. The only question in the case is whether the contract is usurious on its face. Section 2219, Kentucky Statutes, is as follows:

"All contracts and assurances made, directly or indirectly, for the loan or forbearance of money, or other thing of value, at a greater rate than legal interest, shall be void for the excess over the legal interest. The amount loaned with legal interest, may be recovered on such contract or assurance; but if the lender refuse, before suit brought, a tender of the principal, with legal interest, he shall pay the costs of any suit brought on such contract or assurance."

In Grimes v. Shrieve, 22 Ky., 553, this court said: "It is not the form or expression of the agreement, but the nature and intent of it, which must determine whether the contract be a shift to get more than legal interest, and colorable only to evade the statutes. * * * Every shift, device or subterfuge, which the art or ingenuity of man can invent, to take unlawful interest, either directly or indirectly, or by any shift, or deceitful way or mean, is included in the prohibition of the statute. Neither are cases of usury confined to precise loans of money; but they extend to cases where the relation of debtor and creditor exists, and to cases of wares, merchandise or commodities."

The rule is that as part of the consideration for the sale of property any rate of interest which is agreed on will be enforced until the maturity of the obligation, but, after the obligation falls due, then only legal interest will

be enforced because the creditor may collect his money, and if he does not do so he can not demand more than legal interest for the forbearance. (McCann v. Bell, 79 Ky., 112; Warton v. Warton, 5 Ky. Law Rep., 302.) In the case before us we cannot presume that Tomlin paid Lizzie Cotton more than $700 for the property; for by the terms of the contract Morris could, by giving him thirty days' notice, demand a conveyance of the entire property by paying him $700, with legal interest. The contract also expressly states that Tomlin should purchase the Cotton property in order that Morris might have the privilege of purchasing the same. The deed which Morris executed to Tomlin for his two lots were in legal effect only mortgages to secure Tomlin in the payment of the money referred to. Tomlin also, by giving thirty days notice, could require the $700, with legal interest, to be paid, and thus terminate the contract. The contract, therefore, was terminable at the pleasure of either of the parties on thirty days notice. When this notice was not given it is apparent that Tomlin was forbearing to give the notice to secure the higher rate of interest upon his money. While the contract is unusual in form, it seems to us clear it was simply a device to avoid the statute against usury. The three lots were in equity the property of Morris subject to the lien of $700. By the contract he was made to pay rent on the property and the $700 bore no interest until one or the other of the parties gave thirty days' notice, and then the debt would bear legal interest. If by such a device the statute against usury could be evaded, it would soon become a dead letter. For this reason the courts have always declined to lay down any general rule upon the subject and have left every case to be determined upon its own facts under the principles above quoted.

Judgmeent affirmed.

WRATHER, &c. v. STACY.

(Filed October 18, 1904—Not to be reported.)

1. Insurance—Beneficiary—Change of—John M. Stacy procured an insurance of $1,000 on his life, payable to his wife at his death. There was a provision in the policy which authorized a change in the beneficiary, and he made appellants beneficiaries instead of his wife, they being his creditors, and as additional consideration they were to pay the premiums and were to pay the father of insured $500 of the policy at the death of insured. At the death of insured his wife instituted suit against the beneficiaries to recover the amount they had collected on the policy, and the verdict and judgment were in her favor for the full amount. Held—That the insured had the right to change the beneficiary, and had the right to substitute creditors as beneficiaries for their protection, as they would have had an insurable interest in his life. His father also had such an interest because of his relationship and the father was entitled to one half, or as much as was necessary to pay a purchase-money note for property sold by appellants to insured and his father.

2. Same—The mere fact that appellants obtained a benefit by reason of the substitution of beneficiaries and the widow lost thereby one that would have accrued to her had the substitution not taken place, is not a deprivation of a right which would give her a cause of action, as the insured, in changing the beneficiary, exercised a right he had under the contract of insurance.

Bullock & Smith for appellants.

Bennett, Robbins & Thomas and R. B. Flatt for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Paynter.

In June, 1901, John M. Stacy obtained a policy on his life for $1,000, payable at his death to his wife, Pearl D. Stacy. There was a provision in the policy which authorized the insured to change the beneficiaries therein. On June 16, 1902, the insured made J. R. Skinner and J. D. Wrather beneficiaries in the policy instead of his wife; they at the time were creditors of the insured and it was contemplated that the amount of his liability to them would be increased. And as an additional consideration they were to pay the premiums which might become due on the policy; besides they were to pay James Marshall Stacy, father of the insured, $500 of the amount which they might receive at the death of the insured. At the time the change in the beneficiaries took place, the insured was a consumptive with the prospect of a short life, and he died in January, 1903. The insured and his father were without a home, and they conceived the idea of acquiring one. They purchased a house and lot in Oakton, Ky., of J. R. Wrather for $350, and as additional security for the purchase-money note, the $500 part of the policy going to James Marshall Stacy, was pledged to its payment.

The property was conveyed to the father, which he sold in the son's lifetime. After the death of the insured, Skinner and Wrather collected the money on the policy. They claim that there was due them something over $500. They paid the note which had been executed for the purchase money of the house and lot. This action was instituted by the widow, Pearl D. Stacy against the beneficiaries named in the policy and J. R. Wrather to recover the amount collected on it. The case was tried before a jury, and the verdict and judgment was for the full amount. The defendant relied upon the state of facts which we have stated above as a defense to the action.

The insured had the right, under the terms of the policy, to change the beneficiary. He could do it with or without reason, because the beneficiary first named did not have a vested interest therein. (Wirgman v. Miller, 98 Ky., 620.) He had the right to substitute creditors as beneficiaries for their protection, as they would have an insurable interest in his life. (Baldwin v. Hayden, 24 Ky. Law Rep., 900.) His father also had an insurable right therein by reason of his relationship. So when the policy matured, the father was entitled to one-half of it, and so much of that one-half as was necessary to pay the purchase-money note, should have been thus appropriated. Whatever sums were justly due the beneficiaries named in the policy should have been paid out of the other half of its proceeds. Under the contract with the insured the beneficiaries in the policy were trustees, and it was their duty to disburse the money according to the terms of the contract with him. (Crews v. Crews, 23 Ky. Law Rep., 2374.) The mere fact that Skinner and Wrather obtained a benefit by reason of the substitution of beneficiaries and the widow thereby lost one which would have accrued to her had the substitution not taken place, is not a deprivation of a right which would give her a cause of action. The insured simply exercised a right which was reserved under the contract of insurance. The right which the wife took in

the policy was subject to the power which the insured had to substitute another as the beneficiary. There is not the slightest evidence in the record showing that the insured was mentally incapable of making the substitution of beneficiaries, or that the change made of the beneficiaries was the result of fraud. It was not a fraud in contemplation of law that the insured chose to make the change.

As Skinner and Wrather were trustees, and this action involved the settlement of the trust, we think that the court should have transferred the case to equity. Having reached this conclusion, we do not deem it necessary to pass upon the question as to whether certain depositions were parts of the bill of exceptions, and whether the instructions given by the court were properly brought here for review. While the policy of insurance was not properly in the record, still the pleadings sufficiently show its provision, with reference to the power of the insured to make the substitution of beneficiaries, to enable us to pass upon the questions we have considered. It may be added here that the widow or the estate of the deceased have no interest in the one-half of the policy which was to go to James Marshall Stacy. The settlement of that question is for him and Skinner and Wrather.

The judgment is reversed for proceedings consistent with this opinion.

WILSON v. COMMONWEALTH.

(Filed October 18, 1904—Not to be reported.)

1. Dentistry—Authority to practice—Board of examiners—Certificate—Constitutionality—An act to amend the charter of the Kentucky Dental Association, approved May 10, 1886, requiring all persons engaged in the practice of dentistry in this State, within six months thereafter, to cause his name to be registered with the board of examiners of the Kentucky Dental Association, and procure a certificate authorizing him to practice dentistry, is constitutional.

2. Indictments—Separate offenses—For same time—Plea in bar—Where three indictments were found at the same time against the same person for practicing dentistry without the certificate required by the amended act of May 10, 1886, each alleging that the offense was committed within twelve months before the finding of the indctment, a conviction on one may be pleaded in bar of the other two.

O'Meara & James for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Barker.

The law under which these prosecutions were had is an act entitled "An act to amend the charter of the Kentucky State Dental Association," approved May 10, 1886, which, so far as pertinent, is as follows:

"Section 1. The board of examiners of the Kentucky State Dental Association shall keep a record in which shall be registered the names and residence or place of business of all persons authorized under this act to practice dentistry or dental surgery in this State.

"Sec. 2. Every person now legally engaged in the practice of dentistry or

dental survery in this State, at the time of the passage of this act, shall, within six months thereafter, cause his name and residence or place of business to be registered with said board of examiners, upon which said board shall issue a certificate to such person, duly signed by a majority of the members of said board, and which certificate shall entitle the person to whom it is issued to all the rights and privileges set forth in section 1 of an act approved April 8, 1878, to amend an act, entitled 'An act to incorporate the Kentucky State Dental Association.'

"Sec. 4. Any person who shall, in violation of this act, practice dentistry or dental surgery in the State of Kentucky, for fee or reward, shall be subject to indictment by the grand jury of the county in which the offense is committed; and, upon conviction, shall be fined in the sum of not less than $50 nor more than $200 for each offense."

Three indictments were returned against appellant by the grand jury of Hardin county, Kentucky, for violations of this act, by practicing dentistry without a certificate. Each covers the same period of time, being one year prior to the 19th day of November, 1903. They are precisely alike in every respect, except that in each one the name of a different patient appears, upon whom the practicing was done. That containing the name of Sam Bell as the patient operated on, was tried first, under a plea of not guilty, with an agreed statement of facts. The trial resulted in the appellant being found guilty, and his fine fixed at $60. Afterwards, those containing the names of Virgie Greenwell and Elie Lewis were tried under the plea of not guilty, and also the plea of former conviction, with the same agreement of facts as in the first case. These trials resulted in appellant's conviction, and a fine of $51 in each case. From these judgments the appellant has appealed to this court.

Two propositions are insisted upon for reversal: First, that the act creating the Kentucky Dental Association, as amended by the acts of April 8, 1878, May 10, 1886, and May 1, 1893, in so far as it required the appellant, who had been practicing dentistry in Kentucky since 1864, to register, is unconstitutional; second, if this be not sound, then the judgment of conviction under the first indictment is a bar to the prosecution of the other two. The case of Commonwealth v. Basham, 101 Ky., 170, in principle involves the very case we have here on the first proposition. There, Basham had practiced dentistry prior to 1878, but, failing to register under the provisions of the amendment of 1886, was indicted. A general demurrer to the indictment was sustained by the circuit court, and it was dismissed. This judgment was reversed on appeal, the court holding that the act of 1878, and the amendments of 1886 and 1893 constitute one law regulating the practice of dentistry in Kentucky, and that, although the defendant had begun the practice of his profession prior to 1878, his failure to register was a violation of the amendment of 18 6, which required every person practicing dentistry at the date of its enactment, to register. While the opinion does not discuss the constitutionality of the act, that was, necessarily, upheld in order to reverse the case. The constitutionality, however, of a similar act was expressly decided in the case of the Kentucky Board of Pharmacy, &c. v. Cassidy, 25 Ky. Law Rep., 102, and the authorities bearing upon the question are therein reviewed at length. These cases are conclusive of the first judg-

ment against appellant, as that involves only the question of the constitutionality of the act under which it was rendered.

The pleas of former conviction to the second and third indictments present valid defenses. As said before, they cover the same period of time as that occupied by the first. The statute provides that, upon conviction for a violation of the act, "the defendant shall be fined in the sum of not less than $50 nor more than $200 for each offense." The question presented is whether or not the offense denounced by the statute is of such continuous nature as to subject the violator to only one conviction for the whole period of time next before the institution of the prosecution, or is it of such a character as that each act of practice constitutes a separate offense? It is apparent, upon very slight consideration, that, if each time an unregistered dentist pulls a tooth, he is subject to a fine of from $50 to $200, in a short while these would aggregate so large a sum as to make payment impossible, and, as a result, the defendant might lie in jail a large part of his life. Such a conclusion is not to be reached, unless constrained by the very letter of the statute. We are not without high authority, as well as sound reason, against the cumulative construction. In the case of the Apothecaries Co. v. Jones, 1 Q. B., 89, there was involved an act similar in principle to the one under consideration. The Apothecaries Act of 1815 (55 Geo., 3, chapter 194), section 20, provided that "any person who shall 'act or practice as an apothecary' without a certificate is liable to a 'penalty for every such offense.'" The defendant had practiced as an apothecary without a certificate, and given medical advice and supplied medicine to three different persons at different times on the same day, and it was held that the words "act or practice as an apothecary" were directed against an habitual or continuous course of conduct, and that the defendant was not guilty of a separate offense in attending each of the three persons, and was only liable to one penalty. In the opinion, the leading case of Crepps v. Durden was relied on. In the latter case, the plaintiff had been convicted in four separate cases for unlawfully exercising his business of a baker by selling rolls on Sunday, contrary to the statute of 29 Car, 2, chapter 7, the words of that statute being "that no tradesman or other person shall do or exercise any worldly labor, business, or work of their ordinary calling on the Lord's Day," and Lord Mansfield is quoted as saying: "The offense is exercising his ordinary trade upon the Lord's Day; and that, without any fractions of a day, hours, or minutes. It is but one entire offense, whether longer or shorter in point of duration; so whether it consists of one or a number of particular acts, the penalty incurred by this offense is five shillings. There is no idea conveyed by the act itself that if a tailor sews on the Lord's Day, every stitch he takes is a separate offense, or if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offenses. There can be but one entire offense on one and the same day."

In the case of in re Snow, 120 U. S., 274, there was involved the construction of an act of Congress, directed against Mormonism. So much as illustrates the matter in hand is as follows:

"Section 3. That if any male person, in a territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with

more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than $300, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court."

Snow was indicted by the grand jury of the United States for the November term, 1885, in the District Court of the First Judicial District in and for the Territory of Utah, for four violations of this statute, and was convicted under each. In our opinion reversing these judgments, the Supreme Court said: "There was but a single offense committed prior to the time the indictments were found. This appears on the face of the judgment. It refers to the indictments as found 'for the crime of unlawful cohabitation committed' 'during the time' stated, divided into three periods, according to each indictment. For so much of the offense as covered each of these periods the defendant is, according to the judgment, to be imprisoned for six months and to pay a fine of $300. The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half, and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-four years, and fines amounting to $44,400, and so on, ad infinitum, for smaller periods of time. It is to prevent such an application of penal laws, that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purpose of indictment or prosecution, prior to the time the prosecution is instituted." (Cawein v. Commonwealth, 22 Ky. Law Rep., 1784; Parks v. N. C. & St. L. R'y, 48 Am. Rep., 655; Friedeborn v. Commonwealth, 57 Am. Rep., 464, and Am. & Eng. Encycl. of Law, 2 edition, volume 13, page 65, title "Rule as to offenses of continuing nature," and cases there cited.)

In the first case, being that in which Sam Bell is alleged to have been the patient operated on, the judgment must be affirmed; in the other two cases, the judgments are reversed.

BURNS, &c. v. SPARKS, &c.

(Filed October 14, 1904—Not to be reported.)

1. Bills and notes—Peddlers—Sale of "territory" to sell tinware—A note executed in consideration of a sale of "territory," or the right to sell patented articles of tinware in a certain locality, without having a license so to do, is void, because of the failure to have upon it, endorsed, the words, peddler's note, as required by Kentucky Statutes, section 4223.

R. C. Burns, Richard Moore, M. S. Burns, Thos. R. Brown and Alv. Lackey for appellant.

H. C. Sullivan, W. D. O'Neal, Jr., and A. O. Carter for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge O'Rear.

Appellees executed certain negotiable promissory notes to one C. A. Post, who, before maturity and for value sold and assigned them to appellant. In this suit upon the notes, defense was interposed that they were executed

solely in consideration of the right to vend certain patented articles in certain territory in this State; that they were peddler notes, in other words, and had not written or endorsed upon them the words "peddler's notes," as required by section 4223, Kentucky Statutes. Appellants seek to avoid the effect of this contention upon the grounds, first, that the statute in so far as it interferes with or attempts to regulate the sale or traffic in articles patented under the laws of Congress, is an invasion of the federal domain of government, and consequently void; second, that the articles for which the notes were executed were in point of fact tinware, which, by section 4218, Kentucky Statutes, is exempt from the operation of sections 4216 and 4217; and, third, that appelles are estopped by reason of certain writings executed by them to Post, which it is claimed estop them from relying on the provisions of the statute (section 4217).

In Commonwealth v. Petty, 96 Ky., 452, it was held that the right to vend a patented article could not be curtailed by a State by exacting a license to sell it. But in a number of later cases it was held in most explicit language that the State could require a license of the patentee or his vendee, before he could sell the right to make or sell the patented article. (Bohon v. Brown, 101 Ky., 354; Nunn v. Citizens Bank, 107 Ky., 262; Rumbly v. Hall, 107 Ky., 349; Hays v. Walker, 25 Ky. Law Rep., 1045.) We must regard that question as now closed in this State, not calling for a restatement of the reason upon which the conclusion rests.

The patented article in this case was found to be, and we think is, tinware. But, the thing sold appellees was not the article named, but was "territory" as it is called, or the exclusive right to sell it in certain counties of this State. Section 4218, Kentucky Statutes, exempts only vendors of tinware, not those who sell the right to sell patented articles of tinware in a locality, from the operation of sections 4216 and 4217.

Nor do we regard it as material that the contract, or paper executed in the transaction as an evidence of the contract, purported to sell so many of the specific articles, when the evidence clearly discloses that the real consideration was the privilege of selling in certain territory that was sold. The suit was upon the notes. Not having been negotiated to and then held by a bank in this State (under the statute then in force) it was competent to show the true consideration of the paper sued on, even if to do so contradicted some written agreement between the parties, possibly executed in contemplation of defense of a suit on the notes, that the consideration was not one within the operation of the statute.

The writings relied on as constituting an estoppel are as follows:

"Louisa, Ky., August 29, 1902.

"Received of C. A. Post sample commissary and all goods promised me in a transaction had with him.

"L. T. SPARKS."

The one signed by M. E. Sparks was identical in wording. These writings lack several elements of a good estoppel. They are not addressed to the person who claims to have relied upon them to his injury. They do not negative the proposition now asserted as a defense to the notes. They could not have misled as to the existence of the ground of defense now asserted. If the same statements had been incorporated in the face of the notes, they

would have been equivalent only to the customary words "for value received." Under the statute, the notes are void, because of the failure to have upon them the words "peddler's note." We do not decide, though, what the rights of the parties are under their contract. The purpose of the statute was not to prohibit dealings in such matters. It was simply to reserve defenses to buyers from such itinerant persons as "are here to-day and gone to-morrow," who sell worthless articles or privileges under misrepresentations, so that the real consideration and transaction might be shown, and the payment of the consideration successfully resisted if the transaction warranted it. The statute goes no further, as affecting the validity of the contract, than to annul the note not so marked as to preserve all defenses against it if it should be negotiated. But it was not meant to let out one party to an agreement of sale which was in fact free from fraud or overreaching, and was otherwise binding.

This suit, however, as stated, was upon the notes. They being void, the circuit court porperly adjudged that no recovery could be had in this action.

Judgment affirmed.

JONES v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed October 14, 1904—Not to be reported.)

Railroads—Causes of action—Damages—Appellant set out in his petition that appellee, by its agents and servants, maliciously caused his wrongful indictment and prosecution under charges of derailing a railway train and of murder, and caused his imprisonment without reasonable or probable cause. It was error for the lower court to require appellant to elect which cause of action he would prosecute, or upon his failing to do so to dismiss his petition, because there was but one cause of action stated, that of malicious prosecution.

E. N. Ingram for appellant.

Benjamin D. Warfield and E. W. Hines for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, in his petition, alleges that defendant, by its servants and agents, directed and authorized to do so, maliciously caused his wrongful indictment and prosecution under charges of maliciously derailing a railway train, and of murder, and that its said servants, by force and without warrant, arrested appellant, and imprisoned him under the charges named, all without reasonable grounds or probable cause; that he was in fact innocent of the charges, and that the prosecutions have been dismissed and finally disposed of by the court in which they were pending.

The defendant moved the court to compel appellant, the plaintiff, to elect which of two causes of action set out in the petition he would prosecute, whether that for malicious prosecution, or that for false imprisonment. The circuit court, under the idea that the two causes of action were stated, or attempted to be, and that under section 83 Civil Code of Practice they could not be joined in one action, sustained the motion, and ordered the election. Plaintiff declining to elect, his petition was dismissed. The court

is of opinion that but one cause of action was stated, that of malicious prosecution. The offenses with which appellant says he was wrongfully charged were felonies. Whether his arrest was procured to be done by officers of the law, or by private persons, as it might have been legally if he in fact had been guilty, or if there had been probable cause to believe him guilty, is not material. The fact of arrest and imprisonment under the false charge, if it was false, was but an element or state of the malicious prosecution, and whether pleaded or not, could have been given in evidence on the trial under the general issue. The motion to elect should have been overruled.

Judgment reversed and cause remanded for further proceedings not inconsistent herewith.

LIST'S EXT'X v. LIST, &c.

(Filed October 14, 1904—Not to be reported.)

1. Appeal—Equity action—Motion for new trial—Necessity—In an equity action to enforce a mortgage lien on real estate, it is not necessary that a motion be made for a new trial or for a separation of the law and facts, in order to take an appeal from the judgment of the chancellor, the recovery of personal judgment on the lien note in controversy being a part only of the relief sought. Nor is this rule affected by the fact that the parties might have caused some question of fact in the case to be tried as an issue out of chancery.

2. Witness—Impeachment—Specific acts—The reputation of a witness can not be impeached by proof of specific acts of wrongdoing on his part; and, therefore, an attempt to discredit a witness by proving that he was a defaulter, or that he was arrested for failing to provide for his family, was properly rejected.

3. Attorney—Privileged communications—Communications made to an attorney for the express purpose of being conveyed by him to a third party, and which he was directed to deliver to the other party, are not privileged communications which will excuse the attorney from disclosing, when sworn as a witness, on the ground that they are confidential.

4. Defense—Written release—Denial—Evidence—Offer to pay—In a suit on a note to enforce a mortgage lien on land, the defense interposed was that the debt had been discharged by the written release of the mortgagee, which was denied. Held—That any fact tending to prove that the release was not true or genuine, such as an admission of defendant's indebtedness, or an offer to pay it, is competent as an independent admission of fact.

5. Judgment of chancellor—Equitable actions—Weight to be given—While in a purely ordinary or common law action the rule is, that on appeal the judgment of the chancellor will be as favorably regarded as would be the verdict of a properly instructed jury, the rule is different in equitable actions which, upon appeal, will be determined by the weight of the evidence.

6. Consideration of evidence—Judgment of appellate court—In an action by the executor of the mortgagee to enforce a mortgage lien on land on a note for $6,000, executed by the son of deceased, to which the defense relied on was a writing releasing the indebtedness, which was controverted as genuine, evidence considered, and held that the judgment of the chancellor is against the weight of the evidence, and same reversed, with directions to enter judgment in appellant's favor for the amount of the note sued on and enforcement of the mortgage lien.

M. L. Harbeson for appellant.

H. D. Gregory for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Settle.

On June 22, 1886, the appellee, George List, executed and delivered to his father, Ferdinand List, his note for $6,000, with six per. cent. interest, payable three years after date. To secure the payment of this note, appellees, George List and Minnie List, at the time it was given, executed to Ferdinand List a mortgage upon the undivided one-half interest of the mortgagors in a certain described lot in the city of Covington.

"And also all machinery, appurtenances and property of every kind and description that now is or may hereafter be brought or placed on the lot of ground above described, and all additions to such machinery, apparatus or property, that may hereafter be made or placed upon said premises, and all improvements that may be made of or upon said premises, or anything thereon."

The mortgage contains in addition to the usual stipulations providing for its enforcement in case of default in the payment of the note and interest, a stipulation requiring the mortgagors to keep the property insured for the benefit of the mortgagee, and also the following covenant: "This mortgage covers the rents, issues and profits of said property and premises." * * *

The mortgage was duly acknowledged by the mortgagors on the day of its execution and immediately delivered to the mortgagee, who thereupon had it placed to record in the proper office.

In January, 1901, Ferdinand List departed this life testate, domiciled in Kenton county, this State. His will was admitted to probate at the February term, 1901, of the Kenton County Court, and duly recorded in the office of the clerk of the county court. Elizabeth List, wife of the testator, was by the provisions of the will appointed executrix, and on the day of its probate she gave bond and duly qualified as such in the county court.

The note and mortgage of $6,000, which appellee George List had given the testator, went into the hands of the executrix with other assets belonging to the estate, and the same being unpaid, and its payment refused by appellee, this suit against him and wife was brought by the executrix in the Kenton Circuit Court to recover the amount of the note, and to enforce the lien given by the mortgage to secure its payment. The answer denied the liability of appellee George List, and averred his discharge from such liability by written release from Ferdinand List, alleged to have been executed August 21, 1900.

The reply of the executrix pleaded non est factum, and no consideration. After the taking of much proof in the form of depositions, the case was submitted to the chancellor, who rendered judgment to the effect that appellee, George List, had been discharged from liability upon the note and mortgage, by the written release filed with his answer; consequently appellant's action was dismissed at her cost. Of that judgment she bitterly complains, asking its reversal at the hands of this court. It is insisted for appellees that as no motion for a new trial was made in the court below,

the only question before this court on the appeal is as to whether the pleadings support the judgment.

The action was one in equity. The recovery of a personal judgment for the amount of the note in controversy was only a part of the relief sought. The enforcement of the lien given by the mortgage to secure the payment of the note was also sought. Only courts of equity have jurisdiction to enforce liens. No motion for a new trial or separation of law and facts is required in an equity action to bring the whole case before this court. Nor is this rule of practice affected by the fact that the parties might have caused some question of fact in the case to be tried as an issue out of chancery. (Sallyer v. Arnett, 23 Ky. Law Rep., 321; McCormick Machine Co. v. Martin, 21 Ky. Law Rep., 309.) This case must, therefore, be considered as properly before us, and we shall so treat it.

The errors complained of are: First, that the chancellor erred in rejecting certain evidence offered by appellant; second, that he erred in refusing to require R. C. Simmons, an attorney, to answer certain questions asked him; third, that the chancellor further erred in admitting certain incompetent evidence; fourth, that the judgment of the chancellor was unsupported by, and is flagrantly against, the evidence.

The evidence referred to in the first ground and which was excluded by the chancellor was offered by appellant through the witnesses, M. O. Todd and W. J. Sanford. By Todd it was attempted to be proven that E. J. Newman, the draftsman of the written release, alleged to have been given appellee George List by his father, was a defaulter while in Todd's employ; and by Sanford, a lieutenant of police, appellant attempted to prove that Newman was arrested for failing to provide for his family, and that judgment against him was suspended upon his promise to do so. To prove the same fact appellant also offered in evidence the records of the Covington Police Court. We think the chancellor properly excluded this evidence. It is well settled that the reputation of a witness can not be impeached by proof of specific acts of wrongdoing on his part. (Civil Code, section 597.)

Appellant offered to prove by Simmons, who it was avowed would so testify, that appellee George List, after the death of his father, and about the time this suit was brought, requested him (Simmons) to see the executrix and children of F. List, deceased, his (appellee's) mother, brothers and sisters, and ask them to release him from his indebtedness upon the note and mortgage sued on, and that the witness did in fact communicate this requests to the persons named. Appellant also offered to prove by the same witness that after failing to secure of the executrix and children of F. List the release of appellee from the debt, he, at the latter's request went to them the second time and also to their attorney and proposed to them that appellee would convey to them by deed the mortgaged property, in payment and satisfaction of the note, which they refused to agree to.

Simmons refused to testify concerning these matters, upon the ground that at the time they were received from appellee, he was his attorney, and that the requests and communications were made to him because of that confidential relation. The examiner before whom his deposition was offered to be taken, and the chancellor to whom the examiner referred the matter, ex-

cused Simmons from giving the testimony in question upon the ground indicated.

We are of the opinion that both the examiner and chancellor erred in this ruling. We do not think communications of the character named can be regarded as privileged. It was not denied by George List that they were made to the attorney for the express purpose of his conveying them to the persons for whom they were intended. The attorney was purposely selected by appellee as a mouth-piece and go-between, and the messages he was directed to deliver to the other parties possess none of the requisites of a confidential communication, to protect which the rule was designed.

In A. & Eng. Ency. Law, volume 19, page 139, it is said: "Nor does the rule of privilege protecting confidential communications extended to communications between solicitors of opposite parties. Communications made by a party to a suit to an attorney to be communicated to the adverse party, are not privileged." (Greenleaf Evidence, section 245.)

We do not agree either with the contention of appellee's counsel that the communications in question should have been excluded because they were in the nature of offers to compromise. The defense interposed was that appellee had been discharged from the debt sued on by a written release from his father, which was denied. Any fact that would tend to prove that the release is not true, or genuine, such as an admission of appellees indebtedness, or an offer to pay it, would be competent as an independent admission of fact.

In a note found in volume —, page 221, Greenleaf on Evidence, it is said: "The American courts have gone further and held that evidence of admission of any independent fact is receivable, though made during a treaty of compromise." * * *

In considering the main question in this case, viz.: Whether or not the judgment of the court is supported by the evidence, it will be well to ascertain what weight should be given the finding of a chancellor on a question of fact.

In the case of Edwards-Barnard Co. v. Pflanz, 24 Ky. Law Rep., 2296, in discussing this subject, it is said: "It will be observed that this action is purely an ordinary, or common law action, and it is a well known rule in such cases that the judgment of the chancellor will be as favorably regarded as would be the verdict of a properly instructed jury, hence, unless palpably against the evidence, it will not be disturbed. (L. & N. R. R. Co. v. Taylor, 96 Ky., 241.)

"The rule is, however, different in equitable actions, for in such action this court will, upon appeal, determine the weight of the evidence." (Scott v. Mitchell, 19 Ky. Law Rep., 218.)

The rule last-mentioned must control in the case at bar.

The alleged written release from F. List to the appellee, George List, is as follows:

"Know all men by these presents: That I, Ferdinand List, of the county of Kenton, and State of Kentucky, for and in consideration of the sum of one dollar to me in hand paid by my son, George H. List, of the city of Covington, and the county and State aforesaid, the receipt of which is hereby acknowledged, and in further consideration of certain valuable ser-

vices to me rendered by the said George List, in promoting and effecting for me and for my account, the sale of a certain property, situated at the corner of Burnett and Water streets, in the city, county and State aforesaid, have remised, released and forever discharged, and by these presents do, for myself, my heirs, executors, administrators and assigns, remise, release and absolutely and forever discharge the said George H. List, his heirs, executors and administrators, of and from all debts, claims and demands, and all manner of action and actions, cause or causes of action, whatsoever, in law or in equity, which I ever had, or now have, or which I or my heirs, executors, administrators or assigns, hereafter can, shall or may have, by reason of the existence of any note or notes, mortgage or mortgages, lien or liens, drawn and executed, in my favor, by the said George H. List, or by reason of any other cause or causes whatever, arising out of any and all dealings or transactions between myself and the said George H. List to this day.

"It is expressly understood and agreed that this release shall not operate against, nor affect the right, title and interest of the said George H. List, as an heir at law to a full and equal share of my estate, in accordance with the terms and provisions of my last will and testament.

"In witness whereof, I have hereunto set my hand and seal this 21st day of August, in the year 1900. Signed, sealed and delivered.

(Signed) "F. LIST. (L. S.)

"In the presence of—

"F. M. SCOFIELD."

The only direct proof of the execution of the release came from appellee George List, and the witness, Newman. It appears from their testimony that it was written by Newman at appellee's instance the day before it was presented to or signed by F. List, and that it was signed by the latter on the date it bears, at the residence of appellee in the presence of George List, Newman and F. M. Scofield, but only Scofield's name appears to it as attesting witness.

It appears from the testimony that on the same date and shortly before the alleged signing of the release, F. List met his son, the appellee, George List, and the lawyer of the latter, one Cash, at the saloon of George List in Covington, for the purpose of obtaining F. List's signature to a lease which appellee had made to a man by the name of Riley of his interest in the distillery property covered by the mortgage, the lessee refusing to accept the lease without the written agreement of the mortgagor, F. List, that he would not institute foreclosure proceedings during the existence of the lease. The lease was written by the lawyer, Cash, at the office of Byrne & Reid, where the parties went from the saloon, and F. List there signed the agreement required of him by the lessee, which was made a part of the lease, and then went to the county clerk's office where he acknowledged the lease, and also another paper which does not appear in this record.

According to the testimony of appellee, George List, and Newman, in a conversation at the saloon F. List agreed with his son, George, to execute the paper releasing the latter on the note and mortgage, and upon leaving the county clerk's office after acknowledging the papers there, he went to his son's residence and there signed the release. Appellee also testified that

his father felt under obligations to him for selling half of the distillery property to one Block for a sum greater than its value, and gave him (appellee) the other half of the property with the understanding that he was not to pay for it, and that the mortgage on his (appellee's) half was taken by the father for the sole purpose of preventing his other children from complaining of the gift of the one-half to appellee, and with the assurance from the father that the appellee would never be called on to pay it, and further that the release executed years afterwards was given in compliance with the assurance mentioned.

The only other witness who testified that F. List gave any assurance of releasing appellee from the note, was the latter's sister-in-law, Mrs. Hummell, who stated that some years before the death of F. List he, in a conversation with her, said he gave appellee half the distillery property for his selling at a big price the other half, and that he would not require him to pay the mortgage. It is true that Cash testified that at the time of signing the writing attached to the lease, F. List said something that impressed him with the belief that appellee would not be required to pay the mortgage debt, but this appears to have been merely an impression of the witness, as admitted in his deposition, and he was unable to definitely say whether it was received from what F. List said, or from a subsequent conversation with appellee. For these reasons the testimony of Cash on this point was entitled to little, if any, credit, and, in fact, we think it should have been excluded by the court. In looking at the evidence in behalf of appellant, we find it testified by the executrix and several of the children of F. List, who are the mother and brothers of appellee, that no reason existed for concealment from them by the father of his purpose, if any he had, to release appellee of the debt sued on.

John List testified that he was present when his father signed the Riley lease, and also at the meeting in the saloon, and that no promise was made by him at either place to release appellee from the debt; upon the contrary, that he refused to do so in the saloon, at which appellee became offended; that the father, after leaving the courthouse, went immediately home with him in a buggy, and did not go to appellee's house, consequently he could not have signed the release there. This witness and the mother, also two other brothers, Ben and Joe List, testified that the note and mortgage after the death of the father were found among his papers, with nothing upon them to indicate that the debt was not to be paid, or that the appellee had been released from the payment thereof. They also testified to communications made to them by appellee after his father's death, through Simmons and another, whereby he sought to obtain a release from the debt, and to convey them his interest in the distillery property in satisfaction thereof, and that neither by these communications or otherwise, was it claimed by appellee that he had received of his father the written release filed with his answer. In fact, they testified that they never heard of this paper until the answer was filed.

M. L. Harbeson, attorney for appellant, testified that when the note and mortgage were shown him by the executrix, he saw they would soon be barred by limitation, and taking them he went to see appellee George List, by request of the executrix, and told him that as the claim was about to be

barred by limitation, it would have to be paid, or renewed by another note and mortgage, and George List said he ought to be released from its payment, and then or in a later interview offered to pay it by a conveyance of his half of the distillery property, and again made the same offer through Simmons and Cash, but that appellee did not say or claim that his father had given him a written release, or that he had such a paper.

It seems to us that this testimony is corroborated by many facts and circumstances in the case which are utterly inconsistent with the theory of the defense. Only two experts as to penmanship testified as to the signature of the release, the one introduced by appellee had never seen F. List use a pen, but upon comparing some of the signatures of F. List to certain checks, admitted to be in his handwriting, with that to the release, the witness gave it as his opinion that they were probably written by the same person, but was not certain that such was the case.

Upon the other hand, the expert witness introduced by appellant was a bank officer with whom F. List had done business for years, and he testified in substance that he believed he knew the handwriting of F. List, and in his opinion the name signed to the release was not written by him. This statement seems to have been made not only from the witness' knowledge of the handwriting of F. List, but also from a comparison of his name upon the checks with that upon the release.

The deposition of the alleged attesting witness to the release, Scofield, was not taken, and though it was testified by appellee that a subpœna had been issued for him and returned "not found," no further effort was made to find him, nor does it appear where he lives, or that any effort was made to prove the genuineness of his signature. If the alleged arrangement between appellee and his father, whereby he was to be relieved of paying the note, was made when the mortgage was given, why did appellee not then take from his father the release which he claims was afterwards given?

If such an agreement had been made, why was the mortgage made to cover the rents and profits of the distillery, as well as the machinery to be thereafter added to it, and why a stipulation therein that appellee was to keep the mortgaged premises insured for the benefit of the mortgagor? If there was an understanding from the father that the appellee was not to pay the note, why was it provided in the lease made of the property by the latter to Riley that half of the lease rent was to be paid to the father by the lessee, and why necessary for the father to agree in the lease that he would not enforce his mortgage lien during the existence of the lease? As according to the testimony of the appellee and Newman, the release was signed by F. List on the very day he joined in the lease of the distillery to Riley, why instead of giving the separate private release, did he not enter it upon the record of the mortgage in the customary way, while in the clerk's office to acknowledge the Riley lease and other paper there acknowledged by him?

If the release is genuine, why did appellee after his father's death keep concealed the existence of the release until sued on the note? And why the repeated offers to pay the note by a conveyance to the other heirs of the distillery property? If the release was genuine, why did he not say to appellant's attorney, when told by the latter that the note and mortgage would have to be paid or renewed, "I have a writing from my father releasing me

from the debt," or produce it for the attorney's inspection? If the release was signed by the father on the day he joined in the Riley lease, why did he not sign it when and at the time he signed the lease, instead of waiting until he got to the appellee's house? And after going to Cincinnati and procuring the presence in Covington of the lawyer, Cash, to write the Riley lease, why did appellee not have him to write the release at the same time, instead of having Newman, who is not a lawyer, to do it the day before when F. List was not present?

If the release was given appellee by his father, why did the latter not deliver to him the possession of the note and mortgage at the same time, or at some time before his death? No sufficient answer to any of these questions is disclosed by the record. They are circumstances that do more than throw suspicion upon the genuineness of the alleged release. In our opinion, considered in connection with the facts testified to by the witnesses introduced by appellant, they overthrow the testimony of the opposing witnesses and demonstrate the falsity of the release.

Being of the opinion, therefore, that the judgment of the chancellor is against the weight of the evidence, the same is hereby reversed and cause remanded with directions to the lower court to enter judgment in appellant's favor for the amount of the note sued on, and the enforcement of the mortgage lien.

SHEPHERD v. COMMONWEALTH.

(Filed October 14, 1904—Not to be reported.)

1. Criminal law—Grounds for continuance—Appellant complains because he was not granted a continuance on account of the absence of counsel. The counsel who was absent had some months before the trial, been elected to congress and was necessarily absent in his official capacity, but he had other counsel whose reputation and standing as a lawyer was the very best, and whose conduct of the defense shows every evidence of painstaking and competent attention. If a continuance as a matter of right could be had on such grounds, it might be impossible to bring one charged with crime to trial at all.

2. Instructions—Complaint is made of an instruction defining manslaughter which required the jury to find that appellant shot deceased in sudden affray, or in sudden heat and passion, or upon provocation of such character as to excite the passion of one beyond control. The criticism is that the conjunctive form of expression required the concurrence of two things, when either was enough to constitute that degree of offense. As the jury found appellant guilty of manslaughter instead of murder, he was not prejudiced by the conception of the instruction which he urges.

W. S. Harkins and F. A. Hopkins for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant appeals from a judgment sentencing him under a conviction of manslaughter, asserting two grounds of which this court has jurisdiction for a reversal.

The first is, because he was not granted a continuance on account of the absence of counsel and of certain witnesses. The counsel who was absent had some months before the trial been elected a representative in congress, and at the time of trial was necessarily absent at the seat of government in his official capacity. Appellant had other counsel present at the trial, whose reputation and standing as an attorney at law is of the best, and whose conduct of the defense shows every evidence of painstaking and competent attention. If continuance as a matter of right could be had on such grounds, it might be impossible to bring one charged with crime to trial at all. The statement of the affidavit for continuance as to what the absent witnesses would prove, including appellant's brother who left court during the trial and before he had testified, were admitted before the jury as their depositions. Compulsory process to obtain the presence of the absentees was not asked for, because presumably not desired. The witnesses all lived in the county, and were known to appellant. Had their presence been of more value to him than their statement as contained in the affidavit, it was a simple matter to have gotten them there, and the court would doubtless have afforded the means of enforcing their attendance had a request to that effect been made. The second ground is, that the instruction defining manslaughter required the jury to find that appellant shot the deceased in sudden affray, or in sudden heat of passion, and upon provocation of such character as to excite the passion beyond the power of self control. The criticism is that the conjunctive form of expression required the concurrence of two things when either of them was enough to constitute that degree of the offense. If the jury had found appellant guilty of murder, the argument would call for more particular notice; but as the jury found him guilty of manslaughter only he was not prejudiced by the conception of the instruction which he urges.

Not having found him guilty of murder, then before the jury could find against him under this instruction, the burden was imposed upon the Commonwealth, according to his interpretation of the instruction, of proving two elements, whereas one was enough to satisfy the law as to the degree of manslaughter. In this aspect, the instruction was more beneficial to the accused than he was entitled to.

We are unable to perceive any error in the record prejudicial to his substantial rights and the judgment is, therefore, affirmed.

ASHLAND AND CATLETTSBURG STREET RAILWAY v. LEE.

(Filed October 14, 1904—Not to be reported.)

Railroads—Damages—Pleading—Cure of by verdict—In this action the bill of evidence is not in the record and the only question is, whether the petition authorized the judgment. The petition was defective in failing to allege facts showing knowlege by the servants of appellee's presence as he attempted to board appellant's car, or their negligence in not ascertaining his presence at that time, but in the absence of the evidence in the record, it will be presumed that such proof was introduced upon the trial as to authorize the verdict for appellee. The fact that appellant did not bring the evidence to this court is presumptive of the fact that the lower court did

its duty and would not have submitted the case to the jury without such evidence had been introduced. It can not be said, therefore, that the court erred in not sustaining appellant's motion for a peremptory instruction.

Thos. R. Brown for appellant.

James Andrew Scott for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Nunn.

This is an appeal from the judgment of the lower court in favor of the appellee for $1,000. On the trial, after the appellee's evidence had been introduced, the appellant moved the court to give the jury a peremptory instruction, which was refused, and after the verdict of the jury the appellant moved for a judgment in its behalf notwithstanding the verdict, which the court overruled, and the case is here on appeal.

The evidence introduced on the trial is not before us, the bill of evidence not being in the record. The appellant claims that the petition of appellee was defective and does not authorize or sustain the judgment. This is the only question involved on this appeal. It was in substance alleged in the petition by appellee that he received serious injuries by reason of the gross negligence of appellant's servants in charge of one of its cars, in the city of Catlettsburg.

That he attempted to get aboard one of its cars at Mahan's Crossing to be transported as a passenger thereon and he stepped on the lower step of the car and was attempting to ascend the steps with his box of tools when, before he had gotten safely on the car, the servants in charge, by gross negligence, suddenly started the same without any fault on his part with a jerk, without giving him notice, which jerk caused him to be thrown to the ground and he was dragged thirty feet or more. The appellant, by answer, controverted all the allegations of the petition. The petition of appellee was defective in failing to allege facts showing a knowledge, by the servants, of his presence, or negligence on their part in not ascertaining his presence, at the time he was attempting to ascend the steps of the car. At common law, where there was any defect, imperfection, or omission in any pleading, whether in substance or form which would be fatal on demurrer, yet if the issue joined be such as necessarily required on trial, proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge would direct, or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict, by intendment of law after verdict. (105 Ky., 527.)

In the case of Hill v. Ragland, &c., 24 Ky. Law Rep., 1058, the court said: "Where the parties have attempted to join an issue to be tried, and which has been tried, however defective in form the pleadings may be, a verdict for the one or the other will be held to cure such defective pleading, that is, will cure them as to their form, supplying all omitted necessary averments concerning essential facts relied on, provided the proof or admission of such facts were necessarily considered before the verdict could have been rendered." In this case we have not the proof before us and we must presume that proof was introduced showing that appellant's servants had knowledge of the presence of appellee at the time he was attempting to get on the car

or that the car had stopped for passengers at that place and by the exercise of ordinary care on their part they could have ascertained his presence. Without proof of this character the court could not have submitted the case to the jury, nor could the jury have rendered a verdict for appellee. The appellant did not bring the evidence here, and it must be presumed that the lower court did its duty in this regard and would not have submitted the case to the jury unless such evidence had been introduced.

For these reasons the judgment of the lower court is affirmed.

SWETMAN v. CITY OF COVINGTON, &c.

(Filed October 14, 1904—Not to be reported.)

Validity of ordinance—Where an ordinance provides for the payment of licenses by the owners of vehicles used for let or hire, one who uses horses and wagons in the business of hauling merchandise can not escape the payment of such license on the ground that he makes contracts with persons who do hauling and then either goes himself or sends his employes. The object of the ordinance was to include persons who operated wagons and teams for pay, and the demurrer to the petition in this action which sought to enjoin the collection of the license, was properly overruled.

W. McD. Shaw for appellant.

F. J. Hanlon for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

The appellant is in business in the city of Covington, a city of the second class; he owns and uses in his business of hauling, two two-horse wagons and one one-horse wagon; his business consists of hauling goods and merchandise.

The city of Covington has the following ordinance: "That the yearly amount which the owners of vehicles used or let for hire, plying the streets of the city of Covington, shall pay respectively for a license therefor each and every year, shall be as follows: Two-horse wagon used for hauling boilers, engines, safes, stone, lumber, logs, iron, brick, sand, tobacco, $15. Drawn by one horse, $3."

The appellant filed his petition and alleged that the appellees were threatening to enforce this ordinance by collecting from him the license fees named therein and were threatening to arrest him on warrants for the violation of this ordinance on account of his failure and refusal to pay this license, and he asked that appellees be enjoined and prohibited from collecting same and the issual of warrants against him for a violation of this alleged ordinance. The appellant claims that he is not required to pay license under this ordinance; that he does not hire out his wagons or horses in such a way that the person to whom he hires them takes charge of them; that he makes contracts with persons to do hauling for them and then he either goes himself or sends his employes with the horses and wagons, who use them in performing the contract; the employer never uses the horses and

wagons in any way. Appellant claims that under these facts his wagons are not used or let for hire.

It will be observed that the ordinance uses the terms "used or let for hire." It is evident that the council, in the passage of this ordinance, understood that the word "used" and "let" each had a separate meaning, by the use of the disjunctive "or." In our opinion the council, in the use of the words "used for hire," meant to meet just such a case as appellant's. The "letting for hire" was intended to apply to cases where persons, the hirers, took temporary possession of the wagon and team; "using for hire" was intended to apply to cases where persons, the hirers, did not take temporary possession, but where the owners handled the wagon and team for pay, which covers the case of appellant.

For these reasons we are of the opinion that the lower court was right in sustaining a demurrer to appellant's petition, and it is, therefore, affirmed.

O'DAY v. BENNETT.

(Filed October 18, 1904—Not to be reported.)

1. Sale of certificates of investment company—Evidence—In this action by appellant to recover damages for deceit in the sale of ten certificates, or bonds with coupons attached, the evidence fails to sustain the contention of appellant. She bought the certificates from an agent of appellee who appears to have been a trader in such securities, and whatever representations were made concerning their value were made by this agent and not by appellee. It was in proof by appellee that this sale was made without his knowledge and there was no direct testimony in contradiction of this.

2. Same—Lottery scheme—The contention that the scheme of the Southern Mutual Investment Co. is a lottery scheme, is not borne out by the record. On the face of the corporations organization and contracts, so far as presented in the record, its financial scheme is legal and valid.

J. D. and G. R. Hunt and Butler Southgate for appellant.

C. J. Bronston, F. C. Elkin and J. R. Morton for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the appellant, to recover damages of the appellee for deceit in the sale to her of ten certificates, or bonds, with coupons attached, of the Southern Mutual Investment Co. of Lexington, Ky. The deceit alleged is that appellee represented to appellant at the time of the sale, that the certificates and coupons were legal and valid obligations of the company; that they were then of the value of $1,800; that appellee owned over $17,000 of them; that such payments had theretofore been made, upon those sold to appellant, as made them worth, then, the sum of $1,800; that appellee fraudulently concealed from appellant the fact that the Southern Mutual Investment Co. had repaid upon the coupons and certificates involved here, the sum of $357.21; that she believed all of these representations to be true, whereas, on the contrary, they were untrue, and were known by appellee to be false at the time, and were made for the purpose of inducing her to make the purchase; that the corporation's scheme of redemption of

the coupons is what is known as the "numeral apart" system, which is a mere system of chance or lottery, by which the payment of the coupons to be redeemed is made to depend upon the chance selection of a numeral; and that, under it, the holders of certain numbered coupons receive their money earlier than others who have paid in equal amounts as dues, and who have held their coupons for the same length of time; and that this system constitutes a gift enterprise or lottery; that she did not know the coupons and certificates were illegal, or that the method of redemption used by the company constituted a lottery or gift enterprise.

The answer placed in issue all of the foregoing allegations, except the statement that appellant did not know the scheme of redemption of the coupons constituted a lottery; the court being of opinion that the denial by appellee of the allegation that the scheme was a lottery, and the denial of appellant's knowledge that it was, were inconsistent, and upon motion required him to elect between the two. This ruling resulted in an election to stand by the denial of the charge that the scheme was a lottery, leaving the other allegation undenied. A trial resulted in a peremptory instruction to the jury, at the close of all the testimony, to find for the appellee defendant.

The appellant did not buy the certificates and coupons from appellee directly, but from one W. A. Garland, who appears to have been a trader in securities such as are involved in this litigation, who made whatever representations were made concerning their value. The price finally agreed upon between them was $1,250; it appears that he had, before selling to appellant, obtained from appellee an option on the securities for the sum of $1,171. Appellant gave him her check for the agreed price, and this he indorsed to appellee in payment of his purchase, receiving the latter's check for $79, that being his profit in the transaction.

The theory of appellant is that Garland was the agent of appellee, and that the latter is responsible for the statements made by the former to her.

The allegations of the petition, that appellee sold the securities to appellant, was placed in issue, and both Bennett and Garland testified that it was made by the latter, and not by the former; that the sale by Bennett to Garland was without any knowledge on the part of the former of the trade between the latter and appellant. Appellant had no direct or positive evidence contradicting this, although the burden was on her to establish the issue joined; there are some circumstances in regard to appellee's attitude toward the sale to appellant, that, by a vigorous exercise of the imagination, are calculated to excite suspicion, but we think, on the whole, she failed to show the existence of contractual relations with him in the matter; and this seems to have been the conclusion reached by the circuit judge. But passing this for the present, we will examine the evidence as to the deceit in the sale. It is alleged that the scheme of redemption adopted by the Southern Mutual Investment Co., for the purpose of redeeming the coupons, was what is known as the "numeral apart" system, and was a lottery or gift enterprise. The evidence shows that while the company did, some years before the sale, use the "numeral apart" system, the postoffice department having raised a question of allowing its literature to go through the mails, on the theory that it was a lottery, it was then abandoned, and has

not been in use since the sale to appellant. The representation to appellant that the appellee (who is a banker, and presumably holds only safe securities) owned $17,000 of the certificates and coupons of the company was not shown to be false, but, on the contrary, it was proved that he owned as much as $20,000 in value of them at the time. On the subject of the representation that the coupons were worth, at least, $1,800, there is no evidence showing that this was untrue, but it is shown that the company is solvent, and carrying on an apparently profitable business, as it has been for years. There is nothing in this record upon which we would feel authorized to conclude that the method of business done by the Southern Mutual Investment Co., with reference to certificates and coupons, constitutes a lottery, or that the financial scheme by which its certificates and coupons are to be redeemed is not feasible, or that its soundness is even questionable. The obligor corporation did not deny its liability to appellant under the terms of the contract, or that the certificates and coupons were genuine.

Counsel for appellant rely with great confidence upon the opinion in the case of Taylor v. Commonwealth, 25 Ky. Law Rep., 874, to establish their theory of the illegality of the securities involved here; that case involved an investment company essentially different from the Southern Mutual Investment Co., although they have some features in common; but in the opinion, after reciting the facts with reference to the "numeral apart" system of redemption adopted by the Industrial Mutual Investment Co., which was under investigation, it is said: "So far as the manifest purpose of this corporation are concerned, they do not appear to have been illegal; that the directors subsequently adopted a method that made their transactions violative of law can not affect the fact that the corporation's existence was lawful. If their contracts were void, because mutually engaged in by the parties with the understanding on both sides that the corporation was conducting a lottery scheme alone, then it may be doubtful if the policy holders would have any claim upon the courts to enforce their contracts against the corporation as liabilities. Such understanding, however, was not shown, nor attempted to be shown, in this case. So far as this record discloses the purchasers of the coupons were innocent of such knowledge or connivance. Many features of the contract may have been possible of performance, and without legal objection. It was the duty of the corporation to have employed and distributed the funds received by it for the sale of membership certificates so as not to have broken the law, and so as to have complied with the undertakings to holders as nearly as possible by honest and legal methods of dealing. If they could not do that, then it was their duty to refund the money received, with its interest."

As in that case, so in this, on the face of the corporation's organization and contracts, so far as presented in this record, its financial scheme is legal and valid, and it is not in the power of the officers to corrupt it by adopting illegal methods; so that even had it been shown that the "numeral apart" system (conceding it to be illegal) was in use, that fact would not have invalidated the securities in the hands of an innocent holder, as appellant claims to have been; that she sold them to the corporation years before they were due for a much smaller sum than their value, does not render her ven-

dor (conceding appellee so to be) liable for the difference between the sum received and that paid by her for them.

It seems to us that appellant failed to establish the cause of action set up in her petition in every essential particular, and it, therefore, follows that the judgment must be affirmed.

CALLENDER'S ADM'R v. CALLENDER, &c.

(Filed October 14, 1904—Not to be reported.)

1. Attorney's fee—Settlement of estate—Held—That $500 is a reasonable allowance against a decedent's estate for attorney's fee, employed by the administrator in a suit to settle the estate worth from $5,000 to $7,000, and for defending a suit against the estate on a note for $6,000, which, after bitter and protracted litigation was decided against the estate in the lower court, and decided for the estate on appeal.

Geo. B. Winslow, Winslow & Howe and Hazelrigg, Chenault & Hazelrigg for appellant.

John S. Gaunt and J. A. Donaldson for appellees.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Nunn.

The appellant, Joseph Callender, administered upon his father's estate, which, according to the proof, consisted of real estate and personal property to about the value of $5,000 to $7,000, of which $1,000 was personalty and the balance was real estate. He instituted an action in the Carroll Circuit Court to settle this estate. A note was presented for $6,000 and the interest, which was more than the value of the whole estate. He made defense to this claim, alleging that it was a fabricated claim, and that the estate did not owe the note nor any part of it. The litigation over the collection of this note was bitter and protracted and resulted in a judgment against the estate on the trial in the lower court, which judgment, on an appeal to this court, was reversed. On the return of the case to the lower court, the appellant asked that an order be made allowing his attorneys a fee of $1,000 for representing the estate in resisting the payment of this note and in the settlement of the estate in both the lower and this court. Appellee resisted this allowance and on the trial in the lower court a fee of $400 was allowed, from which order of allowance appellant has appealed.

The appellant introduced two attorneys as witnesses, one of whom stated the services of appellant's counsel in both courts were reasonably worth $1,000, the other fixed it at $750. The appellee introduced one attorney as a witness, who stated that the services in the resisting the collection of this note in both courts were worth only $300, but would not give an opinion as to the value of their services rendered in other matters in the settlement of the estate. We are aware that this court has often stated the rule to be that the judge of the lower court, occupying the position of a chancellor, has the right to judge of the reasonableness of an allowance to attorneys from the character of the case and the record itself as well as from the opinions of witnesses. His action in these matters is, of course, subject to review by

this court. After a careful investigation of this record and the proof therein, and the record on the former appeal, we are of the opinion that the allowance made by the lower court was rather small; that it should have been at least $500.

Wherefore, the judgment of the lower court is reversed and the cause remanded, with directions to the lower court to make an order allowing $500 for attorney's fee.

HAVENS v. COMMONWEALTH.

(Filed October 14, 1904—Not to be reported.)

1. Verdict—Right of jury—Province of appellate court—It is the right of the jury to determine from the evidence whether or not the defendant is guilty as charged in the indictment, and it is not the province of this court to disturb their verdict unless it appears there was no evidence conducing to establish his guilt.

2. United act of two or more—Effect—Liability of all—Where two or more persons unite to accomplish a criminal object, whether through the physical volition of one or all, proceeding severally or collectively, each individual whose will contributes to the wrongdoing, is, in law, responsible for the whole, the same as though performed by himself alone.

3. Evidence—Previous conduct of accused—Competency—Res gestæ—Disorderly conduct of the accused, and an assault made by him upon persons other than deceased, immediately before his attack upon the deceased, served to show his reckless and violent disposition on that occasion, and the intent with which the attack was made on deceased, and, are competent to be given in evidence as part of the res gestæ.

4. Aidor and abettor—Purpose to kill—Where the evidence conduced to show an unprovoked assault upon deceased and an attempt to shoot him, manifesting a malicious purpose on appellant's part to take his life, though the wound which killed deceased was inflicted by another, if it was without justification, and was done to aid appellant in carrying out a purpose to kill deceased, it may well be said that appellant contributed to the result to such an extent as to make him an aidor and abettor in the crime.

Allen W. Cisco, John Morgan Perry and Geo. W. Goad for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Settle.

The appellant, J. M. Havens, was jointly indicted in the court below with his brothers, Willie Havens and T. M. Havens, for the murder of Davidson Castle. The indictment in apt language charges each of the defendants with the act of the killing, and also that each aided and abetted the others in the crime.

Willie Havens was given a separate trial, found guilty of voluntary manslaughter and his punishment fixed at twenty-one years' confinement in the penitentiary. Later, T. M. Havens and the appellant, J. M. Havens, were tried together, as the result of which T. M. Havens was acquitted, but appellant was found guilty of voluntary manslaughter and his punishment fixed at confinement in the penitentiary for fifteen years. His motion for a new trial was overruled, and this court is now asked to reverse the judg-

ment of conviction that he may have a new trial. According to the evidence found in the record, the homicide occurred at the house of Elvin Haney, in Morgan county, on the night of December 22, 1903. A brother of appellant had been married there that day to Haney's daughter. Several of the wedding guests, including appellant and the other two Havens indicted with him, remained at Haney's until night, it being understood that a party of men and boys from the neighborhood would be on hand that night to charivari the bridal party. The charivari party arrived at the Haney residence soon after dark, and began to go around the house ringing bells and making a noise. Among them was Davidson Castle. It appears from the testimony of the Commonwealth's witnesses that the party had gone around the house several times, when appellant, who was intoxicated, went among them and flourished a pistol, which he held in his hand, over the head of Clint Haney, slapped Willis Haney in the breast, caught and choked Alden Stacy, and then turning upon Davidson Castle, snapped his pistol at him. Castle attempted to repel the assault made upon him by appellant with the pistol, by cutting or striking at him, and then began to retreat.

While retreating and being pursued by appellant, Willie Havens ran up to and stabbed Castle in the breast, mortally wounding him. Castle then ran around the smokehouse and fell near the well. As he ran and down to the time he fell he was followed by appellant, who continued the snapping of the pistol at him. When he fell, appellant caught him by the collar and pushed him against the ground, saying, "Won't you stop," and still holding Castle called to his brother, "Come here, Willie, we have got him." The wounded man was carried by some persons present into the house and placed on a bed; soon afterwards appellant, who was in the yard, remarked, "if the damn son of a bitch is not dead, he ought to die."

Castle died before he could be reached by the physician who was sent for; but the latter, upon arriving at Haney's house, examined his wound and found that it was made by a sharp instrument which penetrated two blood vessels in the lung and caused his death.

It also appears that the knife with which Willie Havens killed Castle was borrowed by him that night of one Jesse Gibbs, and was returned after the cutting by Willie Havens, who put it into Gibbs' pocket with the blood of Castle upon it. It further appears from the testimony of the witnesses for the Commonwealth that no difficulty or trouble arose that night until appellant began to flourish his pistol and assault the persons named, including Castle. The evidence relied on by appellant, which consisted mainly of his own testimony, was to the effect that he was, at the time of the homicide, a deputy constable and had been requested by the owner of the premises, Haney, to preserve order and keep the peace, which he was attempting to do when the killing of Castle occurred.

Appellant's version of the affair was that some of the crowd became so boisterous that he called out to them if they did not stop he would have to arrest them, to which Castle, with one or two others, replied, "You can't arrest me or any one else in this crowd, or stop this charivari either." Appellant responded, "You will be the first one I'll arrest if you don't stop." Whereupon, Castle began striking appellant, who had his pistol in his hand; that T. M. Havens then got between them and tried to stop Castle from

striking appellant by holding up his hands and pushing him back, in doing which T. M. Havens was cut in the shoulder by Castle with a knife, seeing which appellant told Castle to consider himself under arrest, but that instead of submitting, Castle struck appellant in the back with a knife, inflicting a wound, and then retreated towards the well, cutting at appellant, who was following to complete the arrest, and that when Castle fell at the well appellant seized him, not knowing at the time he had been cut by Willie Havens, or any one else, but that he did not call out to Willie Havens telling him to "Come here, Willie, we have got him."

In brief, appellant's defense was, that seeing Castle disturbing the peace he attempted to arrest him, and in doing so used no more force than was necessary to that end, and that if in resisting arrest, Castle was mortally wounded by another, it was no more than he deserved, but in any event that he (appellant) did not wound him, or aid in so doing, and was, therefore, in no wise responsible for his death.

In view of the entire evidence we are not surprised that the jury came to the conclusion that appellant, instead of acting the part of a peace officer on the occasion of the homicide, was himself the aggressor and wrongdoer; and that but for his disorderly and arbitrary conduct and unprovoked attack upon Castle, the latter would not have lost his life. At any rate, it was their right to determine from the evidence whether or not he was guilty as charged in the indictment, and it is not the province of this court to disturb their verdict unless it should be made to appear that there was no evidence conducing to establish his guilt.

We are unable to discover any merit in the contention of appellant's counsel that the evidence fails to disclose the elements necessary to constitute him an aider and abetter in the homicide, in the meaning of the law. There was evidence that conduced to show an unprovoked assault upon the deceased, and that the deadly weapon used in the attack and the attempt to shoot deceased with it, manifested an evil and malicious purpose on appellant's part to take his life. And though the wound which caused his death was inflicted by another, if it was without justification, and was done to aid appellant in carrying out a purpose to kill deceased, in such a state of case it may well be said that appellant contributed to the result to such an extent as to make him an aider and abettor in the crime.

"A crime is not always committed by a single individual. Several persons may be concerned in different degrees, some of them by actually doing the deed, others by standing by and abetting it, others by having advised or commanded it, though absent when it was committed, and still others by assisting in the escape of one concerned. When two or more persons unite to accomplish a criminal object, whether through physical volition of one, or of all, proceeding severally or collectively, each individual whose will contributes to the wrongdoing is, is law, rsponsible for the whole, the same as though performed by himself alone." (Roberson's Ky. Criminal Law, volume 1, section 73.)

The grounds for the new trial were, first, that the verdict was against the law and evidence; second, that incompetent evidence was admitted upon the trial; third, that the court improperly instructed the jury; fourth, that the court failed to instruct the jury upon the whole law of the case, and,

fifth, improper language and conduct upon the part of the Commonwealth's attorney in his argument to the jury. We have already expressed the opinion that the first of the above grounds is untenable. The evidence objected to as indicated by the second ground for a new trial was in regard to the disorderly conduct of appellant, and the assault made by him upon persons other than the deceased, just before his attack upon the latter.

These acts of the appellant occurred immediately before his attack upon the deceased, and served to show his reckless and violent disposition on that occasion, and the intent with which the attack upon deceased was made. Besides, they led to and were so nearly connected with the main transaction, the killing of deceased, as to make them a part of the res gestæ. (Bowlin v. Commonwealth, 17 Ky. Law Rep., 1821.)

In Bishop's New Criminal Procedure, volume 1, section 1125, we find the following statement: "Whole transaction as explained under the doctrine of res gestæ. Whenever a part of a transaction appears in evidence, the rest is thereby made admissible. So that the entire transaction, wherein it is claimed the wrong in issue was done, may be shown, though it includes also other crimes, and even though each transaction was a continuing one, or transpiring in parts on different days."

It is also objected that appellant was asked on cross examination if he did not live with Martha Geveden. It may be inferred that the objection was because the woman, Geveden, was of bad reputation, though that fact does not appear from the record, and that the purpose of the question was to affect the credibility of the witness because of his relations with her. It is by no means unusual, and is, indeed, generally proper, to inquire of a witness his age, place of residence, or occupation. We are unable to see anything improper in the question objected to. It certainly could not have been prejudicial to the appellant, for the inquiry as to his place of residence was not carried beyond the one question referred to, and did not elicit anything improper in his relations with the woman, as his answer to the question was "No, sir, I do not live with Martha Liz Geveden; I rent land of her mother and board at her mother's house. She and her brother live there with her mother."

We are of opinion that the instructions upon the whole fairly presented the law of the case. Those numbered one to four inclusive correctly defined murder and voluntary manslaughter, and told the jury in what state of case they would be authorized to find appellant guilty, as principal or aider, or the one or the other of these crimes, and properly indicated the punishment appertaining to each.

Instruction No. 5 explained to the jury the law of self-defense, and informed them what facts, if shown by the evidence, would entitle appellant to the benefit of it in this case, and at the same time correctly advised them under what circumstances he would be authorized to interfere in the defense of his brother, Willie Havens, who admittedly inflicted upon Davidson Castle the wound of which he died.

By instruction No. 6 the jury were told that if they believed from the evidence beyond a reasonable doubt that appellant was guilty of murder or voluntary manslaughter, but should have a reasonable doubt as to which of

these crimes he was guilty of, it was their duty to find him guilty of the lesser, voluntary manslaughter.

No. 7 directed the jury to acquit appellant unless his guilt had been proved beyond all reasonable doubt, and by No. 8 they were advised that the law presumed appellant innocent until proven guilty beyond a reasonable doubt.

Instruction No. 9 told the jury in substance that it was an admitted fact that appellant at the time of the cutting and killing of deceased was a deputy constable of Morgan county; therefore, he had the right to arrest deceased, or any other person, on that occasion, if he or they were committing a breach of the peace in his presence, and to use such force and only such as was necessary or reasonably appeared to him to be necessary to make the arrest, but that unless such person resisted the arrest to such an extent as to put appellant in danger of loss of life or great bodily harm, he had no right to kill him.

It is insisted for appellant that this instruction was improper in that it confined his right to kill the deceased to the existence of actual, instead of apparent, danger to his life or person, at the hands of the deceased, and further because it excluded from the consideration of the jury any right upon the part of appellant to act in defense of his brother, if the latter were in good faith aiding him in making the arrest of deceased. The instruction is undoubtedly open to the criticism made, but it is not, in our opinion, prejudicial to the appellant in view of the full exposition of the law contained in instruction No. 5, whereby, as we have heretofore indicated, the jury were correctly advised upon what state of facts appellant might avail himself of the law of self-defense in respect to the killing of deceased, and also under what circumstances he might interfere in defense of his brother. We think the court properly refused the instructions asked by appellant. Those marked "A" and "B" were included in that part of instruction No. 9 to which no objection was or is urged by appellant's counsel.

Instruction "C," though correct in the abstract, would have been misleading if given the jury, because, as shown by the evidence, the conduct of appellant, on the occasion of the homicide was not of such a character as to raise in his behalf the presumption of official good faith referred to in this instruction.

Refused instruction "D," which was intended to advise the jury of what is required to constitute one an aider and abettor, in the crime of murder or voluntary manslaughter, is not precisely accurate in statement, but if it were quite so, it was not error for the trial court to refuse it, as all that was necessary to be told the jury on that subject was correctly set forth in instruction No. 3.

Objection was made by appellant's counsel to certain remarks made in argument by the Commonwealth's attorney and associate counsel. The language objected to, while outside the record, was in no sense abusive or inflammatory, and we are unable to see that it was prejudicial to appellant's rights.

Regarding the record as free from prejudicial error the judgment of the lower court is affirmed.

BROWN v. BARTON.

(Filed October 18, 1904—Not to be reported.)

1. Passway—Continued use—Sufficient notice—Where the evidence, as a whole, fairly proves that a passway was claimed and used by appellant and his vendors for more than thirty years continuously, and that such claim of right and use were sufficiently notorious and adverse as to give notice to appellee and his vendors and the public generally, the right of appellant's continued use to such passway should be confirmed.

J. M. Brummal & Son for appellant.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Settle.

In this equitable action the appellant was, by the judgment of the Hickman Circuit Court, deprived of the use of a passway leading from his residence and farm, over the land of appellee to the public highway, known as the Columbus and Clinton road. The judgment complained of also declares the appellee the owner of the passway, and quiets his title to the same.

The answer of appellant denied appellee's title to the passway and averred his (appellant's) ownership thereof by use and possession, active, continuous and adverse to appellee and all others, for more than fifteen years before the institution of this action. It is qustionable whether appellee's possession was such as to entitle him to maintain the action which is one to quiet title. Although the passway runs over his land, his possession thereof was not exclusive, nor was it greater than that of appellant, who was also in possession of the passway. Indeed, his use of it had been much longer than that of appellee. Although appellee's title to the passway, and the land over which it runs, were denied by the answer of appellant, no title papers appear to have been introduced in evidence by him; he did, however, prove his ownership of the land by the actual, adverse and continuous possession of himself and vendors for more than fifteen years, but such possession was, as stated, not more than half as long as that proved by appellant as to the use of the passway in controversy by himself and vendors.

It appears that the lands of appellant and appellee were originally owned by one Bullock, and that the land of appellant was purchased from Bullock by Bridgman; later the land owned by appellee was purchased by Hubbard, appellee's vendor, from Bullock's heirs. Hubbard also bought of Bridgman the land now owned by appellant and let America Darling have it. She failing to pay for it, Hubbard again became the owner, and thereafter sold and conveyed it to appellant. Hubbard or his heirs continued to own appellee's land until a year or two before the institution of this action, when the heirs sold it to appellee's father, who gave it to appellee. It appears from the evidence, and is in fact not denied, that the passway in controversy was established by Bridgman more than thirty years ago, and while he owned appellant's land, and he used it constantly down to the time he sold the land to Hubbard for America Darling, and that she and her family used the same passway all the time she owned the land. When Hubbard got the land of her, he at once sold and conveyed it to appellant, which was about fifteen years before this action was commenced, from which time until the rendition of the judgment in this case, depriving him of it, appellant used

the passway, claiming it as his own, adversely to appellee, his vendors and all others.

The evidence also shows that appellant, as a tenant of America Darling, lived on the place now owned by him two or three years before his purchase of it, and he testified that during that time she claimed to be the owner of the passway and used it all the time without interference from any source. There is no evidence, except the testimony of appellee, and his father, that appellant's use of the passway, was merely permissive, and the weight of the testimony was to the effect that his use of the passway was a matter of right, for when appellee wished to change the passway in part, he asked the permission of appellant to do so, which he need not have done, and would not have done if the latter's use of the passway was merely permissive. Appellee says appellant consented to the change, but almost at once withdrew the consent. Appellant says his consent was conditional, that is he told appellee he would consent if the road, as changed, could be made a good one, but finding upon examination that it would not, with the change, be a good or safe road, he at once withdrew the consent, and the fact that he promptly took down the fence made by appellee across the old passway, but gave emphasis to his disapproval of the change.

The only evidence in the record which tends to show that appellee's vendor, Hubbard, regarded appellant's use of the passway as permissive is that he, eight or ten years ago, put up a gate on his land across the passway, to which appellant made no objection as long as he and his family could go through the gate, but when after a year or two Hubbard locked or otherwise fastened it so that it could not be opened, appellant broke the fastening and finally took the gate down, thereby asserting his right to travel the passway, and in effect giving notice to Hubbard that he would not be interfered with or obstructed in its use. Hubbard seemed to acquiesce in his right to remove the gate and never more attempted to interfere with his use of the passway. Indeed, no further interference arose from any source to appellant's free use of the passway, until appellee began to act just before the institution of his suit.

It is in proof that this passway furnishes appellant the only means of getting to and from his farm and residence, and by means of it he travels to the postoffice, church and county seat. Appellee proved by several witnesses that the passway runs in a zigzag course across his land, by reason of which his fields are in bad shape and his land injured. This is no doubt true, but according to the evidence the passway was there, and the land in the same condition when appellee and his vendor purchased it. Taking the evidence as a whole, we think it fairly proves that the passway was claimed and used by appellant and his vendors as a matter of right for more than thirty years continuously before the institution of this action, and that such claim of right and use were sufficiently notorious and adverse to give notice to appellee, his vendors and the public generally, of the nature of appellant's claim.

As said by Judge Pryor, in O'Daniel v. O'Daniel, 88 Ky., 185: "At common law the long enjoyment of an easement gave the right to the easement, and the use continuing uninterrupted for twenty years or longer, when unexplained, created the presumption that the claim or use was adverse.

Under our statute of limitation, the continued use for fifteen years unexplained would create the presumption as to the right, and in this case the use for more than half a century certainly establishes the right to the passway; and it was not necessary to show, by positive testimony, that the appellant had claimed this use as a matter of right and so proclaimed to his neighbors. The burden was, in fact, on the defendant (appellee) after such a long use of his premises, to show that the use was merely permissive.' (Wilkins v. Barner, 79 Ky., 328; O'Daniel v. O'Daniel, 88 Ky., 185; Newman v. Crews, 98, Ky., 340; Anderson v. Southworth, 25 Ky. Law Rep., 776.)

Being convinced that the judgment of the lower court is against the weight of the evidence, it is reversed and cause remanded with directions to the lower court to enter judgment dismissing the petition and confirming appellant's right to the continued use of the passway in controversy.

JOYES v. CITY OF LOUISVILLE.

(Filed October 18, 1904—Not to be reported.)

1. Assessment of property for taxes—Construction of statute—Section 2991, Kentucky Statutes, providing that whenever by the complaint of the party assessed it appears that property has been assessed in a name other than that of the owner or holder, the city assessor shall, after notice, make the correction either for the current or preceding year, does not apply after the assessment has been made and no complaint made.

2. Same—Where property was assessed as required by section 2986 of the Kentucky Statutes, a mistake in the name of the person does not vitiate the assessment, and an owner of property can not complain because his interest in such property was not ascertained before judgment against him on a tax bill, because he knew what interest he owned and no claim is made that he tendered or offered to pay the amount he actually owed.

3. Same—Section 2998, Kentucky Statutes, fixes the rate of interest that must be paid on uncollected tax bills.

Joyes & Jarvis for appellant.

Henry L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Nunn.

Appellee brought this action in the court below on sixty-four tax bills based on assessments of fourteen parcels of land in the name of Patrick Joyes as the owner and holder thereof for the years 1894 to 1899 inclusive. All of these tax bills were paid prior to the judgment herein, except the tax bills on what is called in this record "Tow Head Island," and the tax bill for the year 1894 on a lot situated on the north side of "Court place." It is agreed between the parties that the whole of the Tow Head Island property was listed and assessed against Patrick Joyes when he only owned two-thirds thereof, and that the Court Place property was assessed against him in the year 1894, when he only owned the remainder interest in the property; that at that time one Mrs. Venable was the life tenant and in possession thereof. She died in the early part of the year 1895. It is not pretended

that the taxes on either piece of property for the years named, were paid by any one.

Appellant contends that he is not liable for the payment of the taxes on these two pieces of property because they were incorrectly assessed, one piece being assessed against him as though he were the owner of the whole, and the other assessed against him when it should have been assessed against Mrs. Venable. He refers to section 2991, Kentucky Statutes as sustaining his views. It is provided in this section, whenever, by the complaint of the party assessed or otherwise, it appears that any property has been assessed in a name other than that of the owner or holder, the city assessor shall, after notice through the mail to the owner or holder at the time of the notice, make the correction whether for the current or any preceding year in his books, and certify such correction to the tax receiver, etc.

This section applies to a state of case; first, where the party assessed complains, or, second, where the omission appears otherwise while the tax receiver has the tax bill in his possession before suit, or, third, where the city assessor knows the owner or holder and can send a notice to him by mail. This is apparent from the last clause, which directs the city assessor to certify the correction to the tax receiver, but after an assessment has been made and no complaint has been made, as is the case here, by appellant, that the property has been assessed in the name other than that of the owner or holder, this provision of section 2991 has no application.

It is also provided in section 2986 that no mistake in or omission of the right name of the owner or holder of land or improvements liable to be assessed under the provisions of this act, shall impair any assessment thereof, if such land be designated in said book by its corresponding number and block on the map; or, if such improvement be there designated by the number and block of the land on which it rests; or, if such lands and improvements be otherwise fully identified in such book. It is shown in this record that these two pieces of property were assessed and designated by the number and block as required by this section. This being true, it does not vitiate the assessment because of the mistake in the name of the person against whom it was assessed. Two-thirds of Tow Head Island were owned by the appellant and was properly assessed in his name. The court, however, made him pay only two-thirds of the tax on the trial.

He complains of the interest because it was not ascertained before the judgment the exact amount which he owed. He knew what interest he owned in this property and the amount assessed against it, and there is no claim that he tendered or offered to pay the amount which he actually owed and, therefore, he has no cause of complaint as to interest. The piece of property at Court Place was owned by appellant and Mrs. Venable, she owning the life estate. They both were bound for the taxes, the same being a lien on the property, but as between her and appellant, she should have paid the taxes. She died soon after they were assessed, and he knew they were a lien upon the property and he must of necessity, pay them to relieve the property of the lien. Section 2998 of the statutes fixes the rate of interest that must be paid on uncollected tax bills.

For these reasons the judgment of the lower court is affirmed.

MAGOFFIN COUNTY v. OWENS.

(Filed October 18, 1904.)

1. Counties—Indebtedness—Fiscal court—Levy—Apportionment—Necessities of county government—Overdue indebtedness—Magoffin county being in debt and unable, under the constitutional limit, to raise revenue sufficient to pay its interest and the running expenses of the county, the fiscal court at its October term, 1902, made a levy of 50 cents on the $100 worth of property and a poll tax of $1.50, and ordered that 7½ per cent. of the ad valorem tax should be devoted exclusively to the repair of the roads and bridges; that 10 cents of the ad valorem tax and 41 per cent. of the poll tax should be devoted solely to the payment of current expenses, including officers fees and keeping the poor, and leaving 58½ per cent. of the poll tax and 32½ cents of the 50 cent ad valorem tax which the court set apart for the payment of the principal and interest of the indebtedness of the county which had been contracted prior to that time, and further directed that out of the fund all claims against the county, of $5 and less, should be paid in full. Held—That the fiscal court has a wide discretion in the discharge of its duties; that it has acted with good judgment in the course adopted, and that there has been no abuse of its discretion in making said order.

McGuire & Patrick and Hazelrigg, Chenault & Hazelrigg for appellant.

Appeal from Magoffin Circuit Court.

Opinion of the court by Chief Justice Burnam.

The total valuation of property assessed for taxation in the county of Magoffin is approximately in round number $1,000,000. It has been carrying a floating debt of about $25,000, on which it pays interest at the rate of six per cent. for many years, which was contracted largely for the erection of a courthouse. A levy of 50 cents on each $100 (the full amount allowed by the Constitution) and a per capita tax of $1.50 yields a net revenue of approximately $7,000. The indebtedness of the county is due to a large number of individuals whose claims vary from sums of less than $5 to several hundred dollars. Prior to the 15th of October, 1902, the appropriations made by the fiscal court of the county were added to its past indebtedness and the revenue pro rated among these claims. This policy had been in vogue for several years and as a result thereof claims against the county had become greatly depreciated in value, and the number of its creditors annually multiplied, its roads and bridges had grown in worse condition from year to year. The fiscal court at its October term, 1902, deemed it expedient to adopt a different system for meeting the necessities of the county government and for the payment of its overdue indebtedness. At that term a levy was made of 50 cents on the $100 worth of taxable property, and a poll tax of $1.50, and out of this fund it was provided that 7½ per cent. of the ad valorem tax should be devoted exclusively to the repair of roads and bridges; that 10 cents of the ad valorem tax and 41 per cent. of the poll tax should be devoted solely to the payment of current expenses, including officers' fees and keeping the poor and indigent, and leaving 58½ per cent. of the poll tax and 32½ cents of the 50 cents ad valorem tax, which the court set apart for the payment of the principal and interest of the indebtedness of the county which had been contracted prior to that time. They further directed that out of this fund all claims against the county of $5 and less should be paid in full.

Under this system the county will be enabled to pay its current expenses, the interest on its overdue debts, and approximately 12½ per cent. on the principle thereof. The appellee, Jasper Owens, was a creditor of the county at the date of this order, as vendee of numerous certificates which had been allowed to different persons, in a sum of about $800, and instituted this suit against the fiscal court, asking that it should be compelled to set aside its order of January 30, 1903, the substance of which has been recited above, and to distribute the county revenue pro rata among all its creditors, or in the order in which the indebtedness was created, and a judgment was so entered in the circuit court, and the county has appealed. By chapter 52 of the Kentucky Statutes, the fiscal courts of counties are given jurisdiction to levy taxes within the constitutional limit and to appropriate the county funds so collected to the maintenance of the county government, its roads, bridges, public buildings, poor and divers other public necessities, as set out in section 1840 of the Kentucky Statutes. If they neglect the discharge of these duties they are amenable to the law, but have necessarily a wide discretion in the discharge thereof. In our opinion the facts stated in the answer of appellants, show that they have acted with good judgment in the course which they have adopted for the payment and extinguishment of the county indebtedness. The officers of the county must be paid, if they are to efficiently discharge their duties; the roads and bridges of the county must be kept in a reasonably safe condition for public travel, and we are of the opinion that there has been no abuse of its discretion by the fiscal court in the order complained of.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

COMMONWEALTH, BY, &c. v. VANDERBILT, &c.

(Filed October 18, 1904.)

1. Taxation—Franchise—Stock in railroads—Nonresidents—Constructive service—In a proceeding by the auditor's agent against nonresident defendants to recover a franchise tax on stock alleged to be owned by them in railroad corporations in this State, and who are only constructively summoned and had not entered their appearance to the proceedings, and no proof was introduced showing that these corporations had failed to pay their taxes, under section 126 of the Civil Code, providing that "every material allegation of a pleading must, for the purpose of the action, be taken as true unless specifically traversed, except allegations against defendants constructively summoned who have not appeared in the action," the proceeding was properly dismissed in the lower court.

2. Lien—Attachmment—Jurisdiction—Under Civil Code, section 419, providing that "no personal judgment shall be rendered against a defendant constructively summoned," where the record does not show that any lien was created on the property of the defendants by attachments or otherwise, the lower court did not have jurisdiction to render a judgment against the defendants or make any order affecting their interest in any way.

Allen D. Cole for appellant.

E. L. Worthington and W. H. Wadsworth for C. & O. Ry. Co.

R. L. Greene, Warning Order Attorney.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Nunn.

The auditor's agent for Mason county instituted this proceeding in the court of that county, under section 4241 of the Kentucky Statutes, authorizing him to list omitted property. The proceeding was commenced by filing in the court a statement and amendments thereto alleging that appellees were the owners of the stock of three railroad corporations, to wit, a corporation created by the laws of Virginia; a corporation created by the laws of West Virginia and one created by the laws of the State of Kentucky; and alleged that all these corporations had organized and were doing business in the State of Kentucky, and became and were jointly and severally possessed of and owned a line of railway beginning at Covington, Ky., thence along the Ohio river through Mason county to Ashland, Ky., and thence through the State of West Virginia to Newport News in the State of Virginia.

That each of these corporations had been, since 1893, and prior thereto, exercising a franchise continuously within this Commonwealth, and had failed to report to the railroad commission or the board of valuation and assessment or to any one, the value of their franchise for taxation, and the same had been wholly omitted by the board of valuation and assessment, railroad commission and every other officer whose duty it was to assess such property, nor had any taxes been paid to the Commonwealth by any of these corporations on their franchises and the same were worth each year since, at least twenty millions of dollars. Appellant also stated that appellees Vanderbilts are residents of the State of New York and owned, during the time mentioned, at least seven hundred thousand shares of stock in these corporations worth $100 per share, and that by reason of the failure of these corporations to pay the taxes due the Commonwealth, the stock of the appellees, Vanderbilts, are, by virtue of section 4085 and section 4088, Kentucky Statutes, not exempt from taxation and that the appellees were liable to pay taxes to the Commonwealth on their stock from the year 1892 up to and including the year 1901.

Appellant, by proper procedure, caused a warning order to be made and an attorney to be appointed to defend for appellees as nonresidents, and afterwards filed an amended statement alleging that appellees had no agent or attorney in that county upon whom process might be served; but that the Chesapeake & Ohio Railway Co. was in the possession of the stock of the appellees, and asked that this corporation be summoned and required to answer. This corporation answered and denied that it held or controlled any stock of any amount, kind or character belonging to the appellees, the Vanderbilts, and also denied that the corporations referred to had failed to list their property or franchises for taxation in the State of Kentucky, and denied that they or any of them had failed for any time to pay the taxes due the Commonwealth on their property or franchises. On this state of fact, without any proof, the case was submitted to the lower court for judgment and the court dismissed appellant's proceeding.

Appellant concedes that it had no right to tax the stock of appellees in

the corporations named, unless the corporations failed to list and pay the taxes on the corporate property, including franchises. In the statement it was alleged that the corporations failed to pay these taxes. The appellees were only constructively summoned and had not entered their appearance to the proceedings, and no proof was introduced by appellant, showing that these corporations had failed to pay the taxes. Section 126 of the Code provides, that every material allegation of a pleading must, for the purpose of the action, be taken as true unless specifically traversed except allegations against defendants constructively summoned who have not appeared in the action. Under the state of pleading, and this section of the Code, we are unable to see how the lower court could have done otherwise than dismiss the proceedings.

Again, under section 419 of the Code, it is provided that no personal judgment shall be rendered against a defendant constructively summoned, and the record does not show that any lien was created upon the property of appellees by attachment or otherwise, and under these circumstances the lower court did not have jurisdiction to render a judgment against appellees or make any order affecting their interest in any way. An attachment is necessary to give the court jurisdiction in an action against a defendant constructively summoned, unless a lien is asserted. (14 Bush, 330; 4 Bush, 585, and 84 Ky., 283.)

For these reasons we are of the opinion that the lower court was correct in dismissing appellant's statement or proceedings and the judgment is, therefore, affirmed.

BRYANT v. STEPHENS, &c.

(Filed October 18, 1904—Not to be reported.)

1. Lands—Ejectment—Who may maintain action of—Appellants instituted this action against appellees and numerous other parties, seeking to recover of them a survey of land, described by metes and bounds, courses and distances, averring that they held the title and were entitled to the possession which is illegally held by appellees. Appellees moved the court to require appellants to elect which of defendants they would prosecute the action against, alleging a misjoinder of actions, which motion was sustained by the court Held—That it is manifest the lower court erred in sustaining that motion, because it is well settled that an action of ejectment may be maintained by an owner against several persons illegally claiming and holding separate parcels of it. While defendants hold in separate parcels, they are all within the survey set out in the petition.

2. Same—But had there been a misjoinder of actions, the appellees who had filed answers without objection to the supposed misjoinder, waived the right to require an election of appellants. Sections 85 and 86, Civil Code.

George P. Johnson and O. H. Waddle for appellants.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Settle.

The appellants, Roberta S. Bryant and Hester Bryant Clore, the latter being an infant and joining with the former as her statutory guardian, instituted this action of ejectment in the court below against the appellees, W.

L. Stephens, S. G. Morgan, John R. Morgan, W. P. Jones, Anna Dupee, Fanny Dupee, William Smith, Joseph Duncan, G. P. Creekmore and fifty-one other persons named in the petition as defendants, seeking to recover of them a survey of land containing 9,600 acres, particularly described by metes and bounds, courses and distances, to which, it is averred in the petition, appellants hold the title and are entitled to the possession, but the possession of which is illegally held by the appellees and their co-defendants in separate parcels.

Several amendments were filed to the petition from time to time making new parties defendants, and for the purpose of perfecting the cause of action. Following the service of the summons, and at different terms of the court, the appellees, S. G. Morgan, John R. Morgan, W. P. Jones, Anna Dupee, Fanny Dupee, William Smith, Joseph Duncan and G. P. Creekmore, filed their separate answers which were noted of record, wherein they each denied the title of appellants, averred title in themselves to such parts of the land as are held by them, and relied upon their alleged actual and adverse possession of the same for more than fifteen years before the institution of the action. Replies were filed by appellants to these answers, traversing the material averments thereof.

At the May term, 1903, the appellee, W. L. Stephens, who had not filed an answer, and who had only been served with summons to that term, filed a written motion alleging a misjoinder of actions in the petition, and asked the court to require the appellants to elect against which one of the defendants they would prosecute the action. This motion was sustained by the special judge, holding that term of court, by an order entered to that effect, in which the appellants were given until the first Monday in July, 1903, to make the election; to this ruling of the court the appellants at the time excepted. On the day after this ruling was made by the court, the appellees, S. G. Morgan, John R. Morgan, W. P. Jones, Anna Dupee, Fanny Dupee, William Smith, Joseph Duncan and G. P. Creekmore, were, upon their motion, allowed to withdraw their answers theretofore filed, and to join in the motion to require the appellants to elect, to all of which the appellants at the time also excepted.

At the August term of the court, 1903, the appellants having failed to make the election as required by the order entered at the previous term, the appellees moved the court to dismiss the action as to them, which motion was sustained by the court and the action dismissed without prejudice as to the appellees, each of them being adjudged to recover of appellants their costs. To this judgment appellants likewise excepted, and its reversal is sought by this appeal. The other defendants resisting appellants' right to recover the land not having joined in the motion to elect, or to dismiss the action, the same was allowed to proceed as against them, and they are not involved in this appeal. We think it manifest that the lower court erred in sustaining the motion to elect, as there was no misjoinder of causes of action against the defendants. It seems to be well settled that an action of ejectment may be maintained by the owner of a tract of land against several persons illegally claiming and holding separate parcels of it. And it appears from the averments of the petition in this case that appellants claim to own as tenants in common and under one title, the entire boundary

in controversy, and though appellees and their co-defendants hold in separate parts thereof, they are all within the survey set out in the petition.

An early announcement of this doctrine was made by this court in the case of Woolfolk v. Ashby, 2 Metcalfe, 288, wherein it is said: "It is not the policy of the Code of Practice to multiply actions unnecessarily, but, on the contrary, it authorizes the joinder of causes of action in some cases which would not have been tolerated under the former system of pleading The petition in this case presents but a single cause of action, although it describes and sets out by specific boundaries, several distinct parcels of land. The plaintiffs are tenants in common, and claim it all under the same title; so far, therefore, as they are concerned, their right to the land depends upon the same questions. The defendants in this case rely substantially on the same defenses; and if, in any case, they might find it proper to rely upon separate matters of defense, the court might award them a separate trial. But joint owners of a single tract of land should not be required to bring separate actions against each person in possession, where there are several of them, merely because they hold and claim separate parcels thereof and have no joint possession. We are, therefore, of the opinion that the plaintiffs had a right to bring a joint action against the defendants."

Again, in the case of Kincaid v. McGowan, 88 Ky., 101, which was an action to quiet title, this court in discussing the rule of practice under consideration, said: "And this court in Woolfolk, &c. v. Ashby, &c., 2 Metcalfe, 288, therein decided that an action of ejectment will lie against as many persons as hold an adverse possession of the land, although each one holds the possession of a distinct parcel from the other, and by a distinct claim of right, it follows that, under the statute, supra, in an action to quiet the title to land, all persons setting up claim thereto, whether or not each claims a separate parcel of the land by distinct right, may be joined in the suit as defendants. Also it seems clear that in an equitable action to quiet the title to land, independently of the statutory authority, all of the adverse claimants, whether by independent titles or not, may be joined as defendants. Indeed, as the object to be accomplished is the putting of all litigation about the title to rest, it is not only desirable, but proper, to make all adverse claimants defendants."

But if it were true that there was a misjoinder of actions in the case at bar, the appellee, W. L. Stephens, was alone entitled to require an election upon the part of appellants, as the other appellees by filing answers without objection to such supposed misjoinder, waived the right to require an election of the appellants.

Section 85, Civil Code of Practice, provides: "The court, at any time before defense, shall, on motion of a party, require the adverse party to elect which of two or more causes of action improperly joined he will prosecute, and, upon his refusal so to elect, shall strike out of the petition, answer or reply any cause of action improperly joined with another."

It is further provided by section 86: "Objections to the misjoinder of causes of action are waived, unless they are made pursuant to section 85."

Obviously, the foregoing sections of the Code were violated by the lower court in even entertaining a motion from any of the appellees, except Stephens, to require an election in this case, and, as we have already indicated,

his motion should have been overruled, as the misjoinder complained of by him did not in fact exist. The construction here given the sections of the Code, supra, has been adopted by this court in the following cases: Wilson v. Thompson, 1 Metcalfe, 123; Caldwell v. Caldwell, 2 Bush, 446; Sale v. Crutchfield, 8 Bush, 636; Hunt v. Semmonin, 79 Ky., 270.

As to whether a party has the right to withdraw a pleading in order to enable him to make a motion, which, like the one in this case, should have been made before the filing of the pleading, we find it said in Chiles v. Drake, 2 Metcalfe, 154: "If the plaintiff's petition contained causes of action which could not be properly joined in the same action, all objections to this defect were waived by the failure of the defendant to move the court to correct the error before he filed his answer. The subsequent motion was made too late, inasmuch as the objection had been waived, and the waiver would have remained, even had the defendant been permitted to withdraw his answer." * * *

For the errors indicated the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

GRATZ v. WORDEN.

(Filed October 18, 1904—Not to be reported.)

1. Damages—Evidence—In this action by appellee, who was a laborer of appellant at his distillery, for damages for injuries alleged to have been sustained by reason of an unsafe plank upon which he was required to stand in putting a plug in the bottom of a tub, the evidence of appellee that the support of the plank upon which he was required to stand was removed without his knowledge, and that the plank could have been made secure by driving nails in a post under the end of it, and that the nails were not driven and the plank was not secure, was competent.

2. Conduct of juror—A reversal of the judgment rendered in this action is urged on the ground that one of the jurors, after the trial was over, told appellant that on the trial of the case, and after appellee had testified, the court took a recess, and in passing out of the court room and into the street, he walked behind appellee and watched to see if he was crippled, or whether or not he was pretending, and he concluded that it was not a pretense. Held—That this was a matter of little importance as it was not shown that the juror communicated this to his fellow jurors, and besides, the statement of counsel who communicated it to him was only hearsay.

3. Same—Affidavit and motion for new trial—Appellant, upon his motion for a new trial, stated that he had ascertained after the trial was over and could prove by Dr. Davis, that he was called to see appellee a few hours after he was hurt and visited him and treated him several other times, but upon his last visit found that appellee had violated his instruction and was up, when he dismissed him because of this and did not visit him again; that in his opinion had appellee followed his advice he would not have been in as bad condition as he was at the trial. This physician was not present during the trial, though both parties had him subpœnaed as a witness, but neither introduced him because he had not informed them what his testimony would be. Two physicians did testify on the trial as to the condition of appellee. It is not pretended that the condition of appellee at the trial was otherwise than as these physicians stated, the effect of the affidavit

being that appellee would have been in better condition had he followed Dr. Davis' advice.

Chas. Carroll, O'Neal & O'Neal and Loraine Mix for appellant.

John S. Kelly for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Nunn.

It appears from the record that the appellant was the lessee and manager of a distillery in Bullitt county, Kentucky, and that the appellee had been for some time prior to and on the 10th of November, 1902, employed as a laborer at this distillery; that the distillery was equipped with a cold water tub elevated some fourteen or fifteen feet above the ground and was used in the operation of the distillery; and that while in the regular discharge of his duties as an employe of appellant, he was required to put a plug in the bottom of this tub, and in order to do so it was necessary for him to walk out upon a plank which rested on two cross pieces under the tub; that this plank had been supported by another plank under it, but the supporting plank had been removed without his knowledge, and by reason of this fact the plank upon which he was required to stand became unsafe; that this was known to appellant or his agents, or could have been known to them by the use of ordinary care, but was unknown to him, and that while standing on this plank, attempting to place the plug in the bottom of the tub, the plank, without any fault on his part, turned, and he was precipitated a distance of some fourteen or fifteen feet upon the rocks below and severely and permanently injured.

Appellee recovered a judgment for $2,000 for his injuries, and appellant has appealed. Appellee, in the introduction of his testimony, not only proved that this plank or support, that was under the end of the plank upon which he stood, was removed without his knowledge, but also proved that this plank could have been made secure by driving nails in the post under the end of it, or by other means, and that the nails were not driven in the post, nor was it made secure in any way. Appellant contends that this evidence was incompetent, and was prejudicial to him, because, as he claims, under the allegations of the petition, the only ground of negligence alleged was the removal of the plank which supported the plank upon which he stood, and the court should have confined appellee to the testimony upon that point, and he should not have been permitted to prove other character of negligence on the part of appellant; that is to say, his failure to make this plank secure after the removal of the plank which supported it.

We are of the opinion that this evidence was entirely pertinent to the issue. It was alleged in the petition that appellant's agents and servants in charge of this distillery carelessly and negligently removed this supporting plank and left the platform or plank on which appellee was required to go, without any sufficient or proper support, and in an unsafe and dangerous condition, and carelessly and negligently suffered it to remain in such unsafe and dangerous condition. Appellant asks a reversal because of the misconduct of one of the jurors who tried the case. He presents an affidavit of one of his counsel who stated that one of the jurors told him after the trial was over, that on the trial of the case, and after appellee had testified,

the court took a recess, and in passing out of the court room and out on to the streets, he walked behind appellee and watched him to see how badly he was crippled, or whether he was pretending to be hurt, and he concluded that his injury was not a pretense. If true, this was a matter of but little importance. It was not shown that this juror communicated his observations to his fellow jurors, and, besides, this statement of counsel was only hearsay.

Another ground upon which appellant asks a reversal is of newly-discovered evidence; that he had ascertained after the trial was over, that he could prove by one Dr. J. F. Davis that he was called to see appellee a few hours after he was hurt and visited him and treated him for his injuries five or six times during the next ten days, and that appellee passed no blood, as stated by him, and that before his last visit to him he advised him to remain in bed and rest himself, but upon his next visit he found that appellee had violated his instructions and was out of bed and moving around. Seeing that appellee would not follow his directions, he dismissed him, and did not visit him again; that in his opinion, as a physician, had appellee followed his directions and remained in bed and rested himself for some time longer, he would not have been in as bad condition as he seemed to be at the time of trial.

It is conceded that this physician was present during the trial. Both parties had him subpœnaed as a witness, but neither introduced him because, as stated by appellant, Doctor Davis would not inform them before the trial what his testimony would be. It appears from the record that two physicians did testify on the trial as to the condition of appellee. One of them had examined appellee two or three times at his instance. The other one examined him by order of court, on motion of appellant, and it appears that at this examination a physician from Louisville, the home of appellant, was also in attendance, and examined him carefully, and he was not put upon the stand. It is not pretended in the affidavit of Doctor Davis that the condition of appellee at the trial was otherwise than as these two physicians stated in their evidence. The effect of the affidavit of Davis is that he might then have been in better condition if he had followed his advice. Under the authority of Pfisterer v. Peter & Co., 25 Ky. Law Rep., 1605, and the cases therein cited, the instructions of the lower court were more favorable to appellant than he was entitled to.

Perceiving no error prejudicial to the substantial rights of appellant, the judgment of the lower court is affirmed.

MANN v. COMMONWEALTH.

(Filed October 19, 1904.)

1. Warrant of arrest—Execution—Private citizen—Authority of jailer to deputize—A jailer can not legally deputize a private citizen to execute a warrant of arrest, and an attempt by a private citizen to make an arrest pursuant to such authority is unlawful, and stands upon the same footing as any other assault and battery.

2. Unlawful arrest—Right of resistance—A person is not bound to yield to an unlawful arrest, and might resist force by force, but he is not author-

ized to go beyond the line of force proportioned to the character of the assault, or he in turn becomes the wrongdoer.

Pollard & Redwine and R. L. Greene for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, James Mann, was indicted for the murder of Levy Gross, and being put on his trial before a petit jury was convicted of manslaughter, and his punishment fixed at confinement in the penitentiary for a period of ten years. From this judgment he appeals. The facts leading up to the homicide are as follows: Appellant had been convicted of selling liquor without a license, and whilst confined in jail on a capias issued on the judgment, he escaped from custody. Whereupon the jailer procured a warrant for his arrest.

This warrant was placed in the hands of one Henry Cundiff, a private citizen, living in the same neighborhood of the defendant, and he was authorized by the jailer, in writing, on the back of the warrant, to arrest the appellant. In pursuance of this authority, Cundiff induced the deceased, Levy Gross, to go with him to the home of appellant for the purpose of effecting his arrest. The following statement as to the facts of the homicide is made by Cundiff: "Gross and I rode together to near defendant's house when Gross got off his horse and I rode on to the house, and told the defendant that I wanted to see him, to come into the house. I asked him to sell me some whisky. He said he had no liquor. At this point appellant's father, who was present, remarked, 'These men have come to arrest you.' In answer to this suggestion I said that I had nothing against appellant. We then walked out into the yard and I told the defendant that I had a warrant for him, and he must go to Jackson with me. Defendant immediately drew his pistol and shot me in the right arm. The fight then began and I shot the defendant through the arm and called upon Gross to come to my relief and assist me in making the arrest. He came towards us and the defendant jerked loose and shot Gross twice, the last shot killing him instantly."

The defendant gave the following version of what transpired and his statements are corroborated by the testimony of a number of other witnesses: "Cundiff came to my house and said he wanted to see me, and asked me to come in the house. I went in with him, and he asked me to sell him some whisky. I told him that I had none. He then remarked that I need not be afraid as he would not indict me. I responded that I did not have any whisky. We then both walked into the room in which my father was sitting, who remarked 'These men have come to arrest you.' Cundiff replied that he had no warrant for me. He and I then walked out doors and he put his right arm around my neck and put his pistol against the back of my head and fired, striking me in the back of the neck. I immediately drew my pistol and tried to shoot him, but he caught me by my arm and we struggled for a few moments. He then directed the deceased, Levy Gross, to shoot me. Cundiff, at the time, had my hand, in which my pistol was, fast under his arm. Gross approached at this moment with his pistol leveled

and fired, striking me in the right groin. I then jerked loose from Cundiff and fired on Gross. Cundiff at the same time shot me twice in the back. I did not know that Cundiff had a warrant for me, and he did not tell me that he had one or show me any."

In addition to the usual instructions in such cases, the court gave the following instruction: "The court further instructs the jury that if they believe from the evidence beyond a reasonable doubt that Henry Cundiff had in his possession a warrant for the arrest of the defendant and the one read to the jury, it was his duty to execute same by arresting defendant, and to use such force and to have such assistance as was reasonably necessary to that end. And the court further instructs the jury that it was the duty of the defendant to submit to such arrest, and if the jury believe from the evidence beyond a reasonable doubt that said Cundiff had summoned Levy Gross to assist him and they were, in good faith, attempting to arrest defendant, and that the defendant knew at the time of the attempted arrest that Cundiff was an officer, and had the warrant for his arrest, and if the defendant with such knowledge killed Gross, they will find him guilty of murder and fix his punishment as defined in instruction No. 1."

The main question upon the appeal is whether the jailer had legal authority to deputize Cundiff to arrest the appellant. The Criminal Code provides as follows:

"Section 35. An arrest may be made by a peace office or a private person.

"Section 36. A peace officer may make an arrest, first, in obedience to a warrant of arrest delivered to him second, without a warrant when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony.

"Section 37. A private person may make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony."

In Salisbury v. Commonwealth, 79 Ky., 425, the Sheriff of Letcher county had in his hands warrants for the arrest of one Morris, charged with a felony. He deputized one Banks, a private citizen, in writing on the back of the warrant to execute it by arresting Morris. Banks summoned Salisbury to assist him; in attempting to arrest Morris he was killed. Salisbury being put upon his trial relied upon the fact that he had been summoned to assist Banks in making the arrest, and had killed the deceased in attempting to execute the process, which had been delivered to him by the sheriff. In discussing the provisions of the Code quoted supra in that case, this court said: "There is no provision of the Code authorizing any other person than a peace officer to make an arrest in obedience to a warrant of arrest. Hence, the authority to execute the warrant attempted to be conferred by the sheriff, Amburgy, upon Banks, a private person, was illegal and of itself furnished no protection to Banks and the appellant. Therefore, the summons of the appellant by the sheriff and by Banks to aid the latter in making the arrest was illegal, because none but an officer making an arrest may summon persons to aid in it."

The doctrine of this case was followed in Wright v. Commonwealth, 85 Ky., 123; and Begley v. Commonwealth, 22 Ky. Law Rep., 1546. It, therefore, follows that the jailer could not legally deputize a private citizen to execute a warrant of arrest, and Cundiff's attempt to arrest appellant pur-

suant to such authority was unlawful and stands upon the same footing as any other assault and battery; and appellant was not bound to yield thereto, but might resist force with force, but he was not authorized to go beyond the line of force proportioned to the character of the assault or he in turn became a wrongdoer. (2 En. of Law, second edition, 909; Creighton v. Commonwealth, 84 Ky., 103; Bates v. Commonwealth, 14 Ky. Law Rep., 177.) The evidence in this case justified an instruction that if in resisting arrest appellant had reasonable ground to believe, and did believe, that he was in imminent danger of death or great bodily harm at the hands of Gross, and there was to him, the defendant, at the time no apparent safe way to avoid such death or great bodily harm except to shoot and kill Gross, and he shot for that purpose, they should find him not guilty on the ground of self-defense and apparent necessity. But they should also have been instructed that he could not kill Gross unless he was in actual or apparent danger of death or great bodily harm at the hands of the deceased; and that it appeared to him necessary in the exercise of a reasonable judgment to save himself. (Hughes v. Commonwealth, 25 Ky. Law Rep., 2153.)

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

COMMONWEALTH v. ROSENFIELD BROS.

(Filed October 19, 1904—Not to be reported.)

White & Ray for appellant.

Sweeney, Ellis & Sweeney. Gibson, Marshall & Gibson, D. W. Lindsey, C. H. Shield, Chas. H. Stoll and W. H. Mackoy for appellees.

Appeal from Daviess Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

The purpose of the statute is not to add to the burdens of the taxpayer but simply to give him time to pay his taxes until the whisky is taken out of bond. If he wishes to avoid the imposition of interest he may pay the taxes at any time after the assessment is made and avoid being charged with interest.

A tax is a charge by the State upon the property, and may be removed by the owner by paying the money after the tax proceeding is complete. The taxes in question are payable into the treasury and there is no reason why this payment may not be made at the taxpayer's option before the interest period has begun. As to the penalty we have had some difficulty, but conclude that the statute is peremptory and we have no discretion.

Petition overruled.

CRAIG, &c. v. ARMSTRONG, &c.

(Filed October 19, 1904—Not to be reported.)

1. Lands—Verbal exchange—Possession—Rights acquired—In this action involving the rights of the parties under a verbal exchange of strips of land owned by each on opposite sides of a branch, so as to make the branch the

dividing line between their lands, where each party took possession of the parts exchanged and improved and used same, by building a barn on one parcel, and cutting and selling the timber from the other parcel exchanged respectively, in an action by one of the parties against the vendee of the other to recover the strip on which the barn was built, she claiming that she had acquired possession of the barn from the vendor of the defendant, the judgment of the lower court that the defendant acquired the interest of his vendor which he had by the verbal exchange and the erection of the barn, and fixed the enhanced value of the land by the ercetion of the barn at $200, for which a lien was adjudged to the defendant, will not be disturbed.

C. A. Denny for appellants.

Jas. R. Mallory for appellees.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Paynter.

Al Hightower, while the husband of Mrs. S. C. Craig, owned a small tract of land and Geo. E. Stokes owned a small tract adjoining it. A small branch was the line between the tracts, except at one point, about an acre and a half of Hightower's land was on Stokes' side of the branch and at another point a small part of Stokes' land was on Hightower's side of the branch. It was the mutual interest of the parties that the branch should constitute the division line between them, so they verbally exchanged the small parcels mentioned to accomplish that purpose. Neither parcel was of much value. Stokes, at an expense of more than $400 built a tobacco barn on the piece of land which he obtained from Hightower in the exchange, and Hightower cut and carried away a great many cords of wood from the parcel which he obtained from Stokes. The parties had never exchanged deeds, although each party took possession of their respective parcels

Thus the matter stood until Hightower's death. Appellee Armstrong succeeded to whatever interest Stokes had in the land. Mrs. Craig (she having married Leonard Craig) claimed she had obtained possession of the barn through a contract with Stokes. This was denied, and the controversy resulted in a forcible entry proceeding, which was decided adversely to her claim. Thereafter this action was instituted against Armstrong by Mrs. Craig and others to recover the parcel of land upon which the barn was erected. She also claimed that by the contract under which she acquired possession of the barn she acquired Stokes' interest in it; that she paid for the improvement by releasing Stakes from a debt of about $140, which he owed her deceased husband. These claims were denied in this action by Mrs. Craig and the heirs of Hightower to recover the land turned over to Stokes in the exchange of land.

The court adjudged that Armstrong acquired the Stokes interest in the property which he had by virtue of the verbal exchange of property and the erection of the barn thereon, and fixed the enhanced value of the one and a half acres of land by the erection of the barn thereon at $200, and adjudged Armstrong a lien thereon for that amount. The court also gave the plaintiffs a judgment against Stokes for the amount found due from him to the Hightower estate. Stokes has not appealed from either part of the judgment, hence we can not review the judgment in so far as it is against him

in favor of Mrs. Craig and the heirs of Hightower, therefore, the only question for review is, does the judgment giving Armstrong a lien on the land for $200, prejudice the rights of the plaintiffs growing out of the alleged contract between Mrs. Craig and Stokes after the death of her husband.

The court below necessarily found that they did not acquire such rights or a judgment would not have been given in favor of Armstrong for $200, for if the court had found that Stokes had lost his right to the property by the alleged contract with the plaintiffs, Armstrong could not have been adjudged the $200. Mrs. Craig claims that Stokes delivered her the possession of the barn at the time the contract was made and as part of the transaction. A jury found against plaintiff's claim on this question in a forcible entry proceeding. The lower court found against their claims in this case on that question. They never accounted for the timber which Hightower removed from the piece of land which he obtained in the exchange. They never turned over to Stokes the note which Hightower held for part of Stokes' indebtedness to Hightower's estate, neither did Stokes ever take possession of the parcel of land which Hightower had obtained from him in the exchange of land. In view of these facts and circumstances and Stokes' evidence, the court reached the conclusion that Mrs. Craig and Stokes never made the contract as claimed by her by which she acquired the improvements made by Stokes. The court's finding on the question is entitled to some weight in this court in passing upon the question of fact. We have concluded not to disturb his finding.

The judgment is affirmed.

MONROE v. DAVIS.

(Filed October 19, 1904.)

1. Slander—Averments in petition—Wrongful conversion of goods—In an action by a creditor of a deceased person against the administratrix and her surety, to subject the assets of the estate of the decedent to the payment of plaintiff's debt, an allegation in the petition that the surety, "Wm. Davis, carried away and converted to his own use a lot of the goods and merchandise from the store, which was a part of the estate left by the decedent, and without paying anything for them, or reimbursing the estate in any way; and that said defendant, Wm. Davis, is liable for the payment of plaintiff's debt in so much as the goods carried away by him were worth," do not import a charge that the defendant, Davis, stole the goods from the store, and will not support an action for slander.

2. The issue—Pertinent language—Malice—Slanderous purpose—Good faith—Remedy—The issue was as to the conversion of the goods and as to their value. The language used was not only pertinent to the proceedings, but it was used in stating the cause of action. An averment in this petition that "they were false and slanderous because they import that plaintiff was guilty of larceny by feloniously taking goods from the store, left by decedent; that the words were not germane or pertinent to the matters at issue, in the action in which they were used, and that they were used for the malicious purpose of slandering the plaintiff and to injure his good name," and there being no averment that the suit was instituted against the administratrix and her surety, Davis, for the purpose of conveying the scandal and as a cover for the malice of the party, and not in good faith as

a remedy for the assertion of a right or the redress of a wrong, hence the question is not before the court whether an action instituted for the purpose of conveying a slander, etc , and in which false and slanderous words were used, would give the injured party a cause of action.

J. S. Wortham for appellant.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Paynter.

The estate of W. O. Doyel, deceased, of which his widow, Mary E. Doyel, was administratrix, was indebted to the appellant. The appellee was the surety of Mary E. Doyel on her bond as administratrix. The decedent seems to have been a merchant, and at his death had some merchandise. The administratrix failed to pay the appellant's debt, and he instituted an action against her and her surety, W. S. Davis, to recover it. The plaintiff sought to recover upon the idea that there were assets in the hands of the personal representative and that one of which was a liability of the appellee to the estate. To show that liability the plaintiff's petition contained an averment as follows: "Plaintiff says that the defendant, William Davis, carried away and converted to his own use a lot of the goods and merchandise from the store, which was a part of the estate left by W. O. Doyel, and without paying anything for them, or reimbursing the estate in any way, and plaintiff says that said defendant, William Davis, is liable for the payment of his debt in so much as the goods carried away by him were worth."

This action was instituted by the appellee, Davis, against the appellant, in which it was averred that the words thus used were false and slanderous, because they import that he was guilty of larceny by feloniously taking goods from the store left by the decedent. It was averred that the words were not germane or pertinent to the matters at issue in the action in which they were used, and that they were used for the malicious purpose of slandering the plaintiff, and to injure his good name and reputation. There was no averment in the petition that the appellant instituted the proceeding against the administratrix and her surety for the purpose of slandering the plaintiff, or as a cover to his malice, or that the proceeding was not instituted in good faith to establish his rights.

In our opinion, the words did not import a charge that the appellee stole the goods from the storehouse, or that he even took them without the consent of the administratrix. The words used do not import more than that he converted some goods to his own use that were in the store. The appellant sought to make the defendants liable for the value of the goods alleged to have been converted. The words were used in the course of a judicial proceeding. The courts are open to every citizen to institute proceedings to have his wrongs redressed or to have his rights enforced.

In the case of Forbes v. Johnson, 11 B. M., 51, the court said: "The principle is well settled, and is, indeed, essential to the ends of justice, which demand that there should be a free resort to judicial tribunals and to the remedies furnished by the law, that words spoken or written in the course of justice, and pertinent to a legal proceeding within the jurisdiction of the tribunal to which they are addressed and to the remedy sought in that tribunal, are not actionable though they be false, unless the proceedings were

resorted to merely for the puprose of conveying the scandal, and as a cover for the malice of the party, and not in good faith as a remedy for the assertion of a right, or the redress of a wrong."

In the case of Morgan v. Booth, 13 Bush, 488, the court said: "A party to a judicial proceeding may, by himself or counsel, write or say anything of and concerning the case, or of a witness who testified in the case, that is pertinent and material to the matter in controversy, and he can not be held to answer for scandalous words, unless, under the pretense of pleading his cause, he designedly wanders from the point in question, and maliciously heaps slander upon the party whose conduct or evidence is under consideration; and so long as it can be said that such party confines himself to that which is pertinent and material, he is under no obligation to show that his words are absolutley true; and can not be made to answer for maliciously saying that which the law permits him to say."

The issue was as to the conversion of the goods and as to their value. The language used was not only pertinent to the proceeding within the jurisdiction of the court, but it was used in stating the cause of action. The appellant did not wander from the issue in the case. There is no averment that the suit was instituted against the administratrix and her surety for the purpose of "conveying the scandal and as a cover for the malice of the party, and not in good faith as a remedy for the assertion of a right or the redress of a wrong;" hence the question is not before us whether an action instituted for the purpose of conveying slander, etc., and in which false and slanderous words were used, would give the injured party a cause of action. The plaintiff sought to state a cause of action for slander by averring that the words imported that he had committed a felony, and that they were not pertinent to the issue in the proceeding. The instructions which the court gave the jury were erroneous, but in view of the conclusions we have reached, we deem it unnecessary to point out the errors therein.

The judgment is reversed for proceedings consistent with this opinion.

COMMONWEALTH v. THE LICKING VALLEY BUILDING ASSOCIATION, NO. 3.

(Filed October 19, 1904.)

1. Corporations—Original organization—Filing amended articles—New corporation—Where, by the original articles an association was formed on April 12, 1886, with a capital stock not to exceed $1,000,000, or 2,000 shares of the par value of $500 each, to commence business May 3, 1886, and to continue twenty-five years, with authority to incur an indebtedness, not exceeding $25,000, and by amended articles filed in the county clerk's office April 19, 1897, under chapter 32, Kentucky Statutes, section 554, and reorganized under the same name, the stockholders of the new, the same as the old, without transfer upon the books of the company, the capital stock not to exceed $1,000,000, or, 1,500 shares of the par value of $500 each, and 1,000 half shares of the par value of $250 each, the highest amount of the indebtedness not to exceed 20 per cent. of its paid-up capital, to commence business May 3, 1897, and to continue twenty-five years, the amended articles did more than conform to the new statute; they created a new corporation,

and under the law the old corporation was destroyed, and a new one with new powers and new responsibilities, came into existence.

2. Organization tax—Defense—Want of legal organization—In an action under Kentucky Statutes, section 4225, to recover an organization tax against a corporation organized in this State under chapter 32, Kentucky Statutes, section 366, providing that "no corporation organized under this chapter shall be permitted to set up or rely upon the want of a legal organization as a defense to any action against it," such corporation is not permitted to set up the want of a legal organization, and, therefore, it was unnecessary to allege in the petition facts showing that it had complied with the requirements of the statute. The simple allegation that it is a corporation, created under the laws of the State, is, under the statute above named, sufficient.

3. Demurrer—Exhibits filed—Consideration—In considering a demurrer to an answer filed by a corporation, with which its articles of incorporation are filed as an exhibit, the court will construe the articles of incorporation in determining whether the demurrer should have been sustained.

4. Same—Under Kentucky Statutes, section 4225, providing that "every corporation which shall be incorporated under the laws of this State having a capital stock divided into shares, shall pay into the State treasury one-tenth of one per cent. upon the amount of the capital stock which the corporation is authorized to have. Held—The fact that the building and loan association does not sell its stock is immaterial. By the express terms of the statute it must pay the tax upon the stock which it is authorized to have. The purpose of the statute is not only to raise revenue, but to prevent stocks being watered, or fictitious stocks being issued or put on the market, and we are not at liberty to make an exception to the statute when it makes none.

James M. Guthrie for appellant.

Louis Reuscher for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hobson.

On August 5, 1902, the Commonwealth filed this petition ordinary in the Campbell Circuit Court, against the Licking Valley Building Association, No. 3, to recover of it the organization tax of one-tenth of one per cent. on each $100 of the capital stock of the company, alleging that the association is a corporation created under the laws of this State; that its principal place of business is in the city of Newport, Campbell county; that it has an authorized capital stock of $1,000,000, divided into 1,500 shares of $500 each, and 1,000 half shares of $250 each; that it has failed and refused to pay into the State treasury one-tenth of one per cent. of the amount of the capital stock which it was authorized to have, and that this was due to the State upon the filing of its articles of incorporation on April 19, 1897. Judgment was prayed against the defendant for $1,000, and also for a penalty of 20 per cent. thereon and costs. The defendant demurred to the petition and its demurrer was overruled. It thereupon filed an answer in which it was pleaded that it was organized on April 12, 1886, and was incorporated under the general laws of the State on the third day of May, 1886, under chapter 56 of the General Statutes by filing its articles of incorporation in the Campbell county clerk's office, and that on April 19, 1897, it filed amended articles in the Campbell county clerk's office in accordance with the provisions of

chapter 32, Kentucky Statutes. It relied upon its incorporation prior to the adoption of the present Constitution in bar of the action. On motion the defendant was required to make its answer more definite and certain, and on May 2, 1903, the defendant filed an amended answer, in which it alleged that its articles of incorporation were filed in the Campbell county clerk's office on May 3, 1886; that the purpose of the organization was to enable the members to acquire, in an easy manner, by weekly installments, capital for the building and purchase of houses; that on April 19, 1897, amended articles of incorporation were filed in the Campbell county clerk's office, the sole purpose of which was to conform to the new law governing building associations under the new Constitution. Then are these words, "The following are the said articles of incorporation and amended articles herein referred to." The original articles of incorporation and the amended articles were filed with the pleading.

By the original articles the association was formed with a capital stock not to exceed $1,000,000, or 2,000 shares of the par value of $500 each. The association commenced business on May 3, 1886, and endured for twenty-five years, terminating on May 3, 1911. It could not incur an indebtedness exceeding $25,000. By the amended articles of incorporation it is stipulated that the Licking Valley Building Associaiton, No. 3, of Newport, Campbell county, Ky., a corporation created by and existing under the laws of the State of Kentucky, desirous to reincorporate and organize under the provisions of chapter 32, Kentucky Statutes, as authorized by section 554 thereof; now for that purpose certain persons named now acting as such association, be and are hereby created a body corporate and politic under and by virtue of the laws of the State of Kentucky; the name of the corporation shall be the same as the old corporation and under that name shall have perpetual succession, and power, among other things, to mortgage its real or personal property, and exercise, subject to law, such powers as may be necessary for the conduct of the business for which it was organized. The business of the new corporation is substantially the same as the old corporation; the capital stock shall not exceed $1,000,000, or 1,500 shares of the par value of $500 each, and 1,000 half shares of the value of $250 each; the stockholders of the old corporation constitute the stockholders of the new corporation without transfer upon the books of the company, and without any initiation fee succeed to all the rights and privileges of the new corporation as in the old; all business and property of the old corporation is vested in the new, without the transfer of the property, subject to all the liabilities of the old corporation; the highest amount of liability or indebtedness which the corporation may at any time incur shall be 20 per cent. of its paid-up capital. It is also stipulated that the new corporation shall commence business on May 3, 1897, and continue for a period of twenty-five years, unless sooner dissolved, and may renew a like term from time to time.

The plaintiff demurred to the answer. The court overruled the demurrer, and the plaintiff declining to plead further, its petition was dismissed.

The suit was filed under section 4225, Kentucky Statutes, which is as follows: "Every corporation which shall be incorporated by or under the laws of this State, having a capital stock divdied into shares, shall pay into the

State treasury one-tenth of one per centum upon the amount of capital stock which such corporation is authorized to have, and a like tax upon any subsequent increase thereof. Such tax shall be due and payable upon the incorporation of the company and on the increase of the capital thereof, and no such corporation shall have or exercise any corporate powers until the tax shall have been paid; and upon payment, they shall file a statement thereof with the secretary of State."

Section 542, Kentucky Statutes, regulating private corporations, is as follows: "When the articles are filed and recorded as provided, and the license tax imposed is paid to the State, the corporation shall be deemed to be organized for the purpose of transacting, promoting or carrying on the business or purpose for which it was created; and shall thereupon become a body corporate, and be known by its corporate name, and as such may adopt and use a corporate seal; and shall have power to sue and be sued, to contract and be contracted with, to pledge or mortgage its property, real or personal, to secure the fulfillment of its contracts; appoint, remove and elect officers, define their duties, and require from any of them a bond for the faithful discharge of their duties; to prescribe by its board of directors by-laws for the government of the corporation not inconsistent with law; and to exercise, subject to law, such powers as may be necessary to conduct the business or promote and carry on the objects and purposes for which it was organized."

It is insisted for the appellee that a pleading must be taken most strongly against the pleader, and that appellant has wholly failed to make a sufficient legal showing that appellee was legally organized on April 19, 1897; that it is not alleged where its principal office is located, or the nature of its business, or the time it commenced, or the period it is to continue, or what indebtedness it may incur, or that the articles were signed and acknowledged by the parties as provided by the statute in section 540. It is also contended that the act passed under the new Constitution providing for the organization tax, is not retroactive. It is further insisted that this court can not consider the original or amended articles of incorporation, on the ground that the sufficiency of the pleading must be determined without reference to the exhibits; that the purpose of filing the new articles was simply to conform to the new law governing building associations, and that appellee did not terminate or abandon its corporate existence under the old charter, but merely reorganized for the purpose of conforming to the new law, and, therefore, is not liable for the organization tax, and in this connection section 554, Kentucky Statutes, is relied on. That section is as follows: "Any corporation created by, and existing under, the laws of this State, may organize under the provision of this chapter by executing and recording, as provided, articles of incorporation; and when the requirements of this chapter, and other laws relating to it, are complied with, it may commence business, and become a corporation under this chapter, and thereupon all business effects, assets and property, real and personal, of such corporation shall be vested in, and become, without deed or transfer, the property of the new corporation, subject to all liabilities existing against the corporation, its officers or stockholders, at the time of reorganization."

Section 566, Kentucky Statutes, is as follows: "No corporation organized

under this chapter shall be permitted to set up or rely upon the want of legal organization as a defense to any action against it; nor shall any person transacting business with such corporation or sued for injury done to its property, be permitted to rely upon such want of legal organization as a defense."

It is alleged in the plaintiff's petition that the association is a corporation created under the laws of this State, and that it filed its articles of incorporation on May 19, 1897. The corporation is not permitted to set up the want of legal organization, and, therefore, it was unnecessary to allege in the petition facts showing that it had complied with the requirements of the statute. The simple allegation that it is a corporation created under the laws of this State is, under the statute above referred to, sufficient. It is true the act is not retroactive, but it applies to all corporations formed after it took effect, and section 4225, Kentucky Statutes, has been in force since November 11, 1892. Although the corporation could not legally do business until it paid its organization tax, it is none the less liable for the organization tax when it proceeds without paying, because it is not allowed to set up in defense of the suit against it, its own failure to comply with the statute. The original and amended articles of incorporation were filed with the amended answer of the defendant, and while an exhibit will not make a bad pleading good, an exhibit will be considered by the court against the pleader when it is filed by him. We must, therefore, construe these articles of incorporation in determining whether the demurrer to the amended answer should have been sustained.

The amended articles of incorporation did more than conform to the new statute. They created a new corporation. The old corporation would have expired on May 19, 1911. The new corporation runs for twenty-five years from April 19, 1897, and may then be renewed for a like term from time to time. The highest amount of indebtedness which the old corporation could incur was $25,000. The new company can issue a capital stock of $1,000,000, and may incur an indebtedness of 20 per cent of its paid up capital. It also enjoys all the rights, privileges and powers conferred by the new statute upon building associations organized under it. We had this question before us in Senn v. Levy, 23 Ky. Law Rep., 662, and according to the principles laid down in that case the old corporation was destroyed and a new one with new powers and new responsibilities came into existence. The reasoning of that case is conclusive of the question.

By section 4225, Kentucky Statutes, every corporation which may be incorporated under the laws of the State having a capital stock divided into shares, must pay into the State treasury one-tenth of one per cent. upon the amount of the capital stock which the corporation is authorized to have. The fact that the building and loan association does not sell its stock as other corporations, is immaterial. By the express terms of the statute it must pay the tax upon the stock which it is authorized to have. The purpose of the statute is not only to raise revenue, but to prevent stocks being watered, or fictitious stocks being issued or put on the market; and we are not at liberty to make an exception to the statute where it makes none.

Judgment reversed and cause remanded, with directions to the circuit court to sustain the plaintiff's demurrer to the answer of the defendant, and for further proceedings consistent herewith.

SAULSBERRY v. SAULSBERRY, &c.

(Filed October 19, 1904—Not to be reported.)

Bills and notes—Joint obligors—Where a note was executed for a joint liability by three persons, one of them being insolvent and unable to pay his part, each of the other obligors are bound in law to equally pay the debt; and the evidence in this action making it clear that appellant was jointly liable as principal with appellees, he should have been given judgment for an amount that equalled the one-half of the debt that he was required to pay.

Walter S. Harkins for appellant.

James Goble for appellees.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, Greenville Saulsberry, and appellee, Robert Saulsberry, and the decedent, Lackey Saulsberry, executed their note on the 26th of March, 1861, to John M. Burns for $199.20, and to secure the note Greenville Saulsberry and Lackey Saulsberry executed a mortgage on certain lands. In 1869 Burns instituted an action in the Floyd Circuit Court on the note and obtained a personal judgment against the parties and a judgment for the sale of the land to satisfy the debt, interest and cost. Some amounts seem to have been paid on it. Finally in 1890, the appellant, Greenville Saulsberry, paid the balance of the judgment, which amounted to between $450 and $500. Lackey Saulsberry had made payments on the judgment. After Greenville Saulsberry paid the balance of the judgment he instituted this action, claiming that he was only surety for his brothers, Lackey and Robert, and asserted a lien on Lackey Saulsberry's land embraced in the mortgage to Burns, to satisfy the amount which he had paid. The appellees pleaded that the appellant was jointly liable with Robert and Lackey Saulsberry on the note. The court below gave the appellant a judgment for $68, and adjudged that the land should be sold to satisfy it.

If the note was executed for a joint liability of the payors of the note, then each should have paid one third of it. Lackey Saulsberry claimed that he had paid one-third of the note, but as Robert Saulsberry was insolvent and seems to have failed to pay any part of it, Lackey Saulsberry was bound in law to pay one-half of the debt, because he could not place the burden upon the appellant to pay the one-third of the note which Robert was obligated to pay. The appellant was under no more obligation to pay the part which Robert Saulsberry should have paid, than was Lackey Saulsberry. They were bound in law to contribute an equal amount to make up the deficit, which resulted from Robert's failure to pay. The evidence of Burns and Lackey Saulsberry makes it absolutely clear that the appellant was jointly liable as principal with Lackey and Robert to John M. Burns for an attorney's fee, and that the note was executed for that fee, except a small amount. It is difficult to see just how the court arrived at the amount found to be due appellant, but it is manifest that the court did not give the appellant a judgment against the decedent, Lackey Saulsberry's estate for the amount which the latter should have contributed in the payment of the part of the debt for which Robert was liable, for in the preparation of the

case, Lackey Saulsberry endeavored to show that he had paid one-third of the debt, his full share.

The court below should have ascertained the amount which had been paid by Lackey Saulsberry and the amount which had been paid by Greenville Saulsberry on the debt to Burns and treated it as their joint debt (as Robert was insolvent,) and made each pay an equal amount in the discharge of the debt due Burns, except the small part which was the individual debt of Lackey Saulsberry, and this amount should be deducted in ascertaining the joint liability of the parties. As to this small part of the judgment the statute of limitations had barred the right of Burns to collect it from the appellant, as he was only surety therefor. When the appellant paid that part, he was a volunteer, and is not entitled to recover it. (Spillman v. Smith, 15 B. M., 183; Kimball v. Cummins, 3 Met., 826; Dawson v. Lee, 83 Ky., 50.)

The judgment is reversed for proceedings consistent with this opinion.

McKEE v. McKEE'S EX'OR.

CHEEK v. CHEEK, EX'OR, &c.

(Filed October 20, 1904—Not to be reported.)

1. Wills—Construction of—The second clause of the will of Mary McKee, providing that Maggie McKee Cheek should take her dwelling house and grounds attached, portraits, pictures, household and kitchen furniture and all personal property used in and about her premises for and during her natural life, and at her death to pass to her children or her descendants, the issue of any deceased one to represent the ancestor, but if at her death she has no descendants then the property shall pass to testatrix's grandson, Ashby McKee, or his descendants, or if he be not living and have no descendants then to her brothers and sisters or their descendants, Maggie McKee Cheek took a life estate in both the real and personal estate devised, the remainder vesting, upon her death, in such of her children as may then be living and to the living descendants next in order of her children as may then be dead. This remainder is contingent upon the remaindermen indicated being alive at the death of the life tenant.

2. Same—By a devise to one in trust for Sarah Riker McKee, so long as she may remain widow of Alex. McKee, and at her death or remarriage, the fund to pass to Ashby McKee, or his descendants if he be not living, or if he be dead without descendants, then to the children of Maggie McKee Cheek, or their descendants, Ashby McKee's interest is that of a defeasible fee; the defeasance dependent upon his dying without issue. If he should have issue living at his death, then his title to the fund will have become an absolute one.

3. Same—By a provision that a fund shall be held in trust for Susan McKee, so long as she may remain the widow of Samuel McKee, and upon her death or remarriage, such fund shall pass to Maggie McKee Cheek for and during her life, and at her death to vest in her children or their descendants, a life estate was created in Susan McKee with remainder in Maggie McKee Cheek for life, with remainder to her children.

4. Same—Execution of bond by life tenant—Where the life tenant is to have an income of money or similar property devised, the possession of which is directed to be given her, she may be compelled to execute bond to the remaindermen, that it will be forthcoming at the termination of the

particular estate; but in the case of personal property, the enjoyment of which could not be had without its physical possession, a bond should not be required.

5. Same—A devise of all the best of an estate not theretofore disposed of, of all kinds of property, real, personal and mixed, two thirds to Maggie McKee Cheek for life, with remainder to her children, and the other third to Ashby McKee for life, with remainder to his children, and if he have no children, then at his death to pass to the children of Maggie McKee Cheek, vested a life estate in each of the devisees in respect to the interests expressed. Mrs. Cheek is a married woman and it is possible for her to have issue born after the death of testatrix, and if such issue should live more than twenty one years and ten months, to allow the testatrix's intention to control, the devolution of the title would be a restraint upon its alienation for a period of time beyond that allowed by statute.

Humphrey, Burnett & Humphrey for Maggie McKee Cheek.

Hardin & Hardin for Ashby McKee.

Robert T. Quisenberry for Mary McKee's executors.

Morrison Breckinridge, guardian ad litem, for Francis Powell Cheek, Logan McKee Cheek, Mary Ashby Cheek.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge O'Rear.

This action was brought for the construction of the last will of Mary McKee, of Danville, Ky., probated the 16th of September, 1901. Omitting formal parts and others about which there is no controversy, the will is as follows:

"2d. I give, bequeath and devise to my daughter, Maggie McKee Cheek, wife of J. A. Cheek, my dwelling house and grounds attached, situate on the west side of 3d street, in the town of Danville, Ky., and bounded west by the 4th street of said town, east by 3d street, and north by property of Mr. and Mrs. W. L Welsh, and south by property of Mrs. Mahan and others, and also all the portraits and pictures, household and kitchen furniture, table ware, china and silver ware, and in other words, all the personal property used in and about said house and premises. All the said property, both real and personal, named in this, the second clause of my will. I give, bequeath and devise to my said daughter, Maggie McKee Cheek, for and during her natural life, and at her death to pass and go to her children or their descendants, the issue of any deceased one, to represent the ancestor, and if at the death of said Maggie McKee Cheek, she has neither children nor descendants, then said above named property shall pass to and vest in my grandson, Ashby McKee, son of Alex. and Sarah Riker McKee, or his descendants, if any, if he be not living, and if none, then to pass to and vest in my brothers and sisters or their descendants, share and share alike, and the issue of any deceased one, to represent the ancestor.

"4th. I give and devise to J. A. Cheek and G. W. Welsh, Jr., both of Danville, Ky., the sum of $5,000, in trust, however, for the following use and purpose; said $5,000 to be held, invested, controlled and managed by said trustees and the net income only, arising and realized from said fund, to be paid annually or semi-annually, as trustees may see fit, to Sarah

Riker McKee, widow of my deceased son, Alex. McKee, so long as she may live as his widow, and at her death as his widow, or at and upon her remarriage, should same occur, then said fund of $5,000 to pass to and vest in my grandson, Ashby McKee, if he be living, or his descendants, if any, if he be dead, and if he be not living and have no descendants, then said fund shall pass to and vest in the children of my daughter, Maggie McKee Cheek, or their descendants, if any.

"Should said fund of $5,000, under the above provision, pass to and vest in said Ashby McKee, and he should die without issue or descendants, then said fund shall pass to and vest in the children of my daughter, Maggie McKee Cheek, or their issue or descendants.

"5th. I give and devise to J. A. Cheek and G. W. Welsh, Jr., both of Danville, Ky., the sum of $5,000, in trust, however, for the following use and purpose; said fund to be invested, controlled, held and managed by them, and the net income arising from said fund or realized therefrom to be paid annually by them to Susan McKee, widow of my son, Samuel McKee, so long as she may survive and live as his widow, and at her death as his widow, or her remarriage, should same occur, said fund shall pass to and vest in my daughter, Maggie McKee Cheek, for and during her natural life, and at her death to pass to and vest in her children, or their issue or descendants, and in each and every instance in this will, the issue of a deceased one shall represent the ancestor.

"6th. All the rest and residue of my estate of every sort and kind, real, personal and mixed, including 640 acres of land in Holt county, Mo., and 160 acres of land in Clinton county, Missouri, which I own, I now give, bequeath and devise as follows: Two-thirds of all said porperty to my daughter, Maggie McKee Cheek, for and during her natural life, with remainder to her children, and the other one-third of all said property to my grandson, Ashby McKee, for and during his natural life, with remainder to his children, and if he have no children nor descendants at his death, then said one-third shall pass to and vest in the children of my daughter, Maggie McKee Cheek, and I will and direct that any property, real or personal, which may pass to and vest in the children of my daughter, Maggie McKee Cheek, under this will, shall vest in them share and share alike, and the share or interest of any child of my said daughter, Maggie, who may die without issue or descendants, shall pass to and vest in his or her brothers and sisters or their issue or descendants, and the issue of the deceased one, in every case, to represent the ancestor.

"And should all the children of my said daughter, Maggie, die without issue or descendants, then the property, real and personal, which shall go to or vest in them, under this will, except the $1,500 given to Logan McKee Cheek, and the $1,000 given to Francis Powell Cheek, in the second clause of this will, shall all go to and vest in my grandson, Ashby McKee, if he be living, and if not, to his issue or descendants, if any, and if none, then to pass to and vest in my brothers and sisters, or their issue or descendants, share and share alike, the issue of a deceased one, in every case to represent the ancestor.

"And should said Ashby McKee die without issue or descendants, then any and all property, real or personal, that may pass to or vest in him,

under this will, except the $1,000 given him in the third clause hereof, shall pass to and vest in the children of my daughter, Maggie, in the same manner as above set forth in this clause.

"It being my will and desire that my property shall pass to and vest in my direct descendants, if any, but in case of a failure of direct descendants, then to pass to and vest in my own brothers and sisters."

The court is of opinion that under item two above quoted Maggie McKee Cheek took a life estate in both the real and personal property therein described. The remainder estate vests, upon the death of Maggie McKee Cheek, in such of her children as may be living at the time of her death, and to the living descendants next in order of her children as may then be dead. This remainder is contingent upon the remaindermen indicated being alive at the death of the life tenant. If, however, Mary McKee Cheek has no children or descendants living at her death, then Ashby McKee, if then living will be the remainderman. Or, if he be then dead, his living descendants, if any, are to take. If, however, Mary McKee Cheek has no living descendants at her death, and if neither Ashby McKee, nor any of his descendants, be living then, the brothers and sisters of the testatrix, if living, or if dead, their living descendants next in order, take the estate mentioned in item second in remainder. Whoever, under the order mentioned, becomes vested with the remainder upon the death of the life tenant, will take it in fee.

Under the fourth item Sarah Riker McKee took a life estate in the fund of $5,000, subject to be defeated upon her remarrying. Upon her death or remarriage it passes to Ashby McKee, if he be then living.

Under the closing sentence of this clause, Ashby McKee's remainder interest is that of a defeasible fee, the defeasance dependent upon his dying without issue. If he should have issue living at his death, then his title to the $5,000 fund will have become an absolute one.

The question is made by the guardian ad litem of the infant children of Mary McKee Cheek that Ashby McKee should be required to execute bond for the forthcoming of the $5,000 in question in the event of his death without issue. One bequeathed a defeasible estate is entitled to its possession, nothing to the contrary appearing in the will, and to its use as if he were given the fee simple, except that if he should consume it, or any part of it, and then his estate be defeated by the occurrence of the condition imposed, he would be liable to the person next entitled, or if the property could be traced, the person who had got it, unless he were an innocent purchaser for value, in the case of personalty, would be compelled to surrender.

Under the 5th item of the will a life estate is created in Susan McKee, with remainder in Maggie McKee Cheek for her life, with remainder to her children. The circuit court required that Maggie McKee Cheek should execute bond as life tenant for the forthcoming of this property, Susan McKee having died since the testatrix. Where the life tenant is to have an income of money, or similar property devised, the possession of which is directed to be given her, she may be compelled to execute a bond to the remainderman that it will be forthcoming at the termination of the particular estate. In the case of the personal property mentioned in the second item, the enjoyment of which could not be had without its physical possession, probably

without its consumption in whole or in part, the bond should not be required, and was not in this case.

Under the 6th item of the will Mary McKee Cheek was given a life estate in two-thirds the residuum of the testator's property, including the 640 acres of land in Holt county, Mo., and 160 acres in Clinton county, Missouri, and Ashby McKee was given a life estate in the other third. The remainder provided in each instance was first to the children living at the death of the respective life tenants, and to the descendants of such as might be then dead. It was only in the event of the failure of issue at the time of the death of the life tenant that the descent was cast upon the other line, that is, if Mary McKee Cheek died without issue then living, Ashby McKee and his line become remaindermen of her interest under this item, and vice versa. It was only upon the failure of issue at the death of both of such life tenants that the descent was cast upon the brothers and sisters of the testatrix or their descendants. The phrase: "And should all the children of my said daughter, Maggie, die without issue or descendants, then the property, real and personal, which shall go to or vest in them, under this will, except the $1,500 given to Logan McKee Cheek, and the $1,000 given to Francis Powell Cheek, in the second clause of this will, shall all go to and vest in my grandson, Ashby McKee, if he be living, and if not to his issue or descendants, if any, and if none, then to pass to and vest in my brothers and sisters, or their issue or descendants, share and share alike, the issue of a deceased one, in every case to represent the ancestor," means, that should all the children of Maggie McKee Cheek die without issue in her life time.

This is also true of the following clause concerning the property devised to Ashby McKee. This construction is not only in harmony with that rule which in case of uncertainty favors the earliest point of time for the vesting of the fee simple, but rescues the provisions from being obnoxious to the statute against perpetuities. For, as Mrs. Cheek is a married woman, it is possible for her to have issue born after the death of the testatrix, and if such issue should live more than twenty-one years and ten months, to allow that the testtrix's intention to control the devolution of the title of such one thereafter, would be a restraint upon its alienation for a period longer than that allowed by the statute.

The judgment and opinion of the circuit court having been in accord with these views, is affirmed, both upon the original and cross appeal.

LUCAS v. COMMONWEALTH.

(Filed October 20, 1904.)

1. Pool room—City ordinance—Violation—Conviction—Bar to indictment for nuisance—Under Constitution, section 168, providing that "no municipal ordinance shall fix the penalty for a violation thereof at less than that imposed by statute for the same offense," a conviction or acquittal under either shall constitute a bar to another prosecution for the same offense, the conviction of one for operating a pool room in the city of Paris in violation of an ordinance of said city, is not a bar to an indictment against the same party for the offense of maintaining a nuisance in said city, by unlawfully causing and permitting persons to assemble on premises in his possession

and control, and there engage in betting, winning and losing money on racing; the latter being a common law offense, and for which no punishment is imposed by statute of the State.

2. Trial—Plea not guilty—Plea in bar overruled—Peremptory instruction—Right of jury—Coercion by court—On the trial of a prosecution for maintaining a nuisance where a plea of "not guilty" is entered by the defendant and also a plea in bar, of former trial and conviction for the same offense, to which latter plea a demurrer was sustained, though the defendant introduced no proof, and that of the Commonwealth clearly established his guilt, it was error in the court to give the jury a peremptory instruction to find the defendant guilty, as, under the plea of "not guilty," the jury are the sole judges of the credibility of the witnesses and the weight to be given to their evidence, and the jury alone were authorized to pass upon the question of defendant's guilt under proper instructions and without coercion from the court.

E. M. Dickson, J. H. Brent and Brent & Thomas for appellant.

Dennis Dundon, N. B. Hays and Loraine Mix for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Settle.

The appellant was jointly indicted with others in the Bourbon Circuit Court for the offense of maintaining a nuisance, committed by unlawfully causing and permitting persons to assemble on premises in their possession and control, and there engage in betting, winning and losing money on racing, to the injury of the public morals.

Appellant was given a separate trial, found guilty by verdict of the jury, and his punishment fixed at a fine of $500. He insists that his conviction was illegal, and that a new trial should have been granted. Upon the trial appellant filed, in writing, and relied on two grounds of defense, the first being a plea of not guilty, and the second, former conviction. To the second plea a demurrer was sustained by the court, and the trial then proceeded upon the issue made by the plea of not guilty. The plea of former convictions set out with great particularity the following facts: That the city of Paris, which is a municipality of the fourth class, on June 16, 1902, through its mayor and board of council, and as authorized by section 3490, Kentucky Statutes, duly enacted the following ordinance:

"Be it ordained by the mayor and board of council that any person who shall, within the city of Paris, operate a pool room, shall be fined not less than $2, or more than $5 for each offense. Each day said pool room is operated shall be deemed a separate offense. By pool room is meant any place where persons are allowed to assemble for the purpose of betting on horse races."

Which ordinance has been in force ever since the 26th day of June, 1902.

That under this ordinance warrants were issued from the police court of the city of Paris, charging appellant with operating a pool room in Paris nineteen days in the month of January, twenty-five days in the month of February, and eleven days in the month of March, making fifty-five days altogether. That appellant was arrested upon each of these warrants and arraigned in the police court, and to each offense, as charged in the war-

rants respectively, he pleaded guilty, and thereupon judgments were rendered against him imposing a fine of $5 in each case; that the acts constituting the offense charged in the indictment in this case as to appellant's suffering a nuisance, are the same acts charged against him in the several warrants mentioned, and for which he was tried, convicted and fined in the police court of the city of Paris, all of which fines he has fully paid; that the Paris police court had exclusive and final jurisdiction of the offenses contained in the warrants and of the person of appellant, and that the judgments of conviction in the Paris police court upon the several warrants against the appellant constitute a bar to the prosecution under the indictment in this case.

It is contended by counsel for appellant that the trial court erred, first, in sustaining the demurrer to the plea in bar; second, in premptorily instructing the jury to find the appellant guilty. The question raised by the first contention has been repeatedly decided by this court. First, in the case of Kemper v. Commonwealth, 85 Ky., 219, wherein it was held that where, by the same act, one violates the police regulations of a city, and also the criminal laws of the state, the punishment of the offender by the city for the violation of its ordinances does not bar a prosecution by the State for the violation of its criminal laws, and the fact that the city charter gives the city court exclusive jurisdiction of all offenses committed against the ordinances of the city, does not give that court jurisdiction of an offense committed against the laws of the State where the same act is a violation of both the city ordinances and the State laws.

It is argued, however, that the opinion in Kemper v. Commonwealth, supra, has been overthrown by section 168 of the Constitution since adopted, which provides: "No municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense. A conviction or acquittal under either shall constitute a bar to another prosecution for the same offense."

We are unable to see that this section of the Constitution affects the question under consideration. The offense of which appellant was convicted in this case is one at the common law, and for that reason an offense against the State, and the punishment inflicted was not a statutory punishment, but that prescribed by the common law. This question has been fully considered and decided by this court since the adoption of the present Constitution in a case in which the defense was identical with that made in the case at bar. We refer to the case of Respass v. Commonwealth, 108 Ky., 139, in which it is said "This section (168, Constitution), however, does not seem applicable to the case at hand. No punishment has been imposed by 'statute' for the maintaining of a nuisance. When a statute prescribes a punishment for an offense, confessedly the city ordinance can not prescribe a less penalty for the same offense; and confessedly, a conviction or acquittal under either the statute or the ordinance constitutes a bar to another prosecution for the same offense." That this section has reference only to statutory offenses, as its own terms imply, was held by this court in city of Owensboro v. Sims, 17 Ky. Law Rep., 1395. There it was held that the city council might, by ordinance, impose a penalty for keeping a bawdy house at less than that fixed at the common law, because no penalty had

been fixed by statute; and the police court was held to have jurisdiction to try the offense denounced by the ordinance. But whether, in the absence of a statutory penalty, a conviction or acquittal of one charged with a violation of the ordinance would be a bar to a subsequent indictment and prosecution for the same offense at common law, was expressly reserved and not decided. A reference to the section as it was first introduced in the constitutional convention shows that the words "general law" were originally in the section, but were afterwards supplanted by the word "statute," and one of the delegates expressly referred to the case of nuisances, and the desirability of permitting cities to legislate with respect thereto. We think, therefore, the defense relied on does not sustain the appellant's plea in bar. It seems to us the principles announced in Kemper v. Commonwealth, 85 Ky., 219, are conclusive of the question.

The opinion of city of Louisville v. Wemhoff, &c., 25 Ky. Law Rep., 995, cited in the brief of counsel for appellant, does not in any respect militate against the principle announced in Respass v. Commonwealth, supra; upon the contrary it refers to and approves the conclusions therein reached. We are clearly of opinion that the lower court did not err in sustaining the demurrer to appellant's plea in bar. In view of the appellant's utter indifference to the many fines inflicted upon him by the Paris police court for his persistent violations of the ordinance under which he later sought shelter against the indictment in this case, and his apparent inclination to treat them as a license for his unlawful business, rather than as punishments, we would feel reluctance in overruling his second contention that the court erred in peremptorily directing the jury to find him guilty, if the law would permit us to do so, but a careful consideration of the matter constrains us to sustain it.

The instruction objected to is as follows: "The court instructs the jury that under the proof they should find the defendant, Desha Lucas, guilty as charged in the indictment, and fix his punishment at a fine in any amount in their discretion, or at confinement in the county jail for any period of time in their discretion, or both so fine and imprison in their discretion."

The Constitution, section 7, Bill of Rights, provides: "The ancient mode of trial by jury shall be held sacred and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution."

Section 180, Criminal Code, declares that all issues of fact where the punishment will exceed a fine of $16, shall be tried by a jury. Section 182 also declares that "an issue of fact arises upon a plea of not guilty, or of former acquittal or conviction." Section 225 requires the court to instruct the jury in writing on the law applicable to the case, and section 238 defines "a reasonable doubt."

These provisions of the Code are designed to preserve inviolate the right of trial by jury as guaranteed by the bill of rights. In addition it has been repeatedly held by this court that it is the duty of the court in the trial of criminal and penal cases, to instruct the jury upon all the law applicable to the case whether requested to do so or not.

In view of these salutary provisions of the Constitution and Criminal Code, we are unable to conceive of a case in which the trial court would be authorized to instruct the jury to find the accused guilty, except upon his con-

fession of guilt by formal plea to that effect, made in open court in the presence of the jury selected and sworn to try him. In this case, though a demurrer had been properly sustained to the appellant's plea in bar, his additional plea of "not guilty" was still before the court and jury, and as we have already seen it raised an issue of fact to be tried and determined by the jury, and though the appellant introduced no proof, and that of the Commonwealth clearly established his guilt, the jury alone were authorized to declare him guilty, and, they should have been allowed to perform their duty under proper instructions and without coercion from the court. They were the sole judges of the credibility of the witnesses and of the weight to be given their testimony.

In Ency. Pleading and Practice, volume 6, page 689, it is said: "In a criminal case a verdict of conviction may never be directed. It is for the jury in all such, to pass upon the credibility of the witnesses, even though the evidence be convincing and uncontradictory." (Proffatt Jury Trial, section 353.)

We think the court should have given the usual instructions in this case, that is, one predicated upon the facts alleged in the indictment, telling the jury in what state of case they would be authorized to find appellant guilty, and the punishmnt they might inflict in that event, and another as to the reasonable doubt.

For the error committed by the court in giving the peremptory instruction, the judgment is reversed and cause remanded for a new trial and for further proceedings consistent with this opinion.

POWERS v. OSBON.

(Filed October 20, 1904.)

1. Assessors—Compensation—Kentucky Statutes, section 4070, fixes the compensation of assessors based upon the total assessed value of the property listed by him as shown by his tax book, and requires the certification of the amount due the assessor to the auditor, based upon the total valuation of the assessment for taxation. Under the Constitution and Statutes, the assessor is only entitled to commissions upon property assessed by him which was actually liable for taxation, and does not include commissions upon any property which is exempt from taxation by the Constitution or Statute

2. Statistics—While an assessor may be required to ascertain facts in connection with the property of the county for statistical purposes outside of his duty as assessor, there seems to be no provision made by law for compensating him for services of this character.

T. L. Caudel and B. F. Day & Son for appellant.

J. F. Osbon for appellee.

Appeal from Menefee Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, F. M. Powers, assessor of Menefee county, presented his claim for services as assessor to the county court in June, 1903, in which he stated that the total assessed value of the property listed by him, as shown

by his tax books, after they had been corrected by the supervisors of the county as of the 15th of September, 1902, aggregated $766,094, and claimed that there was due to him for this assessment $344.74, and asked that this sum, with certain additional allowances for reporting births, deaths and marriages, less the 20 per cent. required to be retained by the statute, should be certified to the auditor of public accounts for payment. The county court refused to certify his claim on the ground that there was embraced in the total valuation on which he claimed commissions, the personal property exempted by law to persons with families, which aggregated $176,581, leaving a balance for taxation of only $589,513, and they offered to certify a claim in favor of appellant for 4½ per cent. commissions on this sum, which he refused to accept, and thereupon instituted this suit against the Menefee County Court, and Osbon, county judge, praying that Osbon should be compelled to allow and certify his claim to the auditor for the full amount claimed by him, including the exempt property which had been included in the assessment made by him. His claim was disallowed by the lower court and his petition dismissed, and he has appealed.

The question presented apparently for the first time by the appellee is, whether an assessor, under the Constitution and Statute, is entitled to be paid a commission upon property which is not liable for taxation. By section 170 of the Constitution: "Household goods and other personal property of a person with a family, not exceeding $250 in value, and crops grown in the year in which the assessment is made in the hands of the producer," is exempted from taxation. And section 172 of the Constitution provides that "all property not exempted from taxation by this Constitution * * * shall be assessed for taxation."

Pursuant to these constitutional provisions, section 4020 of the Kentucky Statutes, defines the property subject to taxation unless exempt by the Constitution. And section 4052 reads as follows: "All taxable estate shall be assessed and valued as of the 15th of September in the year listed, and the person owning or possessing the same on that date shall list it with the assessor and remain bound for the taxes, notwithstanding he may have sold or parted with the same."

By these provisions only taxable property is required to be assessed. Sections 4053 and 4056 of the Statutes provide for the valuation by the assessor and the taxpayer of property subject to taxation with the value thereon on the 15th of September of the year for which the list is given, and such other facts as may be required in blanks to be thereafter provided. Section 4070 fixes the compensation of assessors based upon the total assessed value of property listed by him, as shown by his tax book, and requires the certification of the amount due the assessor to the auditor, based upon the total valuation of the assessment for taxation. It is clear from these sections of the Constitution and Statute that appellant was only entitled to commissions upon property assessed by him, which was actually liable to taxation, and does not include commissions upon any property which is exempt by the Constitution or Statute. While an assessor may be required to ascertain facts in connection with the property of the county for statistical purposes, outside of his duty as assessor, there seems to be no provision made by law for compensating him for services of this character. To this category, per-

haps, belongs the ascertainment of exempt property set apart to citizens. We are, therefore, of the opinion that the circuit judge properly refused to allow a commission upon the value of the exempt personal property reported by the assessor, or to require a certification thereof by the county court.

For reasons indicated the judgment is affirmed.

McFARLAND'S ADM'R v. THE HARBISON & WALKER CO., SOUTHERN DEPARTMENT.

(Filed October 20, 1904—Not to be reported.)

1. Damages—Evidence—Instructions—In this action for the recovery of damages for the death of appellant's intestate, it was error for the court to peremptorily instruct the jury to find for the defendant, where the proof conduced to show that appellee had two persons in its mine whose duty it was to inspect and examine the sides and roof of the mine and keep them in repair, and in a reasonably safe condition for the protection and safety of those who labored in the mine; that it was the sole duty of appellant's intestate to haul empties into the mine and loaded cars out, and where it appeared that unsafe and dangerous places in the entries could be detected by sounding them with a pick.

2. Practice—The rule has been well established by this court that if a party introduces any evidence supporting his claim, it is a reversible error to take the case from the consideration of the jury.

3. Same—In an action for damages against owner of mine, it was error in the trial court to refuse to permit appellant to prove the description of the mine where deceased was killed, and also how it could have been ascertained whether or not it was unsafe.

James Andrew Scott and Armstrong & Wood for appellant.

Theobold & Theobold and R. L. Greene for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Nunn

The appellant brought this action against the appellee for the sum of $15,000 for the negligent killing of his intestate. He alleged in his petition, in substance, that his intestate was employed by appellee as a car driver in appellees' mines, and that his duty was to haul fire clay from the inside of the mine to a tipple on the outside; that while engaged in his duties as such driver, and using ordinary care for his own safety, he was killed by a fall of slate, rock, clay and dirt which fell from the roof and side of one of the entrances of the mine. He alleged that the appellee, its agents and servants, in charge of the entry, negligntly permitted the same to become and remain greatly out of repair and in such defective, unsafe and dangerous condition as to endanger his life and the lives of others whose duty it was to pass along this entry in the mines, and negligently failed to repair and make the same reasonably safe for the purpose for which it was used, and that appellee, its agents and servants, knew, or could by the exercise of ordinary care have known of its defective, unsafe and dangerous condition in time to have prevented the death of appellant's intestate. But that his intestate did not know, or have any information of its defective, unsafe and dangerous condition. The appellee traversed the allegations of the petition.

On the trial and after the appellant had introduced his evidence, the court, on motion of appellee, gave a peremptory instruction to the jury to find for the appellee, and on the return of the verdict, as directed, the court rendered a judgment dismissing the petition, from which judgment appellant has appealed.

This action of the court was upon the theory that there was no evidence sustaining appellant's petition. The rule has been well established by this court that if a party introduces any or a scintilla of evidence supporting his claim, it is a reversible error to take the case from the consideration of the jury.

Without referring to the testimony introduced, in detail, it conduced to prove the following state of facts; that appellee had, in charge of its mines, Perry Henderson and brother, Henry, whose duty it was to investigate and examine the roofs and sides of entries of the mine and keep them in repair and in a reasonably safe condition for the protection and safety of those who labored in the mine; that the sole duty of appellant's intestate was to haul empties into the mine and loaded cars out, no part of his duty being to inspect as to the safety of the mine. Several witnesses stated that unsafe and dangerous places in the entries could be easily detected by sounding them with a pick. One witness testified that for some considerable time before the intestate lost his life, he discovered a crack or seam in the roof of this entry, and that he considered it dangerous and spoke of it at the time. But the evidence showed that this crack or seam was about three and one-half or four feet from the place where appellant's intestate lost his life. One or two other witnesses stated that at the place where he was killed there was a slab six or eight inches below the regular line of the arched roof which hung out over the entry and extended from the roof down the side of the arch. One of the witnesses stated that it had the appearance to him of being dangerous. This slab, together with about two tons of slate and clay, did fall upon appellant's intestate and kill him.

We are of the opinion that this was sufficient evidence to authorize a submission of the case to the jury. The rule has been often announced by this court that it is the duty of the master to furnish his employe a reasonably safe place in which to work, and that the servant has the right to presume, when directed to work in a particular place, that the master has performed this duty and could proceed with his work relying upon this presumption, and that it is not the duty of the servant to discover defects, and unless he knows of their existence, or they are patent and obvious to a person of his experience and understanding, he would not be precluded from a recovery. Pfisterer v. Peter & Co., 25 Ky. Law Rep., 1605, and the cases therein cited.

As the case will have to be reversed and sent back for another trial, it is proper for us to notice other alleged errors committed on the trial. It appears from the bill of evidence that the court refused to permit some of the witnesses to give a description of this entry of the mine where deceased was killed, and also to state how it could have been ascertained whether or not it was unsafe. This was error. Appellant complains that the lower court erred in not permitting him to prove by a witness that in a conversation with Henry Henderson, the "bank boss," some time after deceased was killed, that Henderson stated to the witness that he and his brother on the day before this accident occurred, had tried to pull down this place in the

entry where deceased was killed, with their picks. In this the court was correct. This could not be introduced as substantive testimony, but only for the purpose of going to the credit of the witness, Henry Henderson, in case he had denied the conversation on the witness stand, and in such state of case the court should have so admonished the jury.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

GERMAN NATIONAL BANK'S RECEIVER, &c. v. NAGEL, &c.

(Filed October 20, 1904—Not to be reported.)

1. Sales—Laudatory statements—Intentional misstatements—Patent defects—Concealment of latent infirmities—In a sale of mill property, commendatory laudations and praise concerning the property to be sold, which do not amount to knowledge, misstating some fact patent to the observer, or to the concealment of some latent infirmity, at the same time inducing the buyer to believe that it does not exist, such action does not make the seller liable to deceit.

2. Purchaser—Opportunity for inquiry and examination—It is a well-settled rule that mere commendation or even false representation by the seller of property as to its value, when the purchaser has an opportunity to ascertain for himself such value by ordinary vigilance or inquiry, has no legal effect on the rights of the contracting parties, even when made to deceive.

W. M. Smith for receiver.

Lane & Harrison for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge O'Rear.

This suit was brought by appellees against the German National Bank and Albert Reutlinger to have a lien adjudged the plaintiffs against a certain planing mill property, and the lot upon which it stood in Louisville, Ky., because of these alleged facts. The plaintiffs claim that the president of the German National Bank and Albert Reutlinger, who it was charged was also an officer in the bank, and in this matter was the agent of the bank, acting together with one John G. Brown, induced the plaintiffs to subscribe to the capital stock of a corporation known as the VanSeggern Planing Mill Co.; that the bank held an unsatisfied debt against H. G. VanSeggern and John G. Brown for more than $20,000; that VanSeggern's estate was insolvent, and that Brown was also; that VanSeggern's estate owned the planing mill property, which was really worth only about $4,000; that the bank, its president and agent in the matter, fraudulently represented to the plaintiffs that the planing mill property was worth in fact $30,000, and that it could be bought at a great bargain for $15,000; that for many years before it had been earning large dividends, as much as 20 per cent. per annum, and that its business was such that it would continue to do so. That these statements were made for the fraudulent purpose of deceiving the plaintiffs into subscribing for the capital stock of the corporation, whereby the bank was enabled to apply the subscription secretly to the satisfaction of its debt against VanSeggern and Brown.

On a former appeal, which came here upon a demurrer to the petition, this court said (Nagle v. Reutlinger, 19 Ky. Law Rep., 304): "From the statements and averments of the plaintiffs' petition and amended petition we think the facts therein stated constitute a cause of action against the defendants in the amended petition, and entitle the appellants to the relief sought as against them."

Upon a return of the case to the circuit court, Reutlinger filed an answer traversing all the material allegations of the petition. The German National Bank having been placed in the hands of a receiver by the comptroller of currency, its receiver was permitted to intervene in its behalf. In his answer he also denied the material allegations of fraud and deception.

The proof for the plaintiffs falls far short of sustaining the allegations of the petition. As a matter of fact, it presents this condition: It was true that VanSeggern owed the bank about $22,000 at his death; that Adolf Reultinger, who was a neighbor of VanSeggern, and the president of the bank, administered upon VanSeggern's estate; that VanSeggern's estate was insolvent; that John G. Brown, who was surety for VanSeggern to the bank, and was the son-in-law of VanSeggern, was also insolvent; that the bank's only chance, so far as the record discloses, to realize on this debt, was to get it from Brown or the assets of VanSeggern's estate. Brown had had practical experience and connection with the planing mill business in the lifetime of his father-in-law. His son had been likewise connected. Brown proposed to buy in the mill if the bank would loan him the money to pay for it. He was the only bidder at the marshal's sale, and bid it in at $49,000. The sale was approved without objection it seems.

Appellee Fenton Meixsel, who was also a neighbor of Reutlinger, had been employed by VanSeggern as foreman in the operating department of the mill for more than twenty years, and testified that he had had forty years' experience in that business. He suggested to Reutlinger the advisibility of organizing a corporation to buy and operate the plant, assuring him that it was a money-making institution. Albert Reutlinger subscribed for $1,000 of stock, and paid in $500 of it. Others than appellee, including the Browns, also subscribed and paid in about the same proportion of their subscriptions. The only representations made to appellees by either of the Reutlingers, according to appellees' showing, were as follows:

"Appellee Phillip Rissberger:

"Q. Through whom did you learn about that VanSeggern planing mill?"

"A. Albert Reutlinger."

"Q. Did you ever invest any money in the VanSeggern planing mill?"

"A. $500. I paid in."

"Q. How did you happen to do that?"

"A. Well, one day I was in the bank—"

"Q. What bank?'

"A. German National Bank. I was in there, I done some business there in front by the teller, and Albert called me back on the side of it, and he said 'there is a good thing, you ought to go in it, there is some money in it.' I says I wouldn't that day and he says 'I know there is money in that business, in that mill; Mr. VanSeggern had $20,000 cash money in our bank that he made with nothing, commenced with nothing,' and he talked to

me. I didn't like to go in, and I says, 'I don't understand about planing mills;' he said 'You don't need to understand nothing, if you have got a good man to attend to it, you make money;' and old man Reutlinger come there and touched me on the shoulder, and he said, 'You make 20 per cent. on your money; you never put your money in no better investment than that.'"

Appellee H. C. Hess:

"Q. Do you know anything of a corporation known as the VanSeggern Planing Mill Co.?"

"A. Yes, sir."

"Q. What did you know of it?"

"A. Well, Adolf Reutlinger and Albert—"

"Q. Albert who?"

"A. Reutlinger, asked me to go into this concern, old man VanSeggern having died, they were going to start a company, and get Mr. Meixsel, who was the foreman for old man VanSeggern, they said Meixsel was going to run the mill, he was a competent man, and they are going to have the employes there to do all the work that possibly could be done, that is the clerks were to sweep up the floors and so on, to economize and save expenses, and it was going to be a paying business; that Mr. Meixsel had mortgaged or sold his property to the extent of $4,000 and put every dollar that he had into it; that he would not certainly sacrifice everything he had if he did not know and think it was a good thing."

Appellee John L. Fisher:

"Q. Now just tell exactly if you subscribed for stock, how it came about?"

"A. Albert came to see me in January, 1889, came to my store and told me that Fent Meixsel, whom I was acquainted with, was going to take charge of the mill; that old man VanSeggern had died, and that Fent was his former foreman or manager, and Fent being a practical man they were going to turn the VanSeggern Planing Mill over to him, and held out very glowing returns as to what the profits would be, and such representations I took out stock; I took out—subscribed for a $1,000 worth, and paid $500."

Fenton Meixsel (appellee):

"Q. State as near as you can what the representations were, what inducements were held out by those men?"

"A. The inducements held out—the first inducement that Mr. Reutlinger held out, he came and asked me to buy that mill. I was in the employ for H. G. VanSeggern when Mr. Reutlinger became administrator of H. G. VanSeggern, deceased, that was in 1887, and after that the work was finished up in the mill by Mr. Reutlinger and closed until the fall of 1888. He asked me to buy the mill at the courthouse door; that he would put up the money for me and I could form a company, selling it on long time to a company. I declined to do it; the mill was bought in by John J. Brown shortly afterwards, in 1888."

"Q. What statements or disclosure, if any, was made to you by Adolf Reutlinger in reference to the indebtedness of VanSeggern, or his estate, to the bank—any?"

"A. None at all, no, sir."

"Q. Did you subsequently find out how much that indebtedness was?"

"A. Not until after the mill was closed."

"Q. State whether or not it was through the persuasions or representations of Adolph Reutlinger that you subscribed and paid in this amount of money that you did?"

"A. Yes, sir."

"Q. Now state what those representations or offers or statements by Adolf Reutlinger to your were, that led to this subscription?"

"A. Mr. Reutlinger represented to me that if I took stock that I could be manager in the mill, and the stockholders would endorse my paper, and that he would give me the money on their endorsement; that he failed to do after I had signed my name for stock, for I sold my home and put up my money in this corporation. He asked, he said he would take a mortgage on my home, that is, Adolf Reutlinger, and he would not give the amount, he said he would give me the amount the bank would allow and I thought it wasn't enough, so I sold it; and Albert was present when this conversation took place, that was at Albert Reutlinger's house."

"Q. What statement, if any, did Adolf Reutlinger make to you about old man VanSeggern having made money in the prosecution of that mill business just prior to his death?"

"A. Well, he never made any statement about old man VanSeggern making money, for I was with Mr. VanSeggern, but he held out inducements that we had made money in Green street, you understand. I didn't know that Mr. Van was indebted to him at all, to the German National Bank."

"Q. Was that concealed from you by him?"

"A. Yes, sir, but on Green street we had made money."

The fact that the bank desired to sell the VanSeggern planing mill property at as high a price as possible so that its proceeds might be applied in liquidation of that debt, was not of itself necessarily an unlawful purpose; that it sought to do so was in keeping with the every day experience of people who have things to sell, and who try to get the highest price obtainable for them. It is likewise the experience of mankind, that sellers use expressions of commendation and praise concerning the article being sold, and particularly as to what can be done with it. Where such commendatory laudations do not amount to knowingly misstating some fact not patent to the observer, or to the concealment of some latent infirmity, at the same time inducing the buyer to believe that it does not exist, such action does not make the seller liable for deceit. It is a well-settled rule that mere commendation, or even false representation, by the seller of property as to its value, when the purchaser has an opportunity to ascertain for himself such value by ordinary vigilence or inquiry, has no legal effect on legal rights of the contracting parties, even when made with the intention to deceive. (Marshall v. Peck, 1 Dana, 609; Beach's Modern Law of Contracts, sections 1436-1439; Perkins' Adm'r v. Embry, 24 Ky. Law Rep., 1990.)

Upon all the evidence in this case we are convinced, that neither the bank nor Reutlingers made any actionable misrepresentations concerning the property. Meixsel knew much more about it than the bank or its officers.

It was upon his experience and his continued connection with it, that Albert Reutlinger and several others of the subscribers of stock relied in

engaging in the enterprise. They put their money into it. They employed Brown at a large salary, and Meixsel at an annual salary of $1,200 to manage the business. It was continued for about two years with heavy losses, its account having been overdrawn at the German National Bank for about $9,000. It failed because, it seems, of certain improvident contracts made by Meixsel with the building and loan association to build a number of houses in the city of Louisville at a loss of some $9.000. The action of the bank's officers seems to have been free from fraud throughout. It was error for the court to have adjudged against the bank's receiver that he pay to appellee stockholders the amount of their subscriptions to the capital stock of the VanSeggern Planing Mill Co.

The judgment is reversed and cause remanded, with directions to dismiss the petition.

YOUNG & HUMPHREY v. TRAPP, BY, &c.

(Filed October 20, 1904.)

1. Personal injuries—Negligence of independent contractor—Liability of original contractor—Nuisance—Appellant contracted to erect a building for another, and sublet the brick work to an independent contractor, who in doing the brick work failed to erect barricades to prevent injury to persons passing along the adjoining sidewalk. A child, in passing on the sidewalk, was injured by a brick falling from the scaffold erected by the independent contractor. Held—That the failure to erect such barricades for the protection of the public, considering the location of the building to the sidewalk, was a nuisance for which the original contractor was liable for an injury caused thereby, to one passing on the sidewalk.

2. Same—While the contention of appellant that the independent contractor alone is liable, is the general doctrine, it does not apply to cases where the thing done or omitted to be done, is, of itself, a nuisance, or will necessarily result in a nuisance if proper precautionary measures are not used.

O'Neal & O'Neal and I. T. Woodson for appellants.

Pryor, Sapinsky & Castleman and Thos. Walsh for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Nunn.

The appellee, a child ten years of age, recovered a judgment against appellants for the sum of $400 damages for personal injuries. The facts in the case are as follows: The Cumberland Telephone and Telegraph Co. entered into a contract with appellants for the erection of a brick building on the corner of Breckinridge street and Baxter avenue in Louisville, Ky. The appellants sublet the brick work to one John Gray. While Gray was in the performance of his work, this child was passing along Baxter avenue by the building, and a brick fell from the second story upon her head, severely injuring her. There is no issue as to her injuries or that the injury was caused by the negligence of the employes of Gray, nor is there any complaint as to the amount of the verdict. The sole contention of appellants is that they are not liable therefor for the reason that Gray was an independ-

ent contractor; that he had the sole control and management of the brick work of the building and the employment of hands to perform this work, and the sole control of them while in the performance of this labor; that it was the duty of Gray to erect and maintain barricades or other means to prevent persons from passing along the pavement by the side of this building, for their protection while persons were performing labor on the building. And that the failure to perform this duty was the negligence of Gray, the independent contractor, and not the negligence of the appellants.

The contention of appellants is the general doctrine, but does not apply to cases where the thing done or omitted to be done is of itself a nuisance, or will necessarily result in a nuisance, if proper precautionary measures are not used. In the case of Matheny v. Wolffs, 2 Duv., 139, in discussing the principle herein involved, the court said: "The liability of the proprietors has been universally recognized where the relation of master and servant or principal and agent existed; but where an independent contractor intervened, there has been a contrariety of opinion. If the owner of real estate suffers a nuisance to be created or continued by another on or adjacent to his premises, in a prosecution of a business for his benefit, when he has the power to prevent or abate the nuisance, he is liable for an injury resulting to third persons. * * * Is a perpendicular excavation up to the very edge of the pavement and sidewalk of a street, in a populous city, without placing sufficient safeguards or barricades to admonish passersby after nightfall, a nuisance? Any act of an individual done to a highway, though performed on his own soil, if it detract from the safety of travelers, is a nuisance."

And after discussing the facts of the case, continued: "Proprietors have the legal right to excavate their lots for building purposes up to the very edge of the street, and perhaps to encroach on the street, and for this purpose have the right to use that part of the street for a reasonable time to the exclusion of the public; but this legal right must be exercised in a prudent, legal manner; and in populous cities the public interest and individual safety imposes responsibilities from which such proprietors can not escape; neither can they, by private contract, shift this responsibility upon undertakers or others. Hence the distinction, that, when an act must necessarily result in a nuisance, unless it be prevented by the proper precautionary measures, the proprietor is bound to the exercise of such measures, else he must answer in damages for injuries resulting to others from the neglect thereof. No matter what may have been his contract with the undertaker, in such case his responsibility does not depend on the relation of master and servant nor principal and agent, but results from others doing, at his instance, that which must needs result in a nuisance, unless prevented by the appropriate precautions." (Baumeister, &c. v. Markham, 101 Ky., 123, and also 11 Bush, 477.)

The only remaining question to be settled is, whether the manner of erecting this building, considering its location to the pavement, was necessarily a nuisance. If a nuisance, the appellants are liable; if not, the doctrine of the independent contractor applies.

In the case of Matheny v. Wolffs, supra, it is said: "Any act of an individual done to a highway, though performed on his own soil, if it detract from the safety of travelers, is a nuisance." This case declared that an ex-

cavation contiguous to a pavement, was a nuisance. We are unable to perceive how it can be argued, with any degree of consistency, that to render a public highway unsafe by such an excavation without barricades to protect the public, is a nuisance, while to render the same highway equally unsafe by permitting brick, mortor and other debris to fall upon it from a wall immediately contiguous thereto, without safguarding, by barricades or other means, is not a nuisance. Clearly it can make no difference whether the cause of appellee's injury came from below or above. If one was a nuisance, the other must be.

Wherefore, the judgment of the lower court is affirmed.

TABER v. COMMONWEALTH.

(Filed October 21, 1904—Not to be reported.)

1. Homicide—Brothers—Assault by accused upon one—Interference by the other—Killing of the latter—Necessity—Instructions—On the trial of appellant for the murder of Dock Acrey, there are two theories as to the killing; that of the Commonwealth is, that the accused unlawfully made a deadly assault upon William Acrey with a pistol, when Dock Acrey to save his brother assaulted the assailant and was by him shot to death; that of the accused is, that he had no difficulty with William Acrey at the time of the killing, except some words, and that the assault upon him by Dock Acrey was unlawful and made it necessary to shoot him to save himself. Held—That the following instruction by the court aptly gives the law of the case "Instruction No. 3. Although you may believe from the evidence beyond a reasonable doubt that defendant shot and killed Dock Acrey, yet if you further believe from the evidence, that at the time he did so, he had reasonable grounds to believe, either real or apparent, and did believe he was then and there in danger of suffering loss of life or serious bodily harm at the hands of Dock Acrey, and that it was necessary or appeared to him in the exercise of a reasonable judgment to be necessary to shoot and kill Dock Acrey to protect himself from such danger, you will find him not guilty upon the grounds of self-defense and apparent necessity, unless you further believe from the evidence beyond a reasonable doubt that the defendant sought and brought on the difficulty with Wm. Acrey in the use, or threatened use, of a deadly weapon, and was then and there in the act of inflicting loss of life or serious bodily harm on the person of Wm. Acrey, and then Dock Acrey interferred to prevent said danger to Wm. Acrey, in which latter state of case the defendant can not be excused upon the grounds of self-defense and apparent danger."

2. Evidence of previous difficulty—Motive—The court did not err in refusing to allow appellant to prove the particulars of a difficulty between him and the Acreys the day before the homicide—the reason for the admission of evidence concerning previous difficulties, is to show motive and the mental attitude of the parties at the time of the hostile meeting and this right is amply secured by limiting the evidence to the fact that there was a difficulty without confusing the investigation of the main issue by conflicting testimony as to the particulars of what took place on the previous occasion.

Stone & Stone for appellant.

N. B. Hays and Lorraine Mix for appellee.

Appeal from Wayne Circuit Court.

Opinion of the court by Judge Barker.

The appellant was indicted by the grand jury of Wayne county, charged with the murder of Dock Acrey. A trial resulted in his being found guilty of the crime of voluntary manslaughter, and his punishment fixed at confinement in the penitentiary for a term of fifteen years.

The accused and two brothers, William and Dock Acrey, had a difficulty the day preceding the homicide at the store of the former, but had separated without bloodshed, the Acreys saying, as they left the store, "there will be another day."

The next day, Sunday, the appellant armed himself with a Winchester rifle, and a Smith & Wesson revolver, and went to Mount Union meeting house, the neighborhood place of worship, at about the hour for holding religious services. Before he quite reached the place, he stopped on the roadside, and waited until the Acreys passed along. He then, according to his own statement, "hunkered (squatted) down" until they passed. After they reached the front of the church, and William Acrey had joined a small group of men, and stood talking with them, appellant walked up, armed as before described, and, addressing himself to James Chrisman, said: "Have you heard the derned or damned lies they are telling about me?" To this Chrisman gave an affirmative reply, and Acrey said: "If you are throwing that at me, they aint no lies." Here the evidence becomes contradictory; according to that of the Commonwealth, the accused at once opened fire on William Acrey with his pistol, to escape from which the latter sprang behind Pierce Hubbard, who was accidentally shot in the face and nearly killed. Then Dock Acrey, in order to save his brother's life, assaulted appellant by throwing a brick at him; whereupon appellant opened fire on him, inflicting wounds from which he in a few moments died; that at this point, Amos Acrey, the father of William and Dock, struck appellant with a stick, and in return was immediately shot to death, whether by appellant or one of his friends does not fully appear. There is no evidence that any body, except the accused, was armed, in the melee which resulted in the death of two men and a third being desperately wounded. The appellant testified that he did not know William Acrey was in the group of men when he approached them; that he did not address his remark to him, and when he told Acrey not to address him again, the former said, "you have got the drop on me and I will go," and at once withdrew from the crowd; that he did not draw his pistol on William Acrey, or point it at him, or shoot in his direction; that he did not shoot Pierce Hubbard, but that just after the words above quoted between him and William were spoken, he was struck with a rock or brick thrown by some one from behind, whereupon he at once turned and, in self-defence, fired on his assailant, and killed Dock Acrey.

We have not undertaken to give all the testimony, or even to quote it with absolute accuracy, being desirous only to give it in sufficient detail, and with such fidelity, as will serve to illustrate the questions of law raised by the exceptions taken by the accused on the trial. There are, as usual in cases of this character, two theories as to the killing; that of the Commonwealth is that the accused, without lawful cause, made a deadly assault upon William Acrey with a pistol, and was about to take his life when Dock

Acrey interfered to save his brother, and for this purpose assaulted, as he had the right to do, the assailant, and was by him shot to death; that of the accused is that he had no difficulty with William Acrey at the time of the killing, except some words which imported no danger to the latter, and that the assault upon him by Dock Acrey was unlawful, and made it necessary that he shoot him, to save himself.

It is indisputably true that Dock Acrey had no right to assault the appellant, except to defend his brother, and if the latter was in no danger, then his assault upon appellant, desperate and deadly as it undoubtedly was, warranted the latter to kill him in self-defense. Dock Acrey had the right to assault the accused in the manner he did, and even to take his life, to save his brother from an unlawful and murderous assault, such as is claimed by the Commonwealth to have taken place, the rule being that what one may do for himself he may do for another. The right of the accused to defend himself from the attack of Dock Acrey is just what it would have been if he was being attacked by William Acrey; in other words, Dock Acrey could do for his brother just what, under the circumstances, the brother could lawfully do for himself; and the legal quality of the killing of Dock Acrey is just what the killing of William Acrey would have been, had he, instead of dodging behind Pierce Hubbard, picked up a brick and hurled it at appellant, and then been killed in return. The court instructed the jury on the question of self-defense as follows:

"Instruction No. 8. Although you may believe from the evidence beyond a reasonable doubt that the defendant shot and killed Dock Acrey, yet if you further believe from the evidence that at the time he did so he had reasonable grounds to believe, either real or apparent, and did believe he was then and there in danger of suffering loss of life or serious bodily harm at the hands of Dock Acrey, and that it was necessary or appeared to him in the exercise of a reasonable judgment to be necessary to shoot and kill Dock Acrey to protect himself from such danger real or to him reasonably apparent, you will find him not guilty upon the grounds of self-defense and apparent necessity, unless you further believe from the evidence beyond a reasonable doubt, that the defendant sought and brought on the difficulty with Wm. Acrey in the use or threatened use of a deadly weapon, and was then and there in the act of inflicting loss of life or serious bodily harm on the person of said Wm. Acrey, and then Dock Acrey interfered to prevent said danger to Wm. Acrey, in which latter state of case the defendant can not be excused upon the grounds of self-defense and apparent necessity."

This instruction aptly gives the law of the case. The qualification of the right of self-defense as to Dock Acrey depended on appellant's attitude towards William; if he had unlawfully sought and brought on the difficulty with William, and was then and there about to take his life, then Dock had the right to assault, and even kill him, without the right of self defense on the part of the wrongful assailant. There was no foundation for the further qualification of instruction No. 8, by the principle that although the original attack of accused was wrongful, if he in good faith withdrew from the affray, and made his withdrawal apparent to Dock Acrey, his right of self-defense returned to him as to subsequent parts of the difficulty. The evidence of the Commonwealth was, that the attack on William was murderous

and incessant; that the accused turned from his intended victim, William, only to repel the rescuing attack of Dock, and there was no withdrawal from or cessation of the affray until Dock was killed. On the part of the accused, it is claimed that there was no attack on William at all, and, consequently, there could have been no withdrawal from a difficulty which did not take place. Instructions must be based on evidence.

The criticism of instruction No. 6, which contains a definition of "malice aforethought," is without utility on this appeal. "Malice aforethought" only appertains to instructions concerning murder. The accused was found guilty of voluntary manslaughter. Conceding, for the purposes of the case, the error of the court in the definition, appellant was not prejudiced thereby. (Criminal Code, section 340.) The case of Bohannon v. Commonwealth, 8 Bush, 481, does not militate against this conclusion. In that case Bohannon was convicted of murder, and sentenced to be hung; correct instructions concerning murder was of the utmost importance to him. The definition, as given in the instruction complained of, is approved in Jolly v. Commonwealth, 22 Ky. Law Rep., 1622.

The court did not err in refusing to allow appellant to prove the particulars of the difficulty claimed to have taken place between him and the Acreys the day before the homicide; the reason for the admission of evidence concerning previous difficulties in cases such as this, is to show motive, and the mental attitude of the parties at the time of the hostile meeting; this right is amply secured by limiting the evidence to the fact that there was a difficulty, without confusing the investigation of the main issue by conflicting testimony as to the particulars of what took place on the previous occasions.

Certainly there was nothing in the evidence in this case which warranted the admission of the particulars of the difficulty the day before; so far as what took place between the accused and William Acrey is concerned, the accused admits that William did not assault him, or commence any difficulty with him; he denies that there was any difficulty between himself and William. On the other hand, the Commonwealth admits that the accused did not first assault Dock Acrey, or even commence any quarrel with him. It admits that Dock Acrey first assaulted the accused, and that this assault was of such a character as fully warranted the accused in killing him in self-defense unless he had lost that right by unlawfully attempting to kill William Acrey. The issue on this branch of the case, then, was not who commenced the difficulty, as between the accused and William, but whether or not the accused was trying to kill William when Dock assaulted him.

The fact that William had inflicted an injury on appellant the day before, afforded no ground for the latter's killing him in cold blood the day after.

The error complained of, that the jury, while deliberating on the case, came into the court room in the absence of the accused, and were conducted to the jury room by the sheriff, appears for the first time on the motion for a new trial. In construing section 281 of the Criminal Code, we have uniformly held that errors appearing for the first time on the motion for a new trial, could not be considered on appeal. (Fuqua v. Commonwealth, 24 Ky. Law Rep., 2205.)

Without going into an analysis of the evidence in this case, we feel justi-

fied in saying that no substantial injustice appears to have been done appellant by the verdict rendered.

Judgment affirmed.

SMITH v. CHESAPEAKE & OHIO R. R. CO.

(Filed October 21, 1904.)

1. Motion for peremptory instructions—Filing amended petition—In an action against a railroad company for the alleged wrongful killing of a horse, the value of which was alleged in the petition and shown by the proof to be $150, it was error in the court, after the plaintiff's proof was all heard and a motion made by defendant for a peremptory instruction, to allow the plaintiff to file an amended petition claiming $75 additional damages, for the avowed purpose of making the pleading conform to the proof, when it was manifest the purpose was to bring the case within the jurisdiction of the appellate court, and was, therefore, a sham pleading.

2. Killing crippled horse by section boss—Act of humanity—Punitive damages—Where plaintiff's horse was found on a railroad bridge, with its legs fastened in the timbers, and, after three hours unsuccessful efforts by plaintiff's hands and the railroad section boss and crew to relieve it, during which time it broke one of its legs in its struggles, and, after delaying the train waiting for the track to be cleared, was killed by order of the section boss, against the protest of plaintiff's agent, such killing was a humane act to relieve the horse's sufferings, and did not authorize a claim for punitive damages.

E. L. Worthington and W. H. Wadsworth for appellant.

R. C. Burns for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Helen L. Smith, who lives in Catlettsburg, Kentucky, was the owner of a horse, which, in fright, ran on the railroad bridge of appellee, and there fell, its legs going through the open timbers of the trestle. An employe of appellant found it in this helpless condition, and, obtaining the assistance of several men, tried to extricate it from its peril. They were engaged at this work about two hours without success. Afterwards, one of appellee's section bosses with his crew arrived, and assisted in the attempt to rescue the animal, working for about an hour without result. The animal in the meantime, by struggling, broke its leg. Appellee's eastern bound passenger train reached the scene, and was forced to stop and wait for the track to be cleared. With this condition of affairs confronting him, the section boss ordered one of his men to kill the animal, and throw it off the bridge which was done, over the protest of appellant's agents, who insisted that, if given sufficient time, they could save it.

This action was instituted by appellant to recover damages of appellee for the loss of her property as above described. The value, as laid in the original petition, was $150. Upon trial of the case, after all the plaintiff's (appellant's) evidence was in, the defendant (appellee) moved the court to instruct the jury to find for it. Before this motion was acted upon, the appellant tendered, and was permitted, over the objection of appellee, to file

an amended petition, which contained two allegations; first, that the horse was killed with an axe instead of a club, and, second, that appellant had been damaged in the sum of $75, in addition to the $150 set out in the original petition. This pleading was controverted of record, and after it was filed the court sustained the motion of appellee for a peremptory instruction to the jury to find for it; of this appellant is now complaining.

The first question to be disposed of is the motion of appellee to dismiss this appeal for want of jurisdiction. Section 950, Kentucky Statutes, on this subject, provides: "No appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property if the value in controversy be less than $200, exclusive of interest and costs." * * *

In the original petition, the value of the horse was alleged to be $150, and appellant's evidence sustained this, showing that, before the injury, it was fairly worth that sum, and no more. The amendment, which was filed for the avowed purpose of making the pleadings conform to the proof, contains no allegation showing that the animal was worth more than $150; nor is any foundation given for the additional $75 in damages. The amended pleading does not conform to the proof on the subject of the value of the animal, but is contrary to it, and it is apparent that it was offered after it became obvious to appellant that the court would sustain the motion for a peremptory instruction, to so increase the damages as to bring the case within the jurisdiction of this court, and is, therefore, a sham pleading.

Taking a comprehensive view of the whole record, we are of opinion that the matter in controversy is not of the value of $200. The animal is alleged to have been worth only $150 before it was hurt. Without any fault on the part of appellee, it broke its leg on the bridge, and it is a matter of common knowledge that a horse with a broken leg is practically worthless; certainly its value is not enhanced by this misfortune. There is no evidence to support the allegation concerning the additional damages of $75, and the court erred in permitting the amendment to be filed. A similar question arose in the case of Bowman v. Chicago & Northwestern R'y Co., 115 U. S., 611. In the opinion in that case, it was said: "Upon the face of this record it is apparent that the actual value of the matter in dispute is not sufficient to give us jurisdiction. It is now well settled that our jurisdiction in an action upon a money demand is governed by the value of the actual matter in dispute in this court, as shown by the whole record, and not by the damages claimed, or the prayer for judgment alone. (Omitting cases cited.) As was said in Hilton v. Dickinson, 'it is undoubtedly true that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern all questions of jurisdiction, but it is equally true, that when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail' Here the suit is to recover damages for not transporting from Chicago to Marshalltown 1,000 kegs of beer. There are no allegations of special damage or malicious conduct. In the original declaration the claim was for only $1,200, and it was not until the case was actually decided, or about to be decided on its merits, that application was made for leave to increase the amount of the demand. Then it was manifestly done, not in expectation of recovering more than was originally claimed, but to give color to the

jurisdiction of this court. As it stands, the case is not materially different in principle from that of Lee v. Watson, supra, where, after a demurrer was sustained, the demand for damages was increased, by leave of the court, so as to be in excess of our jurisdictional limit, although it was apparent from the whole record that in no event, could there be a recovery except for a much less sum. Under these circumstances, the court did not hesitate to dismiss the cause, for the reason it was clear that the amendment was made for the sole purpose of giving color to jurisdiction."

There was nothing in the evidence to show that the killing of the horse was done in a high-handed or malicious manner, upon which to base a claim for punitive damages, but, on the contrary, the servants of appellee did all they could to assist appellant's agents in their efforts to extricate it, and it was not until all hope of accomplishing this had been abandoned, and the necessity of appellee's train being allowed to go on became imperative, did they kill it; and this was required, not only to meet the urgency of appellees' being allowed to forward its train, but as well by the dictates of humanity to relieve the wounded animal of its suffering.

It follows that the subject of the controversy in this case is of less value than the sum of $200, and we are, therefore, without jurisdiction to entertain the appeal. The motion to dismiss is sustained.

SMITH v. ERWIN, &c.

(Filed October 21, 1904—Not to be reported.)

Conveyances—Notice of fraud in—Appellant learned, two weeks before her marriage to Thomas Smith, that he had made a voluntary conveyance of all of his property to his daughter with a view of depriving appellant of any interest in it, and while the proof shows clearly that the conveyance was made after his engagement to appellant, the fact that she consummated the marriage notwithstanding such knowledge, leaves her no ground of complaint.

C. E. Rankin and W. L. Whittinghill for appellant.

E. H. Gaither, J. F. Vanarsdall and W. S. Sumrall for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hobson.

In June, 1900, Thomas Smith and appellant, Bettie Smith, became engaged to be married. He owned at that time real state in Harrodsburg, Ky., to the value of about $4,000. On September 19, 1900, he conveyed all the property to his daughter, Sophia Erwin and her children, without the knowledge or consent of his intended wife. They were afterwards married in November, 1900, and he died in April, 1903. Appellant, Bettie Smith thereafter brought this suit, charging that the deed to his daughter was in fraud of her martial rights and asking that it be set aside and that she be, allotted dower in the property. The circuit court dismissed her petition and she appeals.

The proof shows clearly that the deed was made after Thomas Smith and appellant were engaged to be married and that it was made for the purpose

of depriving Bettie Smith of all interest in his estate should she marry him. The deed comprised all the property he had and by it a life interest was reserved to him in the property. It was a voluntary conveyance and made simply to give the property to his daughter and her children at his death, so that his intended wife, if she survived him, would be left without anything. But the proof is clear also that she learned of this deed at least two weeks before she married him, and that she at first, after learning of it, declined to carry out the marriage contract; but afterwards was persuaded by him and others to marry him anyhow. This is shown by a number of witnesses whose testimony is confirmed by circumstantial evidence which leaves no doubt of its truth. He, at that time, wanted the deed set aside, but was advised it could not be done. So the naked question is presented whether she can now complain of the fraudulent deed when she learned of it before the marriage, and married him with full knowledge of all the facts.

In Hobbs v. Blanford, 7 T. B. Monroe, 469, it was held that notice of such a deed before the marriage does not affect the rights of the party intended to be defrauded. But this case was overruled in Cheshire v. Payne, 16 B. Monroe, 618, and in that case it was held that if the intended spouse learns of the deed and notwithstanding such knowledge deems it proper to consummate the marriage, the act is voluntary and there is no ground of complaint that the deed was fraudulent. The circuit court followed this case which has been the law of the State something over fifty years, and will not now be departed from.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. PAYNTER'S ADM'R.

(Filed October 21, 1904—Not to be reported.)

Railroads—Damages—New trial—Pleading—Appellee instituted this action to recover damages for the killing of her husband, who was a brakeman in appellant's employ. Upon the conclusion of the testimony for plaintiff, the court, upon motion, awarded a peremptory instruction to find for appellant. Afterwards the judgment was set aside and a new trial granted, when appellee recovered a judgment of $2,500. This judgment was set aside and there was a third trial and judgment for $2,500. Section 126 of the Civil Code provides that every material allegation of a pleading must, for the purposes of the action, be taken as true unless specifically traversed; and section 127 provides that "a material allegation is one which is necessary for the statement or support of a cause of action or defense." Appellee's petition alleges the death of her intestate through the negligence of appellant and its employe, the conductor, and in addition negatives, by anticipation, the plea of contributory negligence, alleging the exercise of ordinary care by the decedent. The answer puts in issue all the material allegations of the petition and pleads contributory negligence. No reply was filed. Subsequently an amended petition was filed reiterating all of the statements of the original, with additional allegations of negligence. This was controverted of record. The allegation of due care in the petition is not necessary to appellee's cause of action, the allegations of the answer should have been denied, otherwise the peremptory instruction was authorized.

Poston & Moorman, Edward W. Hines and Benjamin D. Warfield for appellant.

S. M. Payton and Robt. L. Greene for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Barker.

W V. Paynter was a brakeman in the employ of appellant. At the time of his death he was on a freight train being operated from Lebanon Junction to Bardstown Junction. At the latter place the conductor in charge of the train undertook to move fourteen flat cars from the "Y," and to place them on a siding. In executing this duty, Paynter fell to the track, was run over, and instantly killed.

After the death of her husband, appellant qualified as administratrix of his estate, and instituted this action to recover damages for his death. Her petition states a cause of action by alleging the death of her husband through the negligence of appellant and its employe, the conductor of the train, and in addition it negatives by anticipation the plea of contributory negligence, by alleging the exercise of ordinary care by the decedent at and before the time he was killed. The answer places in issue all of the material allegations of the petition, and in addition thereto pleads contributory negligence by the decedent. To this, no reply was ever filed. Subsequently, an amended petition was filed, reiterating all of the statements of the original, with additional allegations of negligence. This was controverted of record, and the case went to trial in the Larue Circuit Court at the October term, 1902. At the close of all of appellee's (plaintiff's) testimony, the court, on motion, awarded the appellant a peremptory instruction to the jury to find for it, as in case of nonsuit. Afterwards, upon motion, the judgment was set aside, and a new trial awarded the plaintiff (appellee). Another trial resulted in a verdict for $2,500 in favor of appellee, which was set aside by consent, and a new trial again awarded the defendant (appellant). A third trial resulted in the jury again finding a verdict in favor of the plaintiff (appellee) in the sum of $2,500.

The appellant now appeals from the order setting aside the first verdict rendered at the October term, 1902, which awarded appellee (plaintiff) a new trial, and also from the last verdict against it. The conclusion we have reached as to the pleadings in this case renders it unnecessary that the evidence concerning the manner of the death of appellee's intestate, should be examined with more particularity than heretofore stated.

Section 126 of the Civil Code of Practice provides: "Every material allegation of a pleading must, for the purposes of the action, be taken as true, unless specifically traversed." * * * And section 127: "A material allegation is one which is necessary for the statement or support of a cause of action or defense." The Am. & Eng. Encycl. of Law, 2d. edition, volume 5, page 1, title "Contributory Negligence," says: "The authorities are well nigh unanimous that, in an action for negligence, that the plaintiff need not allege that the injury of which he complains was occasioned without his fault, or that he was not guilty of contributory negligence, as the rule is that 'it is not necessary to allege matters which would come more properly from the other side,' and contributory negligence is considered a defense that the defendant must make." (Paducah, &c., R. R. Co. v. Hoehl, 12 Bush, 41; L. & N. R. R. Co. v. Wolfe, 80 Ky., 82; Louisville, &c., Canal

Co. v. Murphy, 9 Bush, 522; Depp v. L. & N. R. R. Co., 12 Ky. Law Rep., 266.)

It follows, then, that the allegations of the petition negativing the negligence of the decedent were immaterial, and the affirmative plea of contributory negligence in the answer was not responsive to them; what, then, was the effect of the failure of appellee to reply to the answer?

The case of the Louisville & Nashville R. R. Co. v. Copas, 95 Ky., 460, involved the identical question we have here, and, in the opinion, it is said: "The plaintiff in his petition had, by direct averment, negatived any negligence on his part, still it was incumbent on the defendant to rely by plea on such contributory negligence on the part of the plaintiff as brought about the injury, and but for which the accident would not have happened. Here was affirmative matter that required a reply, and the defendant was entitled to a judgment on the pleadings. Was its right to such a judgment waived by failing to make a motion for such a judgment? It is not pretended that any reply was filed, or offered to be filed, and, even upon motion for a peremptory instruction, the court would have been compelled to sustain the motion if apprised of the condition of the pleadings; but the court was not required to examine the pleadings for the purpose, unless some motion was made for a judgment."

In the case of Gore v. Illinois Central Railroad Co., 17 Ky. Law Rep., 799, the plaintiff had failed to controvert the affirmative allegations of the answer pleading contributory negligence. The opinion states the rule as follows: "For another reason the judgment must be affirmed. Section 386 of the Civil Code reads as follows: 'Judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him.' Appellant's failure to deny the allegations of the answer, which showed that the injury was the result of appellant's contributory negligence entitled appellee to a judgment notwithstanding the verdict may have been for appellant. Had the jury returned a verdict for appellant, appellee could have moved the court to have returned a judgment for it, and, under the pleadings, such motion should have prevailed. This being true, appellant can not complain, because in the condition of the pleadings, the judgment must have gone for appellee, regardless of the instructions, evidence or verdict." (L. & N. R. R. Co. v. Schweitzer's Adm'r, 14 Ky. Law Rep., 855; White's Adm'r v. L. & N. R. R. Co., 15 Ky. Law Rep., 49; L. & N. R. R. Co. v. Mayfield, 18 Ky. Law Rep., 224; I. C. R. R. Co. v. Nall, 21 Ky. Law Rep., 281; Brooks v. L. & N. R. R. Co., 24 Ky. Law Rep., 1318.)

Under the pleadings in this case the appellant was entitled to the peremptory instruction, regardless of the evidence, and the court erred in setting aside the order made at the October term, 1902; this being true, it follows, that, upon the return of the case, the court should set aside the order granting appellee a new trial, and re enter the first judgment. (Gherkin's Adm'x v. L. & N. R. R. Co., 17 Ky. Law Rep., 201; Crowley v. L. & N. R. R. Co., 21 Ky. Law Rep.; 1434, L. & N. R. R. Co. v. Ricketts, Id., 662.) The principle here enunciated is not militated against by that line of cases which hold that controverting a material allegation in a pleading, by alleging the converse of it in affirmative language, does not constitute new matter which

must in turn be controverted. In those cases, the question was, did the affirmative language constitute new matter, and in each case the court properly held it did not, and, therefore, no responsive pleading was required. That is not the case here. That the plea of contributory negligence is new, affirmative, material matter is not questioned, and, therefore, unless the provisions of the Code are to be abrogated, the failure to deny, for the purposes of the action, admits it to be true.

There is little cogency in the suggestion that, because the allegation that appellee's intestate was exercising ordinary care at the time of his death, is repeated in an amended petition filed after the answer, and the pleading was controverted of record, therefore, the appellant must be held to have consented that the amendment denies the allegation of contributory negligence in the answer. The allegation of due care in the petition is not necessary to the appellee's cause of action; consequently, it is immaterial, and we know of no rule which permits the repetition of an immaterial allegation to add anything to its value. In the science of pleading, as in mathematics, zero plus zero equals zero. Nor do we perceive upon what principle controverting an immaterial allegation puts it in a better attitude than if uncontroverted. The principle relied on in L. & N. R. R. Co. v. Copas, supra, is not obiter. It is decided there that the failure to controvert the allegation of contributory negligence was waived by failure to call the court's attention to the condition of the pleading by motion for judgment; but it was necessary to decide there was a defect, before it could be decided that the defect was waived.

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

Whole court sitting.

Judges Hobson and Nunn dissenting.

Judge Hobson delivered the following dissenting opinion:

It is provided by section 134 of the Code: "The court must, in every stage of the action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The effort has been made in a great many cases by the defendant to have judgment entered for defendant on account of the failure of the plaintiff to file a reply; but applying the above provision of the Code, this court has uniformly refused to do so where there was an issue joined as to the facts however informally it may have been made. Thus in Davis v. Dycus, 7 Bush, 4, the plaintiff instituted suit for the rescission of a contract for the sale of land, alleging that the defendant had not title to the land. The defendant denied the plaintiff's allegations and pleaded affirmatively that he had good title, making his answer a counterclaim, and praying the enforcement of the contract. There was no reply to the answer, and the defendant insisted that he was entitled to judgment on the pleadings. The court overruled this contention, holding that the allegations of the counterclaim were only a denial of what was averred in the petition, and that the answer and the petition made up the issue. In Wise v. Covington Street Railway, 91 Ky., 587, the plaintiff alleged in his petition that he was insulted and beaten by the driver of one of the defendant's cars. The answer denied the allegations

of the petition, and alleged that the plaintiff without cause assaulted the driver. There was no reply to the answer, and the defendant insisted that it was entitled to judgment, but the court held that the matter contained in the answer was only a denial of the facts alleged in the petition. (Smith v. L. & N. R. R. Co., 95 Ky., 11.) In a number of cases it has been held that no reply is necessary to a plea of payment in a suit on a note where the petition alleges that no part of the debt has been paid. (Crowe v. Crowe, 4 Ky. Law Rep., 909; McCrocklin v. Hiatt, 6 Ky. Law Rep., 745; Ermert v. Dietz, 19 Ky. Law Rep., 1639.)

In Deming v. Paynter, 19 Ky. Law Rep., 1123, suit was filed upon the bond of a committee to recover money in his hands, and it was charged that he had not settled his accounts. In his answer he alleged that he had settled with the county court. No reply was filed to this answer, and it was insisted for the defendant that no judgment could be entered for the plaintiff, but the court held otherwise, and affirmed the judgment. (Bank v. Barclay, 20 Ky. Law Rep., 773; Ellis v. Blackerby, 25 Ky. Law Rep., 1557.) In the case before us it was averred in the petition that at the time of his injury the intestate was exercising ordinary care for his own safety. It was pleaded in the answer that he failed to exercise such care for his own safety, and but for this would not have been injured. After the answer was filed the plaintiff filed an amended petition in which he reiterated the allegation that at the time of his injury the intestate was exercising ordinary care for his own safety. The amended petition was by consent of the parties taken as controverted of record. So we have a direct issue between the parties made by the allegation on the one side which is controverted of record on the other as to whether the intestate, at the time of his injury, was exercising ordinary care for his own saftey. If the intestate in fact exercised such care he was not guilty of contributory negligence, for there was no contributory negligence if he exercised ordinary care. It can not be affirmed that the pleadings here conceded that the intestate did not exercise ordinary care, for there is, by consent, a direct issue made as to whether he exercised such care or not; and, therefore, upon the pleadings there can be no judgment entered for the defendant on the idea that it is conceded in the pleadings that the intestate did not exercise such care and, therefore, was guilty of contributory negligence.

The only possible distinction that can be made between this case and those cited above is that in those cases the allegations in the petition which were held to controvert allegations of the answer, were properly incorporated in the petition; while here the allegation that the intestate was in the exercise of ordinary care was not a necessary part of his petition, as the want of ordinary care on his part was properly a matter of defense to be pleaded by the defendant if it saw fit to do so. But while this is true, and the defendant might for this reason have had the allegation stricken from the petition at the plaintiff's cost, it could not take issue upon the matter thus improperly incorporated in the petition and thereafter complain that this allegation had no place in the pleading. Still less could it after consenting that the amended petition should be controverted of record, complain that there were allegations in the amended petition which were unnecessary, or be heard to say that there was no issue formed on these matters which it thus

consented should be taken as controverted of record. The provision of the Code above quoted is denied proper effect if it is not held to apply to such irregularities as these where matter that should have been put in a reply is put in the petition and is taken as controverted of record by consent. If at the time the plaintiff filed his amended petition he had filed a reply containing the allegation that the intestate was injured while exercising ordinary care for his own safety, and the reply had been taken as controverted of record, would it be contended that there was no issue as to whether the intestate was in the exercise of ordinary care at the time he was injured? If not, the case simply comes to this, that the plaintiff, instead of filing two papers, calling one an amended petition and the other a reply, put all the matter in one paper and called it an amended petition. Granting that this was irregular, still the defendant waived the irregularity by consenting that the paper should be controverted of record. In L. & N. R. R. Co. v. Simpson, 23 Ky. Law Rep., 1076, there was a departure in the reply from the allegations of the petition, but the reply was taken as controverted of record by consent, and it was held that no objection could be made on appeal because of the departure. This is familiar law, and under the provision of the Code above quoted wherever an issue is in fact made between the parties, however irregular it may be made, no judgment can be set aside or modified on account of the irregularity in making up the issue.

Of the cases cited in the opinion the only one that is at all in point is L. & N. R. R. Co. v. Copas, 95 Ky., 460, but what is said on the subject in that case was purely obiter, as the case went off on another ground. Besides, in that case, as shown by the record, there was simply an averment that the plaintiff's injuries "were received without fault on his part." The allegation of the answer, therefore, that he failed to exercise ordinary care was uncontroverted, and there was no issue in the case on this subject. Here, there is an averment that he was in the exercise of ordinary care at the time of his injury, and this is by consent controverted of record. The rule now laid down must, if good law, be followed, not only in negligence cases, but in all cases where matter which should have been inserted in a later pleading is put in a petition or an amended petition. The effect of the ruling is that such matter in any case, though controverted without objection, must be passed over as though there was no allegation in the pleadings on the subject. I can not conceive of a better means of misleading a litigant or defeating justice than such a rule; and feel assured that no real precedent can be found for it.

If suit was brought on an account and the defendant pleaded limitation, alleging that the plaintiff's cause of action did not accrue within five years before the suit was brought; and the plaintiff then amended his petition, alleging, among other things, that his cause of action accrued within five years before the suit was brought, and this was controverted of record by consent, would it be maintained that on the pleadings it was conceded that the action was not brought within five years after the cause of action accrued? Or, if suit was brought on a contract, and the defendant pleaded that it was obtained by fraud and without consideration, and the plaintiff then amended his petition and alleged that the contract was not obtained by fraud, but was fairly made in consideration of $1,000 cash paid by him,

which was the full value of the property, and this was controverted of record, would it be maintained that on the pleadings judgment must be entered for the defendant because there was no reply to the answer? Yet this is in effect the case we have. While none of the cases cited are precisely like this, they all rest on the ground that after trial and judgment, irregularities in making the issues will be disregarded.

An immaterial allegation is one that is not pertinent to the case. It is certainly new to say that a material allegation becomes immaterial because it is put in an amended petition when it should have been put in a reply. True, this is an irregularity, but when the allegation is by consent controverted of record, the irregularity is waived. The sum of the opinion is that it stands admitted on the face of the pleadings that the intestate failed to exercise ordinary care, notwithstanding the fact that the parties had, by consent of record, joined issue on this subject. How the court can say there is no issue, when the parties consented there was such an issue, I am unable to comprehend.

I, therefore, dissent from the opinion of the court.

Judge Nunn joins me in this dissent.

HENSLEY v. COMMONWEALTH.

(Filed October 25, 1904—Not to be reported.)

Criminal law—Grounds for reversal—Where the sole ground for a reversal of this case was an affidavit of one Russell that one of the jurors, Nim Harvey, whose mother was a Mackintosh, had a brother who married a sister of the grandfather of the deceased, and "that it is currently reported and generally understood throughout the county that Granville Fugate, another juror herein, is related to the said Spicer, deceased; that Bud Spicer's mother was a Haddix, and that the Haddixs and Fugates and McIntoshs claimed to be kin," such affidavit does not show a relationship between the jurors and the deceased by blood or marriage.

Pollard & Redwine for appellant.

N. B Hays and Loraine Mix for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant was indicted for the willful murder of Bud Spicer and was convicted by a petit jury of voluntary manslaughter, and his punishment fixed at twelve years' confinement in the penitentiary. The testimony heard upon the trial has not been brought up, and the sole ground relied on for a reversal is the alleged fact that Granville Fugate and Nim Harvey, two members of the petit jury were related by blood or marriage to the deceased, Spicer. This contention is based upon the following affidavit: "A. C. Russel says that he is acquainted with Nim Harvey, one of the jurors, who tried defendant, John Hensley, and that he was acquainted with Bud Spicer, the deceased; and that said Nim Harvey and the said Bud Spicer are related by kinship as follows: That the mother of Nim Harvey was a McIntosh, and that she had a brother who married a sister of the grandfather of the deceased, Spicer; and that it is currently reported, and gen-

erally understood through the county, that Granville Fugate, another of the jurors herein, is related to the said Spicer, deceased; that Bud Spicer's mother was a Haddix, and that the Haddixs and Fugates and McIntoshes claimed to be akin."

In our opinion this affidavit does not show a relationship between the jurors named and the deceased by blood or marriage. But aside from this consideration, the decision of the trial court upon this motion for a new trial is not, under section 281 of the Criminal Code, subject to exception or review by this court.

Judgment affirmed.

THE H. T. CONDE IMPLEMENT CO. v. GRIGSBY & CO.

(Filed October 25, 1904—Not to be reported.)

Sales of goods—Fraud—Appellant's salesman upon representing to appellee that a certain kind of twine would not be sold in their territory that season, sold them twine of another kind, but before the shipment the drummer for the twine desired by them, but which they had been assured by appellant's drummer would not be sold in their territory, visited appellee, desiring to sell it the twine they desired, when they cancelled their former order and bought the twine originally desired. Held—That upon learning of the fraud that had been practiced upon them they had the right to cancel the order and were not responsible for damages in not carrying out the contract.

E. H. Brown for appellant.

C. T. Atkinson and John S. Kelly for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Hobson.

On December 11, 1900, appellant's drummer obtained from appellees at Bardstown an order for 10,000 pounds of Sissal twine at 8 cents a pound, to be delivered in May following. On December 18, appellees revoked the order; but notwithstanding this, appellant shipped the twine in May, and appellees refusing to accept it, this action was brought to recover damages for breach of the contract. Appellees pleaded that appellant's agent obtained the order from them by fraud; that for several years they had been using Plymouth twine and desired to continue its use as their customers wanted it, but appellant's agent told them that the twine jobbers had gone into a trust whereby no Plymouth twine would be sold that season in that territory, but only Sissal twine and another brand which they did not desire to buy; and that these could not be bought at less than 8 cents a pound; that these statements were false and were known by him to be false, but were believed by them to be true, and they made their order relying on their truth. That on the 13th of December the agent of the Plymouth Co. visited them, offering to sell them twine at 7¼ cents a pound, and they then learned of the imposition that had been practiced on them; that they thereupon revoked the order to appellant and bought the Plymouth twine. Appellant's agent denies making these statements to them, but the weight of the evidence sustains the allegations of the answer, and on final hearing the circuit court entered judgment for the defendants.

Appellant relies on section 3918, Kentucky Statutes, which is a part of our anti trust law, forbidding all combinations such as that referred to. Section 3918 is as follows: "Any contract or agreement or understanding in violation of the provisions of the preceeding sections of this act shall be null and void; and any purchasers of property or article, or of any commodity, from any individual, firm, company or corporation transacting business contrary to the proceeding sections of this act, shall not be liable for the price or payment of such article or commodity or property, and may plead and rely on this act as a complete defense to any suit for such price or payment."

It is urged for appellant that under this section if the representations alleged to have been relied upon by appellees were made, they showed that there was an unlawful combination, and that the purchasers of property from persons transacting business contrary to the provisions of the act would not be liable for the price; but we can not see how this affects the case. If appellant's agent practiced a fraud upon appellees, and by the falsehood secured an order which they would not otherwise have given but for the deception, the contract was void; for fraud vitiates whatever it touches. Whether, if the representations of the agent had been true, appellants could have been held legally liable for the contract price of the twine, is not a material inquiry. They did not in fact receive the twine. When they learned that a fraud had been practiced on them, they exercised their legal right to cancel the order, and are not, therefore, responsible in damages for not carrying out the contract.

Judgment affirmed.

LOUISVILLE TOBACCO WAREHOUSE CO. v. WOOD & BUMGARDNER.

(Filed October 25, 1904—Not to be reported.)

Action to vacate judgment—Allegations of petition—Failure to make original procedings part of petition—Civil Code, sections 520, 521, regulating proceedings to vacate or modify a judgment, require that they "shall be by petition, verified by affidavit, setting forth the judgment, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant." They also provide that a judgment shall not be vacated "until it be adjudged that there is a valid defense to the action in which the judgment is rendered." Held—Where the proceedings in the action in which the judgment complained of was rendered, are not made part of the petition and are not copied on the appeal, and from the allgations of the petition we can not determine what was the nature of the action and precisely what judgment was rendered in it, or upon what the judgment was based, and are, therefore, unable to determine whether a valid defense to the action is disclosed, the circuit court properly sustained a demurrer to the petition as amended.

Humphrey, Burnett & Humphrey and H. A. Watkins for appellant.

D. A. McCandless, H. L. James and R. L. Greene for appellees.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Hobson.

Appellant filed in the Hart Circuit Court a petition against appellees, which, so far as material, is in these words:

"Plaintiff says that on the 10th day of August, 1901, a suit was filed in this court against it by the defendants herein, in which it was alleged that defendant had been guilty of a breach of contract, which contract was made and entered into in the county of Hart, State of Kentucky.

"Secondly, the plaintiffs in the suit referred to alleged that this plaintiff (defendant therein) had been guilty of a violation of certain sections of the Kentucky Statutes, commonly known as the McCain Law, whereby this plaintiff had rendered itself liable to the plaintiffs in the said suit, in the sum of $450, penalties, as provided in said McCain Law.

"Plaintiff states that the summons in said action was served upon this plaintiff, defendant therein, on the 12th day of August, 1901, and that on the next morning, the 13th of August, 1901, it delivered said summons to its attorneys, Messrs. Humphrey, Burnett & Humphry, with directions to look after the defense of said suit, and, to that end, to employ counsel in the county of Hart to represent the warehouse company. Plaintiff says that on the 13th day of August, 1901, the day after the summons aforesaid was served on it, and the very day that said summons was received by its attorneys in Louisville, Messrs. Humphrey, Burnett & Humphrey, the said attorneys wrote a letter, which was duly mailed in the United States mail in an envelope addressed to 'Judge Macey, Munfordville, Ky.,' and that on the face of said envelope there was printed in large letters, 'Humphrey, Burnett & Humphrey, Louisville, Ky.,' showing from whom said letter was received, and their postoffice address. Plaintiff says that the Judge Macey so addressed was Judge W. J. Macey, and that he is, and was at the time, the only Judge Macey within the town of Munfordville, Ky.; that he was, and is, a reputable, experienced attorney at law in said county. Plaintiff says that said letter informed Judge Macey that a suit had been brought in Hart county against the Louisville Tobacco Warehouse Co., and informed him of the style of said suit, and requested him to take charge of the defense of said suit. Plaintiff says that on the 14th of August, 1901, the day after said letter was written and mailed as above stated, the member of the firm of Humphrey, Burnett & Humphrey, who had special and exclusive charge of said matter, left the city of Louisville on a summer vacation, and did not return to the city for a little over three weeks, to wit: About the 8th or 10th of September, 1901, that having placed the defense of said suit in the hands of a competent, reliable and reputable lawyer, no further thought of the case was entertained, until about the 30th of September, when this plaintiff, defendant in said suit, ascertained that a judgment by default had been rendered in favor of Wood & Bumgardner against it in the suit referred to. Plaintiff says that the letter aforesaid, addressed to Judge Macey at Munfordville, was never returned to its attorneys, Messrs. Humphrey, Burnett & Humphrey, or to either of them, and that said letter was either received by Judge Macey and was overlooked or forgotten by him, or was lost in transmission; that one or the other of these statements is true, but which one this plaintiff does not know, but it believes that said letter was lost in transmission through the mail. Plaintiff says that if said letter had been received by Judge Macey, he would either have undertaken

the defense of said action, and would have prevented a default judgment, or would have notified this plaintiff or its attorneys, and some other and equally as good an attorney would have been selected to represent it. Plaintiff says that it was prevented from appearing and defending the said suit, as above set forth, by unavoidable casualty and misfortune, without any fault on its part.

"Plaintiff says that it had a good and sufficient defense to the action above referred to. Plaintiff says, in the first place, the Hart Circuit Court, where said suit was brought, had no lawful jurisdiction of the matters and things in controversy in said suit, nor of the person of this plaintiff. It says that the contract, a breach of which was alleged in said suit, was not made in Hart county, Kentucky, but whatever contract was made, was made in Jefferson county, Kentucky, and in the city of Louisville, that being the place where this plaintiff's chief office and principal place of doing business are.

"Plaintiff says that no contract whatever was made with Wood & Bumgardner, or with either of them, in regard to the seventeen hogsheads of tobacco set out in their original suit. Plaintiff says that Wood & Bumgardner, without solicitation on this plaintiff's part, voluntarily shipped to it the seventeen hogsheads of tobacco for sale at public auction under and in accordance with the usual and customary rules governing this plaintiff's business.

"Plaintiff further says that in said suit Wood & Bumgardner undertook to recover from this plaintiff penalties provided in sections 4799, 4801 and 4803 of the Kentucky Statutes, known as the McCain Law.

"Plaintiff says that the provisions of said McCain Law, and each of the sections above set out, undertake to deprive the warehouses, including this plaintiff, of their property without due process of law, and that the enforcement of said sections, or the enforcement of either of same, would have the effect of depriving this plaintiff of the equal protection of the law; that each of said sections is contrary to the provisions of the fourteenth amendment to the Federal Constitution, as well as contrary to the Constitution of Kentucky, and is, and ought to be held, as null and void. * * *

"Plaintiff says that under section 63, subdivision 1 of the Civil Code, the circuit court of Jefferson county alone had jurisdiction to render a judgment for a penalty or penalties recoverable under the McCain Law. Plaintiff says that by reason of the joinder of said claim for penalties with the claim for damages for breach of contract, no jurisdiction was conferred upon the Hart Circuit Court, as to the claim for penalties. * * *

"Plaintiff prays that the judgment rendered on the 21st of September, 1901, and the supplemental judgment rendered on the 27th day of September, 1901, be each vacated and set aside, and that this plaintiff be allowed to file its answer and to take such orders and ask such relief as in law it may be entitled to."

The defendants filed a demurrer to the petition, and thereupon the plaintiffs filed the following amended petition:

"The plaintiff, by leave of court, amends its petition herein, and while reiterating all the allegations of the petition, it says further in reference to its defense to the original action in this court, that it is untrue that the

gross weight of the seventeen hogsheads of tobacco was 19,935 pounds; that they personally saw said tobacco weighed and they acquiesced in and agreed to the weights as reported in the account of sales, and it denies that said Wood & Bumgardner were, by this plaintiff, unlawfully or otherwise, deprived of 1,388 pounds, or any other amount, of the value of 5 cents per pound, or of any other value, and denies that same was worth $69.40. It denies that the tare of said tobacco was less than 3,020 pounds; denies that it was only 2,805 pounds; denies that said tobacco was worth 5 cents a pound, or any other amount; denies that plaintiff herein has deprived Wood & Bumgardner of 215 pounds, or any other amount, of said tare weight; denies that it was worth $10.75, or any other amount; denies that the gross proceeds of sales of said tobacco were $791.45, or any more than was reported in the account of sales; denies that 20 cents per hogshead was reasonable amount for drayage of said tobacco, and says that 50 cents was a reasonable amount for same, as charged. Plaintiff further denies that it owes defendants $355.93 on account of these hogsheads of tobacco, or any other sum whatever. Plaintiff says that by the law under which Wood & Bumgardner claimed damages and penalties in the original action, this plaintiff was entitled to $2 a hogshead fee for selling said tobacco, and that by the judgment of the court, this amount for selling each hogshead of tobacco was distinctly disallowed, and no amount was allowed to this plaintiff as fees for selling said tobacco, or any part thereof."

The court sustained the demurrer to the petition and amended petition, and, the plaintiff failing to plead further, the action was dismissed.

Sections 520 and 521 of the Civil Code regulating proceedings to vacate or modify a judgment, require that they "shall be by petition, verified by affidavit, setting forth the judgment, the grounds to vacate or modfy it, and the defense to the action if the party applying was defendant."

They also provide that a judgment shall not be vacated "until it be adjudged that there is a valid defense to the action in which the judgment is rendered." The proceedings in the action in which the judgment complained of was rendered are not made part of the petition and are not copied on the appeal. All that we know as to the nature of that action, or as to the judgment which was rendered in it, we must learn from the allegations of the petition above quoted. From these allegations we can not determine what was the nature of that action, or precisely what judgment was rendered in it, or upon what the judgment was based. We are, therefore, unable to determine whether a valid defense to the action is disclosed, for, it may be that, conceding the truth of all that is alleged in the petition above quoted, we would reach the conclusion under the allegations of the petition in that case, if they were before us, that the judgment which the court actually rendered was not unwarranted, and in no way prejudiced the substantial rights of the appellant. It is true there are in the amended petition denials of certain facts, but whether the denial of these facts would constitute a defense to the action we can not determine without knowing what other facts were alleged in the petition in that case, and if all the facts were before us, it may be that the judgment which was rendered in that case would have been rendered had all the facts stated in the petition and amended petition been before the court at the time that action was tried.

In a number of cases the rule has been laid down that the proceedings in the old case must be pleaded in full, or so set out as to give the court the substance of the matter, and that regularly a copy of the proceedings should be filed with the pleading. (Rice v. Wyatt, 25 Ky. Law Rep., 1060; Weir v. Weir, 19 Ky. Law Rep., 2005; Overstreet v. Brown, 23 Ky. Law Rep., 817.)

As the proceedings in the old case are not so set out as to enable the court to see that a valid defense was made to that action, the circuit court properly sustained the demurrer to the petition as amended. We deem it, therefore, unnecessary to pass on the other questions made by counsel.

Judgment affirmed.

NOLEN, &c. v. HALL.

(Filed October 25, 1904--Not to be reported.)

1. Land—Title—Previous patent—Possession—Equitable action—In an equitable action for land, brought under Kentucky Statutes, section 11, providing that "it shall be lawful for any person having both the legal title and possession of lands, to institute suit by petition in equity in the circuit court of the county where the lands, or some part of them may be, against any other person sitting up claim thereto, and if plaintiff shall be able to establish and does establish his title to said land, the defendant shall be decreed to release his claim thereto," where the plaintiff claims under a patent of date February 15, 1889, and the proof showed that the land had been previously patented on March 4, 1845, the plaintiff's patent was void under Kentucky Statutes, section 4703, of chapter 127, providing that "Every entry, survey, or patent, made or used under this chapter shall be void so far as it embraces land previously entered, surveyed, or patented."

2. Void patent—Constructive possession—In an equitable action brought under Kentucky Statutes, section 11 for land, the plaintiff, as in ejectment, must succeed or fail, according as he establishes his own title, and, where the patent under which the plaintiff claims is void, he is not in the constructive possession thereof; and, not having the actual possession he is without title or possession, and so is not in a position to question his adversary's title or right to possession.

H. C. Clay for appellants.

R. L. Greene and W A. Black for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Hobson.

Appellee Hall filed this suit in equity, alleging that he was the owner and in possession of a certain tract of land on the waters of Four Mile creek in Harlan county, and that the appellant had entered upon it against his will and was cutting valuable timber from his land doing him irreparable injury. The defendant filed answer, setting up that he owned a certain body of land which conflicted with the boundary described in the plaintiff's petition, denying the plaintiff's title to the land claimed by him or his possession of it. Proof was taken and on final hearing the court decreed in favor of the plaintiff and the defendant appeals. The action was brought under section 11, Kentucky Statutes, which is in these words: "It shall and may

be lawful for any person having both the legal title and possession of lands, to institute and prosecute suit by petition in equity in the circuit court of the county where the lands or some part of them may lie, against any other person setting up claims thereto; and if the plaintiff shall be able to established and does establish his title to said land, the defendant shall be, by the court, ordered and decreed to release his claim thereto."

The proof shows that on March 4, 1845, a patent was issued to Boyd Dickinson for 10,000 acres of land which includes all of the land claimed by both plaintiff and the defendant. The defendant claims under James B. Howard, who held a title bond from Boyd Dickinson, executed in the year 1850. Plaintiff claims under a patent issued to Green Fee of date February 14, 1889. He insists that the title bond from Dickinson to Howard is void for want of certainty of description. The defendant insists that the patent to Fee is void because the land was embraced in the old patent of Dickinson. The plaintiff conceding this, maintains that the defendant can not make this question because, if the title bond of Howard was void for want of certainty, he is a mere trespasser and is in no way connected with the Dickinson patent.

The proof leaves no question that all the land in controversy is embraced in the older patent issued to Dickinson. There is no controversy in the evidence on this subject. Among other things, section 4703, Kentucky Statutes, provides: "None but vacant lands shall be subject to appropriation under this chapter. Every entry, survey or patent made or issued under this chapter shall be void, so far as it embraces lands previously entered, surveyed or patented."

As all the land embraced in the Fee patent was embraced in the previous patent to Dickinson, the Fee patent was entirely void. From a void instrument no rights can arise and by it nothing can be conferred. It is a nullity and amounts to no more than a piece of blank paper. (Morgan v. Morgan, 20 Ky. Law Rep., 190; Cornett v. Combs, 21 Ky. Law Rep., 537; Goosling v. Smith, 90 Ky., 157.)

The plaintiff, therefore, had no title to the land. Neither party showed any right to the land by possession, for it was timber land and neither had made a settlement on it under his claim. It will be observed that under section 11, Kentucky Statutes, above quoted, it is provided: "If the plaintiff shall be able to establish and does establish his title to said land, the defendant shall be, by the court, ordered and decreed to release his claim thereto."

The plaintiff having failed to establish his title under the statute, no judgment in his favor should have been entered. In this character of action as in ejectment the plaintiff must succeed or fail according as he establishes his own title. If he has no title he can not call the extraordinary power of the chancellor into action for his protection. It is unnecessary, therefore, for us to consider the defendant's title or to pass upon his rights. If appellee Hall had title to the land he would be in constructive possession of it; but having no title he is not in constructive possession; and not having an actual possession, he is without title or possession, and so is not in a position to question appellants' title or right to possession.

Judgment reversed and cause remanded, with directions to dismiss the petition.

WHITE v. LAUREL LAND CO., &c.

(Filed October 20, 1904—Not to be reported.)

1. Land—Execution sale—Sheriff—Fraud—Motive—Appointing appraisers—Impeaching return—In an action to set aside a sale of land made by a sheriff under execution, on the ground of fraud in the sheriff in having the land appraised, Held—That in the absence of any motive or purpose being shown in the sheriff to practice fraud, and it appearing that the appraisers were sworn and made the appraisement, the return of the sheriff and the report of the appraisers can not be impeached, after the lapse of nine years, by the evidence of the appraisers which amounts to little more than showing that they have forgotten what was actually done by them.

2. Levy—Return—Where the return of the sheriff shows that he levied the execution upon the land, but does not recite how he made the levy, the presumption is he made it as required by law.

3. Notice of sale—Sufficiency—Where the return of the sheriff shows that he levied the execution on four tracts of land, that he advertised the time, place and terms of sale at the courthouse door, and three other public places in the vicinity of the land for fifteen days next preceding the sale, the fact that a small tract of land intervened between some of the tracts sold, is not sufficient to show that the notices were not placed at public places in the vicinity of the land. Evidence of the witnesses that they did not see the notice is of no value.

4. Qualification of appraisers—The fact that one of the appraisers was under twenty-one years of age, did not disqualify him to act as appraiser.

Strother & Hardin for appellant.

Lane & Harrison for appellees.

Appeal from Owsley Circuit Court.

Opinion of the court by Judge Paynter.

John G. McGuire obtained a judgment in the Lee Circuit Court against the appellant, John D. White, O. H. Harrison and Vincent Boering for about $4,400, on which a payment had been made amounting to about $3,000. An execution was issued on the judgment directed to the sheriff of Owsley county on November 14, 1894, and while in full force and effect was levied on four several tracts belonging to the appellant, which were sold to satisfy the execution. At the sale the appellee, Laural Land Co., a corporation, became the purchaser. The sheriff reported that the sale of the property had been properly advertised and had been appraised. Each tract of the land brought less than two-thirds of its appraised value. So far as this record shows the purchaser made no effort to take possession of the land under the purchase. Thus the matter stood until in the spring of 1903 when this action was instituted by the appellant to have the proceedings under the execution adjudged invalid, and if this could not be done to allow him to redeem the land upon payment to the purchaser the amount of the purchase money, interest and costs.

The grounds relied upon for relief are: First, that the sheriff practiced

fraud in having the property appraised; second, that the sheriff did not properly levy the execution; third, that proper advertisement was not made of the sale; fourth, that Adams Baker, one of the appraisers, was under twenty-one years of age when he acted as such.

So far as this record discloses neither the purchaser, nor any of its stockholders or agents had anything whatever to do with the selection of the appraisers. The sheriff seems to have been entirely without motive to have the property appraised for less than its actual value. The appraisers were selected without any purpose upon the part of the sheriff to practice a fraud upon the appellant. They took an oath that they would properly discharge their duty as appraisers. They made the appraisement and reported the result. The sheriff's testimony tends to show that they appraised the several tracts of land. The return of the sheriff and the report of the appraisers can not, after the lapse of nine years, be impeached by the evidence of the appraisers which amounts to little more than showing that they have forgotten what was actually done by them. We think the appellant failed to sustain his charge that the sheriff was guilty of fraud in having his property appraised.

The sheriff reports that he levied the execution upon the land. He does not recite how he made the levy, but the presumption is that he did it as required by law. He testified that he went upon the several tracts and made the levy, which was one of the ways to make a levy. (McBurney v. Overstreet, 8 B. M., 304; Vallandingham v. Worthington & Co., 85 Ky., 83.)

The sheriff reported in his return that he had advertised the time, place and terms of sale by written notices, by placing one notice on the courthouse door and at three other public places in the vicinity of the land for fifteen days next preceding the sale. The appellant did not offer testimony tending to impeach the return of the sheriff. He introduced evidence with the view of showing that the location of the tracts was such that four notices were not sufficient to apprise the public of the sale. Others testified that they did not see the notices. While the appellant testified as to the location of the tracts, and that they were separated so that it would be necessary to ride two or three miles from one to reach another by a public way, still on cross-examination he would not deny that between some of the tracts of land that were sold there intervened a small tract belonging to other people, which showed the tracts sold were only a short distance apart. There is no evidence showing that the notices were not placed at public places in the vicinity of the land. The evidence of witnesses that they did not see notices of the sale posted in the vicinity of the land, was of no value.

They were not looking for them, besides nine years had elapsed from the date of sale until they gave this testimony.

Under section 1682, Kentucky Statutes, a disinterested and intelligent housekeeper of the county, not related to either party is qualified to act as an appraiser. The statute does not require him to be twenty-one years of age at the time he acts. As Barker had the qualifications required by the statutes, he was authorized to act as an appraiser. Having reached the foregoing conclusions stated above, it is unnecessary to consider the other questions raised in the case.

The judgment is affirmed.

MEAD v. MEAD.

(Filed October 25, 1904—Not to be reported.)

Tenants in common—Adverse possession—Estoppel—Where a father died in 1876, intestate, the owner of land, leaving a number of children and grandchildren who inherited his land, the fact that two of his children bought out some of the other children and grandchildren and parceled out the land to each other, leaving a certain portion for certain of the other heirs, but claiming against others whose existence or identity were in doubt, Held—That said heirs had not lost their interest by the adverse possession of the appellant, who, by his pleading recognized them as heirs.

D. D. Fields and S. B. Dishman for appellant.

Salyer & Baker for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Paynter.

Thomas Mead, Sr., a resident of Letcher county died intestate in 1876. He died seized and possessed of a certain boundary of land in that county. He had fifteen children, one named Riley died before his father without issue, some of the other children survived the father, others died leaving issue. So each child and grandchild took his estate by inheritance.

Some of the children had married and left the State of Kentucky before the death of their father. The appellant, J. M. Mead, and the appellee, Albert Mead, appear to have conceived the idea of acquiring the interest of their brothers, sisters, nieces and nephews in the land, and each bought out certain heirs. They then parcelled out the tract left by their father. The appellee took one parcel and the appellant one and they set apart another parcel for the heirs whose interest they had not acquired. The appellant and appellee made some improvements on their respective parcels. After this was done the appellee purchased the interest of another heir, and took possession with the consent of the appellant of another parcel of the land supposed to be about the quantity which the heir whose interest he had purchased was entitled to receive. There seems to have been some lack of knowledge as to whether the intestate's children, Nancy Mead (who intermarried with Jonathan Justice) and Samuel Mead were still living, and if dead, whether they left issue. In 1891 it was ascertained to the satisfaction of appellant and appellee that Samuel Mead was dead and had left issue, thereupon, they bought the interest of his children and took a joint deed to themselves therefor. Subsequently the appellee obtained a deed from persons claiming to be the heirs at law of Nancy Justice, whereupon, he asserted title to his sister, Nancy's, one-fourteenth interest in the land. The appellant denied his right to it and claimed that they were not heirs of Nancy Justice, and furthermore that he took possession of the land which was to be held for the heirs who had not sold their interest and had held it adversely to all the heirs, except his brother, Thomas, and, therefore, the heirs of Nancy Justice had lost their interest by virtue of his adverse possession. The appellee denies these claims and says they each took possession of certain parcels of it as a matter of convenience, and that there was no adverse holding, but that there was a constant recognition of all the right of all the heirs to come and take possession of their respective interest in the land.

The appellee is sustained in this by the fact that as late as 1891 the appellant and appellee recognized that the heirs of Samuel Mead were entitled to their interest, and they purchased it and took a joint deed therefor. Again, there was a suit filed in the Letcher Circuit Court by one of the heirs for a partition of the land left by the intestate. When the appellant, by pleading and by exception to the commissioner's report said that the heirs of Samuel Mead and Nancy Justice were entitled to their interests in the land. The court below held Nancy Justice's heirs had not lost their right to the land and that the appellee was entitled thereto, and ordered a partition of the land. In that conclusion we concur.

The judgment is affirmed.

ASHLAND AND CATLETTSBURG STREET RAILWAY CO. v. HOFFMAN, BY, &c.

(Filed October 26, 1904—Not to be reported.)

Action for assault and battery—Answer—Justification—Burden of proof—Closing argument—In an action by appellee against the proprietor of a public park for being assaulted and forcibly ejected therefrom, the answer of appellant alleged that appellee, at the time, resided in a house of ill fame and her reputation for morals was bad, and, after having been at the park on a previous occasion and acted improperly, and, upon complaint, had promised not to return, but on the occasion complained of in the suit, did return without appellant's knowledge, and renewed her improper conduct, and that a constable, at appellant's request, in the enforcement of the park regulations, requested her to retire, which she refused to do, when reasonable force was used to eject her. On the filing of the answer the appellant asked to take the burden of proof, and also asked to conclude the argument to the jury, both of which requests were refused by the court. Held—That under the pleadings the appellant was entitled to the burden of proof and the closing argument.

Thomas R. Brown for appellant.

J. A. Scott, R. S. Dinkel and Proctor K. Malin for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Nunn.

The appellee brought her action by next friend in the lower court against appellant, in substance alleging in her petition that appellant maintained and operated a park known as "Clyffside Park," on its line of road between Ashland and Catlettsburg for the benefit of the public and its line of road; that any person who rode upon appellant's street car line and paid the regular fare to the park, entitled him to enter the park and remain therein until he desired to leave.

She stated that she paid the regular fare to the park, entered and remained there about one hour, together with a great number of men, women and children who had entered the park for pleasure and as a place of resort, when appellant's agents and servants in charge of the park, without any cause therefor, and without fault on her part, willfully assaulted her by

catching hold of her arm and hands in a rough and violent manner and forcibly and violently ejected her from the park and refused to allow her to remain therein; that by reason thereof her hands and arms were bruised and injured which caused her to suffer great pain and mental anguish and greatly humiliated and degraded her, to her damage in the sum of $5,000.

The appellant answered, denying each and every allegation of the petition. After the jury was empaneled, but before the introduction of any proof, the court permitted appellant to withdraw the answer and substitute another, in which appellant in substance stated that it did operate and maintain this park, as stated by appellee, and that she had paid the price which entitled her to enter therein and then continued, that the appellee then resided in a house of ill-fame and that her reputation was bad for morals, and shortly before her removal complained of she had been at the park and had been associating with the leader of the band of musicians then in the service of the appellant at the park for the supply of music for the entertainment of its patrons and prevented him from discharging his duty to it; that her conduct was such as to be objectionable to appellant and improper and suggestive of impurity and on account thereof was a subject of complaint to it by its patrons; that she then agreed not to come to the park again, but on the occasion complained of she did come to the park, without the knowledge of the appellant, and renewed her association and conduct; that a constable of the county in which the park is situated, at the request of appellant in the enforcement of the park regulations, did request the appellee to retire from the park, which she refused to do, when such force as was reasonable therefor was used by him to remove her, and whatever injuries she received were the result of her own conduct and resistance.

On the filing of this answer, appellant asked to take the burden of proof and offered to introduce its evidence first. The lower court refused this motion and permitted appellee to take the burden, to which appellant objected and excepted. After the evidence was heard, appellant asked to be allowed to conclude the argument to the jury, which motion was likewise refused and appellant excepted. The jury returned a verdict in favor of appellee for $500 and appellant has appealed. The transcript does not contain the evidence produced on the trial. The petition states a cause of action and the only question before us on this appeal is, whether the lower court erred in refusing appellant the burden of proof and the concluding argument to the jury.

Section 526, Civil Code, provides: "The burden of proof in the whole action lies on the party who would be defeated if no evidence was given on either side."

Section 317, subsection 6, provides: "In the argument, the party having the burden of proof shall have the conclusion and the adverse party the opening."

This court, in the cases of Royal Insurance Co. v. Schwing, Surviving Partner, 87 Ky., 410; Firemen's Insurance Co. v. Same, 10 Ky. Law Rep., 883; Crabtree v. Atchinson, 93 Ky., 338, and Lucas v. Hunt, 91 Ky., 279, has decided that a denial of the concluding argument to a person who has the burden of proof, is a reversible error.

In our opinion the substituted answer of appellant in effect confessed the

allegations of the petition and sought to avoid the consequences of the acts of its agents and servants by showing that her immoral and improper conduct on the occasion mentioned, was a sufficient excuse for her ejection from the park. In view of this conclusion it necessarily follows that appellant would have been defeated if no evidence had been introduced on the trial and, therefore, the appellant was entitled to the burden of proof and the concluding argument.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

CITY OF COVINGTON v. BOSTWICK.

(Filed October 26, 1904—Not to be reported.)

1. Continuance—Discretion of court—Where it is shown that a suit was filed November 18, 1903, placed on the trial docket April, 1903, and on November 13 set for trial on November 17, and tried November 18, 1903, which was Wednesday, that appellant's attorney was absent from the city on Monday and part of Tuesday, but was present at the trial, and that all the witnesses for whom subpœnas were issued were present, except Mrs. Kissinger, and the affidavit of what she would prove was read to the jury, there was no abuse of the discretion of the trial court in refusing a continuance.

2. Attorney—Improper language to the jury—The following language of plaintiff's attorney to the jury was objected to: "Why are not the Kissingers, father and son, who live next door to the plaintiff, and in front of whose house this woman fell, not here on the trial? Why is the superintendent of public works not here at this trial? Can the city solicitor answer why he has not had these people here to testify in this case? Why? Because he knows if they were here they could not help testifying that this large and dangerous hole was in the sidewalk." Whilst the language of the attorney was not strictly warranted by any evidence in the case it is wholly improbable that a jury would have attached any importance to such remarks, and it furnishes no sufficient ground for a reversal.

3. Newly-discovered evidence—Newly-discovered evidence that is merely cumulative, and which could have been secured by reasonable diligence, is not sufficient to authorize a new trial.

4. Admonition to jury—"Hopelessly hung"—The following admonition given by the court to the jury when about to hang, was complained of, viz.: "I am informed by the sheriff that you express an opinion that you can not agree on a verdict. I want to call your attention to the fact that an issue such as this, in this case, is to be determined by some jury, that is the only way provided by the laws of Kentucky that such an issue can be decided. So, if you gentlemen fail to decide it, some other jury must hereafter do it. You know that every trial of a case of this kind involves expense and loss of time to the parties, and to the Commonwealth, so that it is important that you should reach a verdict if you can properly. I don't ask any member of the jury to sacrifice his conscience or judgment, but I do urge you to do all you can to reach a verdict without any violation of your judgment or conscience. I ask you to put aside all considerations except those of trying to arrive at the truth and right of the matter, without any private opinion or any like influencing the jury at all, but to fully realize your position as jurors, and, having in view the rights of the parties, and their interest and

that of the Commonwealth, make every effort that you can within the limits I have mentioned to reach a verdict. I will ask you in the light of what I have said to you to again consider the case and see if you can reach a verdict properly. I don't mean to attempt to try to force the jury to do it, or to try to force a verdict by keeping you together at inconvenience to your selves. If you find you can not, after a fair consideration, reach a verdict then you will be discharged from the consideration of the case. In my opinion that is the only kind of verdict that should be reached, and I have never attempted and don't attempt now, to use any coercive methods with the jury, but I put to you the importance of trying to reach a verdict. If you can not agree, let me know and I will discharge you from the further consideration of the case." Even if it be true, as appellant alleges, that up to the time of this admonition to the jury, that it was "hopelessly hung," we can not find anything in the statement that is objectionable.

5. Admonition by court—The following admonition given by the court to the jury at the time of the reading of the affidavit for a continuance is complained of, viz.: "Gentlemen of the jury, the defendant, city, wanted a continuance of the trial because of the absence of a witness. Under the law he was allowed to go into the trial with the privilege of reading that written statement of what the witness would say if here. It isn't taken as true, but simply is a statement of what the witness would testify if present. The jury is to give that the same weight and consideration it will the testimony of other witnesses, believe it or not, as you please. It is the deposition as to what she would say if she was here, but it is not to be taken as true; the jury will believe it or not as the testimony of any other witness." Held—Under our system of instructing juries they should be left to weigh the evidence and draw their own conclusions, and we are inclined to think the language was objectionable, but not sufficiently so to reverse the case. Nor do we think the explanation of the instructions given to the jury in response to a request of one of the jurors, is ground for complaint.

F. J. Hanlon for appellant.

B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by the appellee, Fannie Bostwick, against the appellant, the city of Covington, to recover damages for personal injuries occasioned by a defective sidewalk. She alleges in substance that while she was walking on the west side of Scott street she stepped into a hole in the sidewalk and by reason thereof fell, which fall resulted in dislocating her right hip, knee cap, spraining her ankle, and injuring her spine, and in consequence of these injuries her left leg was shorter than her right, and she had been rendered a permanent cripple. The city answered, denying the allegations of the petition, and pleading contributory negligence. A jury trial resulted in a verdict and judgment for the plaintiff, and the city has appealed.

The principal errors complained of upon the appeal are: First, that the court erred in refusing to grant appellant a continuance. The motion for a continuance was supported by the affidavit of the attorney for appellant, and was based upon two grounds: First, that he had not had time to prepare the case for trial because of his absence from the city for several days preceding the day on which it was assigned for trial; and, second, because

of the absence of Mrs. Kissenger, who resided in the dwelling house in front of which the accident was alleged to have happened, and by whom it was recited in the affidavit that he could prove that there was no hole in the sidewalk, but that it was covered with ice; and that the plaintiff's fall was occasioned by the ice, and not by any hole. The record discloses that this action was instituted on the 18th of November, 1902; that it was placed on the trial docket April 22, 1903, and was set on the 13th of November for trial on the 17th of November, but was not actually tried until the 18th of November, 1903, which was on Wednesday. Appellant's counsel was absent from the city on Monday and a part of Tuesday, but was present at the trial, and all of the witnesses for whom subpœnaes had been issued were present, except the witness, Mrs. Kissenger, and the affidavit of appellant's counsel as to what she would prove was permitted to be read to the jury as provided by section 315 of the Civil Code. We think there was no abuse of discretion by the trial court in its refusal to grant a continuance. (M. & L. R. R. Co. v. Herrick, 76 Ky., 132.)

The next ground of complaint is that plaintiff's attorney, in addressing the jury, used these words: "Why are the Kissengers, father and son, who live next door to the Bostwicks, and in front of whose house this woman fell, not here at this trial? Why is the superintendent of public works, Frank Droste, not here at this trial? Can the city solicitor answer why he has not had these people here to testify in this case? Why? Because he knows that if they were here they could not help testifying that this large and dangerous hole was in the sidewalk," which was objected to at the time. Whilst the language of plaintiff's attorney was not strictly warranted by any evidence in the case, it is wholly improbable that a jury would have attached any importance to such remarks, and if a jury trial is to be set aside in every case for this sort of license on the part of counsel, very few trials would stand. In our opinion, it furnishes no sufficient ground for a reversal of the judgment.

Counsel for appellant also filed affidavits of W. S. and Charles E. Kissenger, who occupied the dwelling house in front of which the accident occurred, as newly-discovered evidence, in his motion for a new trial. They say in substance in these affidavits that the sidewalk was in good condition at the time of the accident. The testimony of these witnesses would have been only cumulative and undoubtedly could have been secured by reasonable diligence between the date of the institution of this suit and the trial thereof.

"It is a general rule that a new trial should not be granted upon the sole ground of a discovery after verdict of parol testimony concerning a point litigated, or a fact known to a party at the trial, because the converse of this rule would open a wide field for unfairness and subornation, and would tend to protract litigation, and render it not only uncertain, but almost interminable." (McFarland's Adm'r v. Clark, 89 Ky., 139; Commonwealth v. Hardcraft, 69 Ky., 91; McConnel's Adm'r v. Ficklen, 7 Ky., 414; Cochran v. Tatum, 19 Ky., 404.)

Fourth. It is complained that the trial court, after the submission of the case to the jury, and when it was probable that they would fail to agree, and not render a verdict, was unduly strenuous in the following admonition

to them to render a verdict: "I am informed by the sheriff that you express an opinion that you can not agree on a verdict. I want to call your attention to the fact that an issue such as this in this case is to be determined by some jury, that is the only way provided by the laws of Kentucky that such an issue can be decided. So if you, gentlemen, fail to decide it, some other jury must hereafter do it. You know that every trial of a case of this kind involves expense and loss of time to the parties and to the Commonwealth, so that it is important that you should reach a verdict if you can properly. I don't ask any member of the jury to sacrifice his conscience or judgment, but I do urge you to do all you can to reach a verdict without any violation of your judgment or conscience. I ask you to put aside all considerations except those of trying to arrive at the truth and right of the matter without any private opinion or any like influencing the jury at all, but to fully realize your position as jurors, and having in view the rights of the parties, and their interest and that of the Commonwealth, make every effort you can within the limits I have mentioned to reach a verdict. I will ask you in the light of what I have said to you to again consider the case and see if you can reach a verdict properly. I don't mean to attempt to try to force the jury to do it, or to try to force a verdict by keeping you together at inconvenience to yourselves. If you find you can not, after a fair consideration, reach a verdict, then you will be discharged from the consideration of the case. In my opinion that is the only kind of verdict that should be reached, and I have never attempted, and don't attempt now, to use any coercive methods with the jury, but I put to you the importance of trying to reach a verdict. If you can not, let me know, and I will discharge you from the further consideration of the case."

Even if it be true, as appellant alleges, that up to the time of this admonition to the jury, it was hopelessly hung, we can not find anything in the statement which is objectionable. (Shely v. Shely, 20 Ky. Law Rep., 1022; Thompson Trials, sections 2302 and 2303.)

The fifth ground of complaint is that the court erred to defendant's prejudice in the following admonition which was given to the jury at the time the affidavit for a continuance was read to them: "Gentlemen of the jury, the defendant, city, wanted a continuance of the trial because of the absence of a witness. Under the law he was allowed to go into the trial with the privilege of reading that written statement of what the witness would say if here. It isn't taken as true, but simply is a statement of what the witness would testify to if present. The jury is to give that the same weight and consideration it will the testimony of other witnesses, believe it or not, as you please. It is the deposition of the witness as to what she would say if she was here, but it is not to be taken as true; the jury will believe it or not as the testimony of any other witness."

Under our system of instructing juries, they should be left to weigh the evidence and draw their own conclusions therefrom, and we are inclined to

Our opinion that the language of the trial judge to the jury was objectionable and should have been more guarded. At the same time we do not believe that this was sufficient to reverse this case, or was probably prejudicial to the substantial rights of appellant, as the testimony was wholly circumstantial in character. Nor do we think the explanation of the instructions given to the jury after the submission of the case in response to a request of one of the jurors is ground for complaint. It is expressly authorized by section 22 of the Civil Code.

After a careful consideration of the whole case, we have reached the conclusion that no substantial ground for a reversal of the judgment appealed, from exists.

Judgment affirmed.

CRIGLER & CRIGLER v. FORD.

(Filed October 26, 1904—Not to be reported.)

1. Filing mandate—Notice—Waiver—Although no notice of the filing of a mandate was given, where it was done in open court, where the trial was not had for six months thereafter, and appellants appeared in open court and made several motions in the action, the acts of making motions were a waiver of the filing of the mandate.

2. Evidence—Evidence of appellee to the effect that the elevator where his injuries were sustained was defective and unsafe, and had fallen before this accident in the presence of appellants, was competent as showing that appellants had actual knowledge of the condition of the elevator.

Furber & Jackson for appellants.

B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal in this case, the former opinion being in 25 Ky. Law Rep., 56. On the return of the cause to the lower court it was again tried and the appellee recovered a judgment against appellants for the sum of $500, and they have appealed.

The appellants assign several errors upon which they ask a reversal. The first is, that the appellee failed to give notice of the filing of the mandate required by section 761 of the Code; second, that no cause of action was ever stated in the petition; third, because the verdict was excessive; fourth, because incompetent evidence was admitted by the court, over the objection and exception of appellants, relating to other accidents claimed to have occurred on the elevator, and which were not connected with the accident sued for in that there was no showing that the elevator had not been repaired between the time of these accidents proven and the one complained of. It is true, as appears from the record, that the appellee failed to give notice of the filing of the mandate, but the record also shows that the man-

date was filed in open court and that the trial was not had for six months thereafter and in the meantime appellants appeared in open court and entered several motions in the action. After these motions and after the case had been set for trial on a day fixed, then appellant for the first time moved that the order fixing the day of trial be set aside because the notice of the filing of the mandate had not been given. The court overruled this motion, but fixed another day. The trial was entered into without further objection, and it appears that a fair and full hearing was given the parties.

In our opinion the acts of appellants in entering and making these motions was a waiver of the notice of the filing of the mandate. The petition was sufficient, but even if it was not, that question is res adjudicata by the former opinion herein. On the trial appellee introduced evidence that the elevator was defective and unsafe, and that by reason of the defects it had fallen once or twice prior to his injury in the presence of appellants. This proof was introduced to show that appellants had actual knowledge of the unsafe and dangerous condition of the elevator. The appellants complain because the court permitted this evidence, when the appellee did not show that appellants had failed to repair the elevator between the time of these accidents and the time of the one in which appellee received his injuries.

We are of the opinion that the court did not err in this. The proof showed that the defects at the time of the injury were the same as at the time of the previous accidents. It was competent for the reason also that this elevator was owned and in the possession of appellants during all this time and the facts with reference to its condition were peculiarly within their knowledge, and if repairs had been made within the time referred to, it was within the power of appellants to introduce such evidence. It did not devolve upon the appellee to prove that they did not make the repairs. The facts, as shown by this record, are about the same as those shown by the record on the former appeal, and in our opinion the verdict is not excessive.

Wherefore, the judgment of the lower court is affirmed.

FINNEY v. COMMONWEALTH.

(Filed October 26, 1904—Not to be reported.)

1. Criminal law—Instructions—Upon the trial of appellant charged with the murder of Clymer whom he was undertaking to deliver to the authorities of Hart county for the purpose of becoming relieved of bail bonds he was surety upon for Clymer, when upon the latter's attempt to leave him, appellant shot and killed him, the proof showed appellant was weak physically, had been paralyzed, that deceased had had an opportunity to arm himself and appellant testified that he believed him to be armed and was about to attempt to shoot him.

2. Instructions—The omission of the words, "sudden affray" in an instruction upon manslaughter, and the use of the words, "and upon consid-

gross weight of the seventeen hogsheads of tobacco was 19,985 pounds; that they personally saw said tobacco weighed and they acquiesced in and agreed to the weights as reported in the account of sales, and it denies that said Wood & Bumgardner were, by this plaintiff, unlawfully or otherwise, deprived of 1,388 pounds, or any other amount, of the value of 5 cents per pound, or of any other value, and denies that same was worth $69.40. It denies that the tare of said tobacco was less than 3,020 pounds; denies that it was only 2,805 pounds; denies that said tobacco was worth 5 cents a pound, or any other amount; denies that plaintiff herein has deprived Wood & Bumgardner of 215 pounds, or any other amount, of said tare weight; denies that it was worth $10.75, or any other amount; denies that the gross proceeds of sales of said tobacco were $791.45, or any more than was reported in the account of sales; denies that 20 cents per hogshead was reasonable amount for drayage of said tobacco, and says that 50 cents was a reasonable amount for same, as charged. Plaintiff further denies that it owes defendants $355.93 on account of these hogsheads of tobacco, or any other sum whatever. Plaintiff says that by the law under which Wood & Bumgardner claimed damages and penalties in the original action, this plaintiff was entitled to $2 a hogshead fee for selling said tobacco, and that by the judgment of the court, this amount for selling each hogshead of tobacco was distinctly disallowed, and no amount was allowed to this plaintiff as fees for selling said tobacco, or any part thereof."

The court sustained the demurrer to the petition and amended petition, and, the plaintiff failing to plead further, the action was dismissed.

Sections 520 and 521 of the Civil Code regulating proceedings to vacate or modify a judgment, require that they "shall be by petition, verified by affidavit, setting forth the judgment, the grounds to vacate or modfy it, and the defense to the action if the party applying was defendant."

They also provide that a judgment shall not be vacated "until it be adjudged that there is a valid defense to the action in which the judgment is rendered." The proceedings in the action in which the judgment complained of was rendered are not made part of the petition and are not copied on the appeal. All that we know as to the nature of that action, or as to the judgment which was rendered in it, we must learn from the allegations of the petition above quoted. From these allegations we can not determine what was the nature of that action, or precisely what judgment was rendered in it, or upon what the judgment was based. We are, therefore, unable to determine whether a valid defense to the action is disclosed, for, it may be that, conceding the truth of all that is alleged in the petition above quoted, we would reach the conclusion under the allegations of the petition in that case, if they were before us, that the judgment which the court actually rendered was not unwarranted, and in no way prejudiced the substantial rights of the appellant. It is true there are in the amended petition denials of certain facts, but whether the denial of these facts would constitute a defense to the action we can not determine without knowing what other facts were alleged in the petition in that case, and if all the facts were before us, it may be that the judgment which was rendered in that case would have been rendered had all the facts stated in the petition and amended petition been before the court at the time that action was tried.

In a number of cases the rule has been laid down that the proceedings in the old case must be pleaded in full, or so set out as to give the court the substance of the matter, and that regularly a copy of the proceedings should be filed with the pleading. (Rice v. Wyatt, 25 Ky. Law Rep., 1060; Weir v. Weir, 19 Ky. Law Rep., 2005; Overstreet v. Brown, 23 Ky. Law Rep., 817.)

As the proceedings in the old case are not so set out as to enable the court to see that a valid defense was made to that action, the circuit court properly sustained the demurrer to the petition as amended. We deem it, therefore, unnecessary to pass on the other questions made by counsel.

Judgment affirmed.

NOLEN, &c. v. HALL.

(Filed October 25, 1904--Not to be reported.)

1. Land—Title—Previous patent—Possession—Equitable action—In an equitable action for land, brought under Kentucky Statutes, section 11, providing that "it shall be lawful for any person having both the legal title and possession of lands, to institute suit by petition in equity in the circuit court of the county where the lands, or some part of them may be, against any other person sitting up claim thereto, and if plaintiff shall be able to establish and does establish his title to said land, the defendant shall be decreed to release his claim thereto," where the plaintiff claims under a patent of date February 15, 1889, and the proof showed that the land had been previously patented on March 4, 1845, the plaintiff's patent was void under Kentucky Statutes, section 4703, of chapter 127, providing that "Every entry, survey, or patent, made or used under this chapter shall be void so far as it embraces land previously entered, surveyed, or patented."

2. Void patent—Constructive possession—In an equitable action brought under Kentucky Statutes, section 11 for land, the plaintiff, as in ejectment, must succeed or fail, according as he establishes his own title, and, where the patent under which the plaintiff claims is void, he is not in the constructive possession thereof; and, not having the actual possession he is without title or possession, and so is not in a position to question his adversary's title or right to possession.

H. C. Clay for appellants.

R. L. Greene and W A. Black for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Hobson.

Appellee Hall filed this suit in equity, alleging that he was the owner and in possession of a certain tract of land on the waters of Four Mile creek in Harlan county, and that the appellant had entered upon it against his will and was cutting valuable timber from his land doing him irreparable injury. The defendant filed answer, setting up that he owned a certain body of land which conflicted with the boundary described in the plaintiff's petition, denying the plaintiff's title to the land claimed by him or his possession of it. Proof was taken and on final hearing the court decreed in favor of the plaintiff and the defendant appeals. The action was brought under section 11, Kentucky Statutes, which is in these words: "It shall and may

be lawful for any person having both the legal title and possession of lands, to institute and prosecute suit by petition in equity in the circuit court of the county where the lands or some part of them may lie, against any other person setting up claims thereto; and if the plaintiff shall be able to established and does establish his title to said land, the defendant shall be, by the court, ordered and decreed to release his claim thereto."

The proof shows that on March 4, 1845, a patent was issued to Boyd Dickinson for 10,000 acres of land which includes all of the land claimed by both plaintiff and the defendant. The defendant claims under James B. Howard, who held a title bond from Boyd Dickinson, executed in the year 1850. Plaintiff claims under a patent issued to Green Fee of date February 14, 1889. He insists that the title bond from Dickinson to Howard is void for want of certainty of description. The defendant insists that the patent to Fee is void because the land was embraced in the old patent of Dickinson. The plaintiff conceding this, maintains that the defendant can not make this question because, if the title bond of Howard was void for want of certainty, he is a mere trespasser and is in no way connected with the Dickinson patent.

The proof leaves no question that all the land in controversy is embraced in the older patent issued to Dickinson. There is no controversy in the evidence on this subject. Among other things, section 4708, Kentucky Statutes, provides: "None but vacant lands shall be subject to appropriation under this chapter. Every entry, survey or patent made or issued under this chapter shall be void, so far as it embraces lands previously entered, surveyed or patented."

As all the land embraced in the Fee patent was embraced in the previous patent to Dickinson, the Fee patent was entirely void. From a void instrument no rights can arise and by it nothing can be conferred. It is a nullity and amounts to no more than a piece of blank paper. (Morgan v. Morgan, 20 Ky. Law Rep., 190; Cornett v. Combs, 21 Ky. Law Rep., 537; Goosling v. Smith, 90 Ky., 157.)

The plaintiff, therefore, had no title to the land. Neither party showed any right to the land by possession, for it was timber land and neither had made a settlement on it under his claim. It will be observed that under section 11, Kentucky Statutes, above quoted, it is provided: "If the plaintiff shall be able to establish and does establish his title to said land, the defendant shall be, by the court, ordered and decreed to release his claim thereto."

The plaintiff having failed to establish his title under the statute, no judgment in his favor should have been entered. In this character of action as in ejectment the plaintiff must succeed or fail according as he establishes his own title. If he has no title he can not call the extraordinary power of the chancellor into action for his protection. It is unnecessary, therefore, for us to consider the defendant's title or to pass upon his rights. If appellee Hall had title to the land he would be in constructive possession of it; but having no title he is not in constructive possession; and not having an actual possession, he is without title or possession, and so is not in a position to question appellants' title or right to possession.

Judgment reversed and cause remanded, with directions to dismiss the petition.

WHITE v. LAUREL LAND CO., &c.

(Filed October 20, 1904—Not to be reported.)

1. Land—Execution sale—Sheriff—Fraud—Motive—Appointing appraisers—Impeaching return—In an action to set aside a sale of land made by a sheriff under execution, on the ground of fraud in the sheriff in having the land appraised, Held—That in the absence of any motive or purpose being shown in the sheriff to practice fraud, and it appearing that the appraisers were sworn and made the appraisement, the return of the sheriff and the report of the appraisers can not be impeached, after the lapse of nine years, by the evidence of the appraisers which amounts to little more than showing that they have forgotten what was actually done by them.

2. Levy—Return—Where the return of the sheriff shows that he levied the execution upon the land, but does not recite how he made the levy, the presumption is he made it as required by law.

3. Notice of sale—Sufficiency—Where the return of the sheriff shows that he levied the execution on four tracts of land, that he advertised the time, place and terms of sale at the courthouse door, and three other public places in the vicinity of the land for fifteen days next preceding the sale, the fact that a small tract of land intervened between some of the tracts sold, is not sufficient to show that the notices were not placed at public places in the vicinity of the land. Evidence of the witnesses that they did not see the notice is of no value.

4. Qualification of appraisers—The fact that one of the appraisers was under twenty-one years of age, did not disqualify him to act as appraiser.

Strother & Hardin for appellant.

Lane & Harrison for appellees.

Appeal from Owsley Circuit Court.

Opinion of the court by Judge Paynter.

John G. McGuire obtained a judgment in the Lee Circuit Court against the appellant, John D. White, O. H. Harrison and Vincent Boering for about $4,400, on which a payment had been made amounting to about $3,000. An execution was issued on the judgment directed to the sheriff of Owsley county on November 14, 1894, and while in full force and effect was levied on four several tracts belonging to the appellant, which were sold to satisfy the execution. At the sale the appellee, Laural Land Co., a corporation, became the purchaser. The sheriff reported that the sale of the property had been properly advertised and had been appraised. Each tract of the land brought less than two-thirds of its appraised value. So far as this record shows the purchaser made no effort to take possession of the land under the purchase. Thus the matter stood until in the spring of 1903 when this action was instituted by the appellant to have the proceedings under the execution adjudged invalid, and if this could not be done to allow him to redeem the land upon payment to the purchaser the amount of the purchase money, interest and costs.

The grounds relied upon for relief are: First, that the sheriff practiced

fraud in having the property appraised; second, that the sheriff did not properly levy the execution; third, that proper advertisement was not made of the sale; fourth, that Adams Baker, one of the appraisers, was under twenty-one years of age when he acted as such.

So far as this record discloses neither the purchaser, nor any of its stockholders or agents had anything whatever to do with the selection of the appraisers. The sheriff seems to have been entirely without motive to have the property appraised for less than its actual value. The appraisers were selected without any purpose upon the part of the sheriff to practice a fraud upon the appellant. They took an oath that they would properly discharge their duty as appraisers. They made the appraisement and reported the result. The sheriff's testimony tends to show that they appraised the several tracts of land. The return of the sheriff and the report of the appraisers can not, after the lapse of nine years, be impeached by the evidence of the appraisers which amounts to little more than showing that they have forgotten what was actually done by them. We think the appellant failed to sustain his charge that the sheriff was guilty of fraud in having his property appraised.

The sheriff reports that he levied the execution upon the land. He does not recite how he made the levy, but the presumption is that he did it as required by law. He testified that he went upon the several tracts and made the levy, which was one of the ways to make a levy. (McBurney v. Overstreet, 8 B. M., 304; Vallandingham v. Worthington & Co., 85 Ky., 82.)

The sheriff reported in his return that he had advertised the time, place and terms of sale by written notices, by placing one notice on the courthouse door and at three other public places in the vicinity of the land for fifteen days next preceding the sale. The appellant did not offer testimony tending to impeach the return of the sheriff. He introduced evidence with the view of showing that the location of the tracts was such that four notices were not sufficient to apprise the public of the sale. Others testified that they did not see the notices. While the appellant testified as to the location of the tracts, and that they were separated so that it would be necessary to ride two or three miles from one to reach another by a public way, still on cross-examination he would not deny that between some of the tracts of land that were sold there intervened a small tract belonging to other people, which showed the tracts sold were only a short distance apart. There is no evidence showing that the notices were not placed at public places in the vicinity of the land. The evidence of witnesses that they did not see notices of the sale posted in the vicinity of the land, was of no value.

They were not looking for them, besides nine years had elapsed from the date of sale until they gave this testimony.

Under section 1682, Kentucky Statutes, a disinterested and intelligent housekeeper of the county, not related to either party is qualified to act as an appraiser. The statute does not require him to be twenty-one years of age at the time he acts. As Barker had the qualifications required by the statutes, he was authorized to act as an appraiser. Having reached the foregoing conclusions stated above, it is unnecessary to consider the other questions raised in the case.

The judgment is affirmed.

MEAD v. MEAD.

(Filed October 25, 1904—Not to be reported.)

Tenants in common—Adverse possession—Estoppel—Where a father died in 1876, intestate, the owner of land, leaving a number of children and grandchildren who inherited his land, the fact that two of his children bought out some of the other children and grandchildren and parceled out the land to each other, leaving a certain portion for certain of the other heirs, but claiming against others whose existence or identity were in doubt, Held—That said heirs had not lost their interest by the adverse possession of the appellant, who, by his pleading recognized them as heirs.

D. D. Fields and S. B. Dishman for appellant.

Salyer & Baker for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Paynter.

Thomas Mead, Sr., a resident of Letcher county died intestate in 1876. He died seized and possessed of a certain boundary of land in that county. He had fifteen children, one named Riley died before his father without issue, some of the other children survived the father, others died leaving issue. So each child and grandchild took his estate by inheritance.

Some of the children had married and left the State of Kentucky before the death of their father. The appellant, J. M. Mead, and the appellee, Albert Mead, appear to have conceived the idea of acquiring the interest of their brothers, sisters, nieces and nephews in the land, and each bought out certain heirs. They then parcelled out the tract left by their father. The appellee took one parcel and the appellant one and they set apart another parcel for the heirs whose interest they had not acquired. The appellant and appellee made some improvements on their respective parcels. After this was done the appellee purchased the interest of another heir, and took possession with the consent of the appellant of another parcel of the land supposed to be about the quantity which the heir whose interest he had purchased was entitled to receive. There seems to have been some lack of knowledge as to whether the intestate's children, Nancy Mead (who intermarried with Jonathan Justice) and Samuel Mead were still living, and if dead, whether they left issue. In 1891 it was ascertained to the satisfaction of appellant and appellee that Samuel Mead was dead and had left issue, thereupon, they bought the interest of his children and took a joint deed to themselves therefor. Subsequently the appellee obtained a deed from persons claiming to be the heirs at law of Nancy Justice, whereupon, he asserted title to his sister, Nancy's, one-fourteenth interest in the land. The appellant denied his right to it and claimed that they were not heirs of Nancy Justice, and furthermore that he took possession of the land which was to be held for the heirs who had not sold their interest and had held it adversely to all the heirs, except his brother, Thomas, and, therefore, the heirs of Nancy Justice had lost their interest by virtue of his adverse possession. The appellee denies these claims and says they each took possession of certain parcels of it as a matter of convenience, and that there was no adverse holding, but that there was a constant recognition of all the right of all the heirs to come and take possession of their respective interest in the land.

The appellee is sustained in this by the fact that as late as 1891 the appellant and appellee recognized that the heirs of Samuel Mead were entitled to their interest, and they purchased it and took a joint deed therefor. Again, there was a suit filed in the Letcher Circuit Court by one of the heirs for a partition of the land left by the intestate. When the appellant, by pleading and by exception to the commissioner's report said that the heirs of Samuel Mead and Nancy Justice were entitled to their interests in the land. The court below held Nancy Justice's heirs had not lost their right to the land and that the appellee was entitled thereto, and ordered a partition of the land. In that conclusion we concur.

The judgment is affirmed.

ASHLAND AND CATLETTSBURG STREET RAILWAY CO. v. HOFFMAN, BY, &c.

(Filed October 26, 1904—Not to be reported.)

Action for assault and battery—Answer—Justification—Burden of proof—Closing argument—In an action by appellee against the proprietor of a public park for being assaulted and forcibly ejected therefrom, the answer of appellant alleged that appellee, at the time, resided in a house of ill fame and her reputation for morals was bad, and, after having been at the park on a previous occasion and acted improperly, and, upon complaint, had promised not to return, but on the occasion complained of in the suit, did return without appellant's knowledge, and renewed her improper conduct, and that a constable, at appellant's request, in the enforcement of the park regulations, requested her to retire, which she refused to do, when reasonable force was used to eject her. On the filing of the answer the appellant asked to take the burden of proof, and also asked to conclude the argument to the jury, both of which requests were refused by the court. Held—That under the pleadings the appellant was entitled to the burden of proof and the closing argument.

Thomas R. Brown for appellant.

J. A. Scott, R. S. Dinkel and Proctor K. Malin for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Nunn.

The appellee brought her action by next friend in the lower court against appellant, in substance alleging in her petition that appellant maintained and operated a park known as "Clyffside Park," on its line of road between Ashland and Catlettsburg for the benefit of the public and its line of road; that any person who rode upon appellant's street car line and paid the regular fare to the park, entitled him to enter the park and remain therein until he desired to leave.

She stated that she paid the regular fare to the park, entered and remained there about one hour, together with a great number of men, women and children who had entered the park for pleasure and as a place of resort, when appellant's agents and servants in charge of the park, without any cause therefor, and without fault on her part, willfully assaulted her by

catching hold of her arm and hands in a rough and violent manner and forcibly and violently ejected her from the park and refused to allow her to remain therein; that by reason thereof her hands and arms were bruised and injured which caused her to suffer great pain and mental anguish and greatly humiliated and degraded her, to her damage in the sum of $5,000.

The appellant answered, denying each and every allegation of the petition. After the jury was empaneled, but before the introduction of any proof, the court permitted appellant to withdraw the answer and substitute another, in which appellant in substance stated that it did operate and maintain this park, as stated by appellee, and that she had paid the price which entitled her to enter therein and then continued, that the appellee then resided in a house of ill-fame and that her reputation was bad for morals, and shortly before her removal complained of she had been at the park and had been associating with the leader of the band of musicians then in the service of the appellant at the park for the supply of music for the entertainment of its patrons and prevented him from discharging his duty to it; that her conduct was such as to be objectionable to appellant and improper and suggestive of impurity and on account thereof was a subject of complaint to it by its patrons; that she then agreed not to come to the park again, but on the occasion complained of she did come to the park, without the knowledge of the appellant, and renewed her association and conduct; that a constable of the county in which the park is situated, at the request of appellant in the enforcement of the park regulations, did request the appellee to retire from the park, which she refused to do, when such force as was reasonable therefor was used by him to remove her, and whatever injuries she received were the result of her own conduct and resistance.

On the filing of this answer, appellant asked to take the burden of proof and offered to introduce its evidence first. The lower court refused this motion and permitted appellee to take the burden, to which appellant objected and excepted. After the evidence was heard, appellant asked to be allowed to conclude the argument to the jury, which motion was likewise refused and appellant excepted. The jury returned a verdict in favor of appellee for $500 and appellant has appealed. The transcript does not contain the evidence produced on the trial. The petition states a cause of action and the only question before us on this appeal is, whether the lower court erred in refusing appellant the burden of proof and the concluding argument to the jury.

Section 526, Civil Code, provides: "The burden of proof in the whole action lies on the party who would be defeated if no evidence was given on either side."

Section 317, subsection 6, provides: "In the argument, the party having the burden of proof shall have the conclusion and the adverse party the opening."

This court, in the cases of Royal Insurance Co. v. Schwing, Surviving Partner, 87 Ky., 410; Firemen's Insurance Co. v. Same, 10 Ky. Law Rep., 883; Crabtree v. Atchinson, 93 Ky., 338, and Lucas v. Hunt, 91 Ky., 279, has decided that a denial of the concluding argument to a person who has the burden of proof, is a reversible error.

In our opinion the substituted answer of appellant in effect confessed the

allegations of the petition and sought to avoid the consequences of the acts of its agents and servants by showing that her immoral and improper conduct on the occasion mentioned, was a sufficient excuse for her ejection from the park. In view of this conclusion it necessarily follows that appellant would have been defeated if no evidence had been introduced on the trial and, therefore, the appellant was entitled to the burden of proof and the concluding argument.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

CITY OF COVINGTON v. BOSTWICK.

(Filed October 26, 1904—Not to be reported.)

1. Continuance—Discretion of court—Where it is shown that a suit was filed November 18, 1903, placed on the trial docket April, 1903, and on November 13 set for trial on November 17, and tried November 18, 1903, which was Wednesday, that appellant's attorney was absent from the city on Monday and part of Tuesday, but was present at the trial, and that all the witnesses for whom subpœnas were issued were present, except Mrs. Kissinger, and the affidavit of what she would prove was read to the jury, there was no abuse of the discretion of the trial court in refusing a continuance.

2. Attorney—Improper language to the jury—The following language of plaintiff's attorney to the jury was objected to: "Why are not the Kissingers, father and son, who live next door to the plaintiff, and in front of whose house this woman fell, not here on the trial? Why is the superintendent of public works not here at this trial? Can the city solicitor answer why he has not had these people here to testify in this case? Why? Because he knows if they were here they could not help testifying that this large and dangerous hole was in the sidewalk." Whilst the language of the attorney was not strictly warranted by any evidence in the case it is wholly improbable that a jury would have attached any importance to such remarks, and it furnishes no sufficient ground for a reversal.

3. Newly-discovered evidence—Newly-discovered evidence that is merely cumulative, and which could have been secured by reasonable diligence, is not sufficient to authorize a new trial.

4. Admonition to jury—"Hopelessly hung"—The following admonition given by the court to the jury when about to hang, was complained of, viz.: "I am informed by the sheriff that you express an opinion that you can not agree on a verdict. I want to call your attention to the fact that an issue such as this, in this case, is to be determined by some jury, that is the only way provided by the laws of Kentucky that such an issue can be decided. So, if you gentlemen fail to decide it, some other jury must hereafter do it. You know that every trial of a case of this kind involves expense and loss of time to the parties, and to the Commonwealth, so that it is important that you should reach a verdict if you can properly. I don't ask any member of the jury to sacrifice his conscience or judgment, but I do urge you to do all you can to reach a verdict without any violation of your judgment or conscience. I ask you to put aside all considerations except those of trying to arrive at the truth and right of the matter, without any private opinion or any like influencing the jury at all, but to fully realize your position as jurors, and, having in view the rights of the parties, and their interest and

that of the Commonwealth, make every effort that you can within the limits I have mentioned to reach a verdict. I will ask you in the light of what I have said to you to again consider the case and see if you can reach a verdict properly. I don't mean to attempt to try to force the jury to do it, or to try to force a verdict by keeping you together at inconvenience to your selves. If you find you can not, after a fair consideration, reach a verdict then you will be discharged from the consideration of the case. In my opinion that is the only kind of verdict that should be reached, and I have never attempted and don't attempt now, to use any coercive methods with the jury, but I put to you the importance of trying to reach a verdict. If you can not agree, let me know and I will discharge you from the further consideration of the case." Even if it be true, as appellant alleges, that up to the time of this admonition to the jury, that it was "hopelessly hung," we can not find anything in the statement that is objectionable.

5. Admonition by court—The following admonition given by the court to the jury at the time of the reading of the affidavit for a continuance is complained of, viz.: "Gentlemen of the jury, the defendant, city, wanted a continuance of the trial because of the absence of a witness. Under the law he was allowed to go into the trial with the privilege of reading that written statement of what the witness would say if here. It isn't taken as true, but simply is a statement of what the witness would testify if present. The jury is to give that the same weight and consideration it will the testimony of other witnesses, believe it or not, as you please. It is the deposition as to what she would say if she was here, but it is not to be taken as true; the jury will believe it or not as the testimony of any other witness." Held—Under our system of instructing juries they should be left to weigh the evidence and draw their own conclusions, and we are inclined to think the language was objectionable, but not sufficiently so to reverse the case. Nor do we think the explanation of the instructions given to the jury in response to a request of one of the jurors, is ground for complaint.

F. J. Hanlon for appellant.

B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by the appellee, Fannie Bostwick, against the appellant, the city of Covington, to recover damages for personal injuries occasioned by a defective sidewalk. She alleges in substance that while she was walking on the west side of Scott street she stepped into a hole in the sidewalk and by reason thereof fell, which fall resulted in dislocating her right hip, knee cap, spraining her ankle, and injuring her spine, and in consequence of these injuries her left leg was shorter than her right, and she had been rendered a permanent cripple. The city answered, denying the allegations of the petition, and pleading contributory negligence. A jury trial resulted in a verdict and judgment for the plaintiff, and the city has appealed.

The principal errors complained of upon the appeal are: First, that the court erred in refusing to grant appellant a continuance. The motion for a continuance was supported by the affidavit of the attorney for appellant, and was based upon two grounds: First, that he had not had time to prepare the case for trial because of his absence from the city for several days preceding the day on which it was assigned for trial; and, second, because

of the absence of Mrs. Kissenger, who resided in the dwelling house in front of which the accident was alleged to have happened, and by whom it was recited in the affidavit that he could prove that there was no hole in the sidewalk, but that it was covered with ice; and that the plaintiff's fall was occasioned by the ice, and not by any hole. The record discloses that this action was instituted on the 18th of November, 1902; that it was placed on the trial docket April 22, 1903, and was set on the 13th of November for trial on the 17th of November, but was not actually tried until the 18th of November, 1903, which was on Wednesday. Appellant's counsel was absent from the city on Monday and a part of Tuesday, but was present at the trial, and all of the witnesses for whom subpœnaes had been issued were present, except the witness, Mrs. Kissenger, and the affidavit of appellant's counsel as to what she would prove was permitted to be read to the jury as provided by section 315 of the Civil Code. We think there was no abuse of discretion by the trial court in its refusal to grant a continuance. (M. & L. R. R. Co. v. Herrick, 76 Ky., 132.)

The next ground of complaint is that plaintiff's attorney, in addressing the jury, used these words: "Why are the Kissengers, father and son, who live next door to the Bostwicks, and in front of whose house this woman fell, not here at this trial? Why is the superintendent of public works, Frank Droste, not here at this trial? Can the city solicitor answer why he has not had these people here to testify in this case? Why? Because he knows that if they were here they could not help testifying that this large and dangerous hole was in the sidewalk," which was objected to at the time. Whilst the language of plaintiff's attorney was not strictly warranted by any evidence in the case, it is wholly improbable that a jury would have attached any importance to such remarks, and if a jury trial is to be set aside in every case for this sort of license on the part of counsel, very few trials would stand. In our opinion, it furnishes no sufficient ground for a reversal of the judgment.

Counsel for appellant also filed affidavits of W. S. and Charles E. Kissenger, who occupied the dwelling house in front of which the accident occurred, as newly-discovered evidence, in his motion for a new trial. They say in substance in these affidavits that the sidewalk was in good condition at the time of the accident. The testimony of these witnesses would have been only cumulative and undoubtedly could have been secured by reasonable diligence between the date of the institution of this suit and the trial thereof.

"It is a general rule that a new trial should not be granted upon the sole ground of a discovery after verdict of parol testimony concerning a point litigated, or a fact known to a party at the trial, because the converse of this rule would open a wide field for unfairness and subornation, and would tend to protract litigation, and render it not only uncertain, but almost interminable." (McFarland's Adm'r v. Clark, 39 Ky., 139; Commonwealth v. Hardcraft, 69 Ky., 91; McConnel's Adm'r v. Ficklen, 7 Ky., 414; Cochran v. Tatum, 19 Ky., 404.)

Fourth. It is complained that the trial court, after the submission of the case to the jury, and when it was probable that they would fail to agree, and not render a verdict, was unduly strenuous in the following admonition

to them to render a verdict: "I am informed by the sheriff that you express an opinion that you can not agree on a verdict. I want to call your attention to the fact that an issue such as this in this case is to be determined by some jury, that is the only way provided by the laws of Kentucky that such an issue can be decided. So if you, gentlemen, fail to decide it, some other jury must hereafter do it. You know that every trial of a case of this kind involves expense and loss of time to the parties and to the Commonwealth, so that it is important that you should reach a verdict if you can properly. I don't ask any member of the jury to sacrifice his conscience or judgment, but I do urge you to do all you can to reach a verdict without any violation of your judgment or conscience. I ask you to put aside all considerations except those of trying to arrive at the truth and right of the matter without any private opinion or any like influencing the jury at all, but to fully realize your position as jurors, and having in view the rights of the parties, and their interest and that of the Commonwealth, make every effort you can within the limits I have mentioned to reach a verdict. I will ask you in the light of what I have said to you to again consider the case and see if you can reach a verdict properly. I don't mean to attempt to try to force the jury to do it, or to try to force a verdict by keeping you together at inconvenience to yourselves. If you find you can not, after a fair consideration, reach a verdict, then you will be discharged from the consideration of the case. In my opinion that is the only kind of verdict that should be reached, and I have never attempted, and don't attempt now, to use any coercive methods with the jury, but I put to you the importance of trying to reach a verdict. If you can not, let me know, and I will discharge you from the further consideration of the case."

Even if it be true, as appellant alleges, that up to the time of this admonition to the jury, it was hopelessly hung, we can not find anything in the statement which is objectionable. (Shely v. Shely, 20 Ky. Law Rep., 1022; Thompson Trials, sections 2302 and 2303.)

The fifth ground of complaint is that the court erred to defendant's prejudice in the following admonition which was given to the jury at the time the affidavit for a continuance was read to them: "Gentlemen of the jury, the defendant, city, wanted a continuance of the trial because of the absence of a witness. Under the law he was allowed to go into the trial with the privilege of reading that written statement of what the witness would say if here. It isn't taken as true, but simply is a statement of what the witness would testify to if present. The jury is to give that the same weight and consideration it will the testimony of other witnesses, believe it or not, as you please. It is the deposition of the witness as to what she would say if she was here, but it is not to be taken as true; the jury will believe it or not as the testimony of any other witness."

Under our system of instructing juries, they should be left to weigh the evidence and draw their own conclusions therefrom, and we are inclined to

the opinion that the language of the trial judge to the jury was objectionable, and should have been more guarded. At the same time we do not believe that this was sufficient to reverse this case, or was probably prejudicial to the substantial rights of appellant, as the testimony was wholly cumulative in character. Nor do we think the explanation of the instructions given to the jury after the submission of the case in response to a request of one of the jurors, is ground for complaint. It is expressly authorized by section 321 of the Civil Code.

After a careful consideration of the whole case, we have reached the conclusion that no substantial ground for a reversal of the judgment appealed, from exists.

Judgment affirmed.

CRIGLER & CRIGLER v. FORD.

(Filed October 26, 1904—Not to be reported.)

1. Filing mandate—Notice—Waiver—Although no notice of the filing of a mandate was given, where it was done in open court, where the trial was not had for six months thereafter, and appellants appeared in open court and made several motions in the action, the acts of making motions were a waiver of the filing of the mandate.

2. Evidence—Evidence of appellee to the effect that the elevator where his injuries were sustained was defective and unsafe, and had fallen before this accident in the presence of appellants, was competent as showing that appellants had actual knowledge of the condition of the elevator.

Furber & Jackson for appellants.

B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal in this case, the former opinion being in 25 Ky. Law Rep., 56. On the return of the cause to the lower court it was again tried and the appellee recovered a judgment against appellants for the sum of $500, and they have appealed.

The appellants assign several errors upon which they ask a reversal. The first is, that the appellee failed to give notice of the filing of the mandate required by section 761 of the Code; second, that no cause of action was ever stated in the petition; third, because the verdict was excessive; fourth, because incompetent evidence was admitted by the court, over the objection and exception of appellants, relating to other accidents claimed to have occurred on the elevator, and which were not connected with the accident sued for in that there was no showing that the elevator had not been repaired between the time of these accidents proven and the one complained of. It is true, as appears from the record, that the appellee failed to give notice of the filing of the mandate, but the record also shows that the man-

date was filed in open court and that the trial was not had for six months thereafter and in the meantime appellants appeared in open court and entered several motions in the action. After these motions and after the case had been set for trial on a day fixed, then appellant for the first time moved that the order fixing the day of trial be set aside because the notice of the filing of the mandate had not been given. The court overruled this motion, but fixed another day. The trial was entered into without further objection, and it appears that a fair and full hearing was given the parties.

In our opinion the acts of appellants in entering and making these motions was a waiver of the notice of the filing of the mandate. The petition was sufficient, but even if it was not, that question is res adjudicata by the former opinion herein. On the trial appellee introduced evidence that the elevator was defective and unsafe, and that by reason of the defects it had fallen once or twice prior to his injury in the presence of appellants. This proof was introduced to show that appellants had actual knowledge of the unsafe and dangerous condition of the elevator. The appellants complain because the court permitted this evidence, when the appellee did not show that appellants had failed to repair the elevator between the time of these accidents and the time of the one in which appellee received his injuries.

We are of the opinion that the court did not err in this. The proof showed that the defects at the time of the injury were the same as at the time of the previous accidents. It was competent for the reason also that this elevator was owned and in the possession of appellants during all this time and the facts with reference to its condition were peculiarly within their knowledge, and if repairs had been made within the time referred to, it was within the power of appellants to introduce such evidence. It did not devolve upon the appellee to prove that they did not make the repairs. The facts, as shown by this record, are about the same as those shown by the record on the former appeal, and in our opinion the verdict is not excessive.

Wherefore, the judgment of the lower court is affirmed.

FINNEY v. COMMONWEALTH.

(Filed October 26, 1904—Not to be reported.)

1. Criminal law—Instructions—Upon the trial of appellant charged with the murder of Clymer whom he was undertaking to deliver to the authorities of Hart county for the purpose of becoming relieved of bail bonds he was surety upon for Clymer, when upon the latter's attempt to leave him, appellant shot and killed him, the proof showed appellant was weak physically, had been paralyzed, that deceased had had an opportunity to arm himself and appellant testified that he believed him to be armed and was about to attempt to shoot him.

2. Instructions—The omission of the words, "sudden affray" in an instruction upon manslaughter, and the use of the words, "and upon consid-

erable provocation killed William Clymer," etc., instead of the words "and upon such provocation as is ordinarily calculated to excite passions beyond control, killed William Clymer," etc., was error.

3. Same—In an instruction upon self defense the expression, "and believed and had reasonable grounds for believing he had no apparently safe means of averting said danger," was erroneous where appellant, at the time, did not occupy the position to require him to avoid or avert the danger.

H. W. Curle and S. M. Payton for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Hart Circuit Court sentencing appellant to a life term for the murder of one William Clymer.

The facts connected with the killing, as they appear of record, are in substance as follows: Appellant was the surety of deceased on two bail bonds of $100 each, executed before the county judge of Hart county. After these bonds were executed, and some time in the fall of 1903, the deceased, Clymer, was arrested and tried in the U. S. District Court at Bowling Green, Ky., and sentenced to serve a term in the jail and pay a fine of $100. He served his term in jail, which expired on the 12th of March, 1904. On that day appellant appeared in Bowling Green with copies of the bail bonds and took charge of Clymer and took him to the jail of Hart county for the purpose of relieving himself from further liability on these bonds. He presented to the jailer the copies of the bonds and offered to deliver Clymer to him, but the jailer refused to receive him, and stated to appellant, in the presence of Clymer, that he must go to the county judge and get a mittimus directing him to receive Clymer into the jail. Then appellant, with Clymer, went to the house of the county judge and stated to him what the jailer had said, and the judge informed him that he could not issue any other paper, that the copies of the bail bonds were all the papers he needed and to take the papers and Clymer back to the jail or to the sheriff, and have the sheriff deliver Clymer to the jailer. While the judge was giving these instructions to appellant, Clymer started away down the pike. Appellant called to him to stop, but Clymer answered him and said that he would not stop, that the judge had said that he was released, and he continued to move on down the pike. Appellant started after him, and just as he caught up with him and attempted to place his hand on his shoulder, Clymer told him not to do that, and turned instantly with his face in the direction of appellant, with clenched fists, as though he were about to strike. There were four eye-witnesses to this occurrence. One or two of them stated that then appellant began to shoot at Clymer. The others stated that appellant told Clymer that he would not take hold of him, and then Clymer started on down the pike, and then appellant began to shoot at him, and continued shooting

until he had emptied his pistol, and that very soon thereafter Clymer fell dead.

Appellant agreed with the statement of the eye-witnesses down to the point where Clymer turned round and clenched his fists. Appellant stated that he thought Clymer was in the act of pushing or striking him; that he told Clymer that he would not take hold of him, but he must go with him back to the jail. Clymer then started on down the pike and he (appellant) walked fast to get below and ahead of him, and just as he was getting ahead of him, he, Clymer, appeared to become angry, and threw his hand back to his hip pocket, and he believed that Clymer was in the act of drawing a weapon to shoot him, when instantly he began to shoot at Clymer and continued to shoot until he had emptied his pistol, and very soon Clymer fell dead.

It was proven that appellant, on the way to the courthouse, immediately after the shooting, and at the courthouse, stated that he had told Clymer that morning at Bowling Green if he started to run away from him he would shoot him, and that he had shot and killed him, but that he was sorry for it. Appellant also testified that Clymer had opportunities that day to arm himself; that he was not in his presence all the time while in Bowling Green. It was also proven, without contradiction, that Clymer was a violent, quarrelsome and dangerous man of great physical power, and large; that appellant was past the age of fifty-two years and weak physically as compared to Clymer; that he had, some few years before this occurrence, been stricken with paralysis on the right side. The proof also showed that appellant and Clymer had drunk some whisky during that day, but that Clymer appeared to be more under the influence of it than appellant.

The court gave to the jury a proper instruction on murder, but the instruction on manslaughter was prejudicial to appellant. The words "in a sudden affray" were omitted, and the court improperly used these words therein: "And upon considerable provocation, killed William Clymer," etc., when he should have used the following words in lieu thereof: "And upon such provocation as is ordinarily calculated to excite passions beyond control, killed William Clymer, etc."

The court also erred in giving a definition of this term or phrase in instruction No. 1, and on the next trial it would be better to leave it out altogether. The court also erred in giving instruction No. 6 on self defense by inserting the following words: "And believed and had reasonable grounds for believing he had no apparent and safe means of averting said danger." Appellant did not, at the time of this occurrence, occupy the position to require him to avoid or avert the danger. It was his right to remain with the deceased and use all reasonable means to take Clymer to the jailer, that he might be relieved from liability from the bond. In fact, he occupied the same position and with the same rights and privileges that a sheriff or constable would have had if acting under a warrant on a charge of a misdemeanor. There should also have been added to instruction No. 6, the fol-

lowing: "The danger to one's person to authorize him to act in his self-defense need not be real, but only apparent danger."

The latter part of instruction No. 8, to wit: "If the defendant surrendered or offered to surrender said Clymer together with a certified copy of the bill bond to the jailer of Hart county, and said jailer refused to accept said Clymer into his custody, the defendant was released from liability on said bail bond, and had no right thereafter to hold said Clymer or restrain said Clymer of his liberty," was very damaging and prejudicial to appellant, and should have been omitted from the instruction.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

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COURT OF APPEALS OF KENTUCKY.

HOLLAND AND CARNEY v. COMMONWEALTH.

(Filed October 26, 1901—Not to be reported.)

1. The judgment of conviction against appellant Carney is reversed because of the reasons stated in the opinion on the appeal of Frank Merriwether.

2. Evidence—One who was being tried for murder where the proof showed that just after the homicide he had a one dollar bill with blood on it; his contradictory statements about this and other matters; his statements to another who was confessing his part in the crime that he should not talk, and his remark that if they (meaning those accused) would stick together and tell the same story the Commonwealth would have no proof, were such as to authorize the court to refuse a peremptory instruction upon appellant's motion.

N. B. Hays and Loraine Mix for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is prosecuted by Dick Carney from a judgment sentencing him to death for aiding and abetting in the murder of an unknown white man at or near Pembroke, Ky., on the night of the 14th of November, 1903.

The facts and circumstances of the murder are related in the opinions this day rendered on the appeals of George Holland and Frank Merriweather, who were jointly indicted with him for this murder. For the reasons related in the opinion on the Merriweather appeal, the judgment of conviction against this appellant, Carney, must be reversed. The appellant is not represented by counsel in this court, but one of the reasons assigned for a new trial in the lower court was that the court erred in refusing to give to the jury a peremptory instruction in his behalf. The court did not err in this matter, for there were many facts and circumstances proven on the trial which authorized a verdict of guilty, to wit: The proof that appellant was at Moore's saloon and saw the stranger with the roll of money, his following the stranger away from the saloon, his not being engaged at any

employment to earn money, his not having any money just prior to his meeting this stranger, but having it immediately after; when he was arrested a one dollar bill with blood on it was found on his person; his contradictory statements with reference to this and other matters of more or less importance; his statements as testified to by B. M. Trabue, that when Will Garrett was confessing to the participation in the murder, appellant reached over and said to Garrett twice, "don't talk" and "stop talking;" appellant's conversation with a fellow prisoner in the jail, in which he was asked why and how he got into this trouble and his answer was that he got in with a lot of "muckshaws" (explained by witness to mean a lot of ignorant or inexperienced persons); his remark that the Commonwealth had no proof and there was nothing in it if all would agree on the same story, tell it and stick to it.

But for the errors in allowing confessions under the circumstances stated in the opinion in Merriweather's case, the judgment against appellant Carney is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

HOLLAND AND CARNEY v. COMMONWEALTH.

(Filed October 26, 1904—Not to be reported.)

Criminal law—Confession of accused—It appearing that an unknown man appeared at the saloon of Moore, in Pembroke, Ky., on the night of November 14, 1903, bought and paid for a drink, had a bottle filled with liquor, and then exchanging some nickles and dimes with the barkeeper for a one dollar bill which he wrapped around a roll of bills, left the place. He was discovered on the 17th of the same month about a mile and a half from Pembroke, dead, his body mutilated, his skull crushed, throat cut, and otherwise mutilated The appellant, Holland, and others, seven in all, were at the saloon when the stranger exhibited the money, and left soon after the stranger did. George Holland was arrested and confessed his guilt to the officer and gave the names of others as guilty with him. Other confessions were proved by the Commonwealth. The evidence shows that appellant Holland's confession was not made as the result of intimidation, threat, fear, or hope of reward, but was made voluntarily and freely. Held —The facts and circumstances point with certainty to his guilt, and the judgment of conviction is affirmed.

N. B. Hays and Loraine Mix for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Nunn.

This is an appeal from the judgment of the Christian Circuit Court convicting the appellants of murder and fixing their punishment at death. These appellants, together with seven others, namely, Ed. Holland, Frank Merriweathers, Frank Sherman, Frank Massie, Ed. Mosely, William Garrett and Charles Finch, were indicted for the willful murder of an unknown white man, giving a particular description of him, on the 14th of November, 1903. The appellant, George Holland, Frank Merriweathers and Frank Sherman were charged with committing the murder, and the other defendants with being present and aiding and abetting.

It appears from the proof that this unknown man appeared at the saloon of D. I. Moore in Pembroke, Ky., between the hours of 6 and 7 o'clock, on the night of November 14, 1908, and bought and paid for a drink, and had a bottle filled with whisky, and then asked the barkeeper if he could exchange a paper dollar for nickels and dimes. The barkeeper furnished him the bill and he took a roll of bills out of his vest pocket and wrapped this bill around it, replaced the roll in his pocket, picked up his valise and left the saloon. It was in proof that these appellants and others of the defendants named in the indictment were present at that time and were in a position to see this roll of bills, and they left the saloon very soon after the stranger left. The next seen of the stranger was some time after, out on the Pembroke and Fairview road, about a mile and a half from Pembroke, where he had built up a fire near a tree about forty yards from the road. He was next discovered dead at that place on the 17th of November, 1908, under a pile of rails some distance from the tree where he had built his fire. When found, the hogs had mutilated his face, throat and bowels, but it appeared that his skull had been broken in on the side of his forehead, his windpipe and esophagus or gullet severed by some sharp instrument, and his organs of generation had been severed from his body by some sharp instrument. Large pools of blood were found near this tree and spots of blood on the ground and leaves from that point to about eighteen or twenty feet to this pile of rails where he was found, the ground showing that he had been dragged from one place to the other. There were knifemarks upon this tree, showing evidence that the knife had been wiped on the side of it, leaving blood on the tree. The frame of his valise was found lying where the fire had been, showing that it had all been burned up except the frame, it being metal. His overcoat had been burned at the same place except a part of the collar, and his shoes had been removed from his feet. A bottle with a small quantity of whisky was also found near this tree. An ax handle was found twenty or thirty yards from this spot in the woods, and in the direction of Pembroke. This ax handle was cracked or slivered when found, and there was long dark hair in the slivers, of the same color as that of the deceased. There was no money or other thing of value found upon the person of the deceased.

A few weeks after the discovery of this dead body, the appellant, George Holland, was arrested at his home about three miles from Pembroke, on the Fairview road. While on the way to Pembroke on the night of his arrest, the officer testified that he confessed to him that he took a part in the killing of this man, and told the officer he wanted him to arrest the others who were engaged in it. Upon being requested to give the names of all engaged in it, he gave the names of the other defendants charged in the indictment. The Commonwealth proved by half a dozen or more witnesses of confessions made by appellant Holland at different times and places. All the confessions were in substance the same, and were about as follows: That he with four or five of the other defendants were at the saloon where the stranger exhibited his money, left the saloon immediately after he left, and agreed together to rob him of his money; that he, with all the defendants, except Merriweathers, Carney, Finch and Sherman, went to his (appellant's) house. After remaining at home for some time, Finch arrived, and appel-

lant and all of the defendants at his house, with Finch, went down the road in the direction of Pembroke, and just before arriving at the place where the stranger was, they met Merriweathers, Carney and Sherman. They had a short consultation, when Merriweathers remarked that if they were going to do anything, then was the time to do it. A few took positions to watch, and appellant, with the balance, went up to where the deceased was sleeping, and Merriweathers struck him three blows with an ax handle, and appellant jumped on him and cut his throat with a butcher knife which Merriweathers handed him, when Sherman took the knife and cut off his organs of generation, and with the assistance of Merriweathers cut the flesh off of his face, and then appellant wiped the knife several times on this tree; that Dick Carney ransacked his pockets and found a dollar and a half in silver and about one hundred dollars in paper money. The appellant, at the time, received the silver and the other was to be divided among the other defendants; that his overcoat and valise were put upon the fire, the ax handle was thrown into the woods in the direction of Pembroke, and the body was dragged through the leaves on the ground to the rail pile and placed thereunder; that one of the defendants took off his shoes and carried them away.

The appellant, on the witness stand, denied taking any part in the murder of this man or having any knowledge of the matter whatever, but stated that he made these alleged confessions through fear, being threatened with a mob if he did not. He also stated that he was not in Pembroke either on the day or the night that this stranger was killed, but that he was at home; that after eating his supper, he, in company with the other defendants named, except Merriweathers, Carney and Sherman, waited at his house until Finch arrived, when they all went to Frank Massie's house, which was about three-quarters of a mile from where the stranger was found, to play cards and pop corn; that he stayed at Massie's until about 10 o'clock, when he left, and went home and stayed there the rest of the night; that he did not see Merriweathers, Carney or Sherman at all that night. He also stated that his nephew, Dudley Bowles, came over to his house and stayed all night. Bowles was put upon the stand and stated that about an hour after supper Finch came to the house after the appellant and they went off together and returned with Frank Massie just before day the next morning and stirred up the fire and began popping corn and playing cards.

The evidence shows that appellant Holland's confessions were not made as a result of intimidation, threats, fear of any kind, or hope of reward, but, on the other hand, were made voluntarily and freely. Section 240 of the Criminal Code provides: "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed."

The evidence in this case shows that this stranger did not die a natural death, but, on the other hand, it shows clearly that he was murdered. The evidence all points to this fact. His skull was crushed, his windpipe and gullet were severed with a knife, his organs of generation had been removed with a like instrument, his shoes had been removed from his feet and had been carried away, the large pool of blood found at the tree, blood scattered along the ground to where he was placed in the rail pile, knife marks and

blood on the tree, the collar of his overcoat and the frame of the valise at the place where the fire had been, the slivered ax handle with the hair of the deceased on it at the place where it was found, and some few other circumstances not necessary to mention, all unerringly point to the fact that the offense was committed, and coincide and agree with the confessions made by appellant Holland, and it seems impossible that the appellant, in his confessions, could have particularized these facts and circumstances as they appeared, as shown by many witnesses, unless he had actual knowledge himself of and was present at the scene of the murder. The instructions fairly presented the law of the case.

The facts and circumstances as shown in the record point with certainty to the guilt of appellant Holland, and the punishment fixed by the jury is no more severe than the perpetrators of this atrocious and brutal murder deserves.

For these reasons the judgment against the appellant, Holland, is affirmed.

Whole court sitting.

MERRIWEATHER v. COMMONWEALTH.

(Filed October 26, 1904.)

1. Evidence—Competency—Prisoner in irons—Statements made by others in his hearing—Silence of accused—Where eight prisoners charged with murder, by killing a stranger at night for his money, were being conveyed to jail in charge of the officers and chained together, while waiting in the station for the train, some of the spectators or officers asked some of the prisoners whether they had killed the stranger, some of them answered, in the presence of appellant, that appellant had knocked him in the head with an ax handle and another had held him while still another cut his throat, to which statements appellant made no reply. Afterward, while appellant was in jail, statements were made by some of the prisoners to the police judge in an adjoining room, in hearing of appellant, the door between the two rooms being open, that appellant struck the blows with an ax handle that killed deceased, to which appellant made no response. The prisoners who made these statements were not introduced on the trial, but their statements made in the presence and presumably in the hearing of appellant, were admitted against his objection. Held—That this evidence was incompetent.

2. Statements—Not part of res gestæ—Adoption by accused—What another may have said, though in the presence of the accused (not forming a part of the res gestæ) is immaterial except it be a fact that the accused, by admitting the statement to be true, made it his statement by adoption. When, therefore, it appears that the accused did not adopt the statement as his own, from whatever cause, it ought not to be admitted at all.

N. B. Hays, and Loraine Mix, for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, Frank Merriweather, and eight others, including George Holland and Dick Carney, all negroes, were indicted for the willful murder of an unknown white man, committed in Christian county on November 14, 1903. The murdered man was a stranger in that community. He appeared

in a saloon in the town of Pembroke after dark on the 14th of November, 1903, Saturday night, and bought some whisky. In paying for it he exhibited some money, and besides got some silver exchanged for paper money which he added to a roll of bills also exhibited in the saloon. Dick Carney is shown by the evidence in this case to have seen the occurrence above narrated, and to have followed the stranger out. There were a number of people in and about the saloon at the time, and others went out directly after the stranger. Persons passing through Chilton Woods, about one and one-half miles from Pembroke, some hour or so later, discovered a fire built near a tree, and a man having the appearance of this stranger, sitting alone by it. On the following Tuesday the body of the stranger was found partially hidden beneath a pile of rails near where the fire had been. The body appeared then to have been dead two or three days. Hogs had gotten to it and partially eaten it. The skull had been crushed by a bludgeon or some blunt instrument, the throat had been cut, the penus had been cut off, and the face cut or eaten away. There was also evidence that a great hole had been cut in the abdomen. Near the scene of the murder, for murder it certainly was, there was found an ax handle, fitting a double-bitted ax. On this handle was blood, and dark hair, matching that on the dead body. Blood was spattered on the tree standng near the place where the fire was. There were also blood stains with a raveling of cloth, on the bark of the tree where a knife had been cut into the bark, evidently for the purpose of cleaning the blood from it. An old glove fitting the right hand was also found near the scene. The glove was identified as belonging to appellant.

On Wednesday appellant was noticed to have blood spots on one leg of his trousers. There was proof that appellant owned a double-bitted ax, which had not been seen since the killing. The murdered man was undoubtedly killed for his money, and the body most horribly mutilated by the murderers, either to conceal its identity, or to gratify a barbarous lust. Appellant had money immediatley after the date of the killing, and had none immediately before. He had not been at work, nor been paid any sum in the meantime. There are other circumstances detailed in the evidence tending to establish appellant's guilt, but which it is not deemed necessary to set forth in the opinion. For it is not the province of this court to determine either the guilt or the innocence of the accused, but to see that if convicted, it shall be upon a trial conducted in the manner which satisfies the law.

Appellant demanded and was granted a separate trial from those jointly indicted with him. The verdict of the jury found him guilty, and fixed his punishment at death.

The motion and grounds for a new trial allege the following errors:

1st. That the jury was irregularly formed.

2d. That irrelevant and incompetent evidence was admitted against him.

3d. That the instructions to the jury were erroneous.

1st. Appellant suggested in his motion for new trial filed in the circuit court that the jury, and the venire from which it was selected, were all white men, and that his race was discriminated against in its selection, which he claimed was in violation of his rights under the 14th amendment to the Constitution of the United States. It is sufficient for the purpose of

this case to say that there is nothing in the record showing the race of any of the jurors. Nor is there anything showing what race or races the venire included. Nor was there objection in the circuit court at the time to the jury. On the contrary, the record shows that it was accepted by the defendant without objection.

2d. Evidence was admitted to the jury which is claimed to be in the nature of admissions by the defendant. By a number of witnesses it was proved that directly after appellant's arrest he, in company with seven others of those indicted with him, was being taken from Pembroke to Hopkinsville, the county seat. The eight prisoners were chained to each other, but in two groups of four each. They were standing in the waiting room at the depot, gathered about the stove. A number of persons, officers and others, were in the room and without. A crowd had gathered about the depot, but were in the main kept from the room by a guard placed at the door. Under these circumstances, some of the spectators, or officers, asked several of the prisoners whether they had killed the stranger. George Holland, and others of them, answered that they had; that appellant had knocked him in the head with the ax handle, and that another held him while yet another cut his throat. To these statements appellant made no response. It reasonably appears that he was within hearing distance of those making the statements.

Appellant was confined in the jail immediately after his arrest. So were the others. The jail room opened into a court room. Some of the prisoners were taken by officers, including a police judge, into the court room into the presence of a number of persons, and questioned as to the occurrence of the killing. The police judge seems to have made a written transcript of one of the prisoner's statements, and had him to swear to it. Appellant and Dick Carney were, during these occurrences, confined in a cell in the jail department, but, because the door between the rooms was open, were probably within hearing of, and could see at least some of the persons in the court room. They were from six to ten feet away from those of the prisoners being questioned in the court room. They there stated that appellant was present and struck the blows with the ax handle. Appellant made no response to these statements. The prisoners who made the statements were not introduced as witnesses against appellant. But their statements, made in his presence and presumably within his hearing, were admitted. He objected, and asked their exclusion, which was overruled.

The general rule is, that what another said about the transaction under investigation, is not relevant as evidence. It is called hearsay. There are, however, numerous exceptions to that general rule. Sometimes classed among these exceptions is where one recited facts in the hearing of the person to be charged, and he assents to their truthfulness. This is allowed upon the ground that such statements by the assent of the person whom it is sought to bind by them, made them his statements, and is, counsequently, bound by them as admissions, if they be against his interest. For it is thought to be contrary to the habit of men to admit a matter which is against their interest unless constrained to do so by its very truth. This evidence is admitted at last, not because somebody else made the statement though in the hearing of the person to be charged, but because the latter

has expressly or impliedly ratified and adopted it as his own statement. Express admissions against one's interest voluntarily and understandingly made, though oral, are regarded as competent evidence of much force. It must be clear, however, in such case, that the party to be bound did understand the statement in its exact import, and of his volition and purpose adopted it as his own version of the transaction. On this subject, Prof. Greenleaf writes (section 200, Greenleaf Ev.): "With respect to all verbal admissions, it may be observed that they ought to be received with great caution. The evidence, consisting as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say."

Of express admissions, though subject to the criticism, or rather caution, made in the foregoing quotation, it may be said that the party has intentionally given them currency by his own speech, and for whatever purpose they can be properly used. Intimately and necessarily connected with that class of admissions, is that where they are implied by the conduct of the party. Among this class are flight, fabrications, and such. There is also included in it that of admission by silence or acquiescence. Manifestly this last is of much lower degree, and less satisfying than an express admission. For, after all, there must be to some extent an assumption that the person sought to be bound did understand the matter as it was understood by the person making the statement, and by the tribunal trying the fact. While this assumption may in some cases amount to almost a certainty, yet in every case it is necessarily an assumption, which of course may be contrary to the truth of the matter. The rule deduced from the varying circumstances under which admissions by silence or acquiescence may be inferred, is thus stated in Greenleaf on Evidence, section 197: "Acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. And whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or speak, but such also as would properly and naturally call for some action or reply, from men similarly situated."

If a statement be made in the presence of one accused, or otherwise sought to be charged with its truthfulness, and he denies it, there can be no sort of doubt that the whole occurrence is incompetent as evidence against the latter. It would be a most dangerous thing to allow evidence to be manufactured in such way. For, if both the statement and the denial were admitted, the jury might elect to discredit the veracity of the accused, while nothing appearing against that of the person who had made the statement, it would be believed. The result would be to convict or charge one upon what a witness said somebody else not under oath said of the matter. It needs no elaboration to show that at the common law such evidence is, generally, not receivable.

What another may have said, though in the presence of the accused (not forming a part of the res gestæ), is immaterial except it be a fact that the accused by admitting the statement to be true, made it his statement by adoption. It is at war with every principle of the law of evidence as administered in this country and England, to admit it on any other ground. When, therefore, it appears that the accused did not adopt the statement as his own, from whatever cause, it ought not to be admitted at all. It is not material in the analysis of this rule that the statement may in fact be true, or that it can not be otherwise proven. The sole inquiry is, did the person attempted to be bound, actually admit it, voluntarily and understandingly; is it evinced that by an action of his mind he in effect likewise declared the fact to be as stated? If not, then the matter is incompetent for any purpose as evidence against him. These may be stated as requisites to the admission of such evidence: First, did the person to be bound by the statement hear it; second, did he understand it; third, did he have an opportunity to express himself concerning it; fourth, was he called upon to act upon or reply to it. If the circumstances attending the statement were such as to show either that he did not, or from whatever motive, probably did not intend to commit himself at all on the subject, then it would be doing violence to the fact and serving a most unsafe practice, to allow an inference to the contrary to be drawn from his silence.

The accused in this instance was in custody, manacled, and being hurried to jail, charged with a heinous crime, justly arousing the indignation of the communiuty. Surrounding him was a crowd of curious people, whose motives for being present may have been interpreted not unreasonably by one so situated as the prisoner was, as inimicable to his personal safety. Without an opportunity to consult counsel, beset by fears and misgivings, possibly stricken by a consciousness of guilt, and ignorant of a proper course to pursue, was not the natural thing for him to do to keep silent? No part of the conversation was addressed to him. He was not asked to answer. Nor was he bound to have done so, even if asked, no matter by whom. One can not be compelled, when not offering himself as a witness in his own defense, to give evidence in court tending to incriminate himself. Much less should he be compelled to do so out of court. If silence in such case is evidence of guilt, then one charged with crime must, under penalty of himself creating most damaging evidence against himself in support of the charge, enter into a controversy of words with every idle straggler who may chose to accuse him to his face. He must parry every cross-examination attempted by every self-appointed questioner; he must, though not addressed, continually shout a denial of every fugitive statement tending to implicate him that may reach his ears. He must hazard answering accurately every statement so made, or have his silence construed as evidence of his having admitted not only what the witness then said, but possibly now says was then said.

Courts have been called upon to apply such facts to that part of the rule above quoted, which says that the accused must not only have an opportunity to respond to the statement sought to be fastened upon him as an admission, but that the circumstances must be such as "naturally and properly called for some action or reply, from men similarly situated."

One of the earliest and most thoroughly considered cases bearing upon this subject, and one which is a leading case thereon, is that of Commonwealth v. Kenney, 14 Metcalfe (Mass.), 235. The accused in that case was charged with having stolen and carried away a bag of money, the property of one Russell. When the prisoner was brought to the police station, Russell, named in the indictment as having been robbed, came in crying, and said "that man," pointing to the defendant, "has stolen my money." A bag which the prisoner had secreted after he was taken to the station house, was found, whereupon Russell immediately said "that is my bag," and as the money was counted, said: "That is all the money I had in the world." The defendant was present and heard all these statements and made no response. Chief Justice Shaw, in delivering the opinion of the court, after stating the rule as announced by Greenleaf above, added: "If (the statements be) made in the course of any judicial hearing, he could not interfere and deny the statement. It would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. So, if a matter is of something not within his knowledge, if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence, then no inference or assent can be drawn from his silence."

The court added: "The circumstances were such, that the court are of opinion that the declaration of the party robbed, to which the defendant made no reply, ought not to have been received as competent evidence of his admission, either of the fact of stealing, or that the bag and money were the property of the party alleged to be robbed."

The Supreme Court of Alabama in Bob v. State, 32 Ala., 560, had occasion to consider the same question. The prisoner in that case, who was a slave, was indicted for an assault with intent to kill Thomas Curtis, a white person. Bob was called into his master's house, in the presence of his master and mistress, with several neighbors who had assembled, when the measure of tracks found at the scene of the shooting was applied to his shoes which he was at that time wearing. On applying the measure it was found that it fitted his shoes in every particular. Several of those present exclaimed that they were the shoes that made the tracks, to which exclamations the prisoner made no reply. The court said: "The implication of admissions from silence rests upon the idea of acquiescence. * * * It never applies, unless an acquiescence in what is said can be presumed. Neither reason nor law will permit the presumption of acquiescence to be drawn from silence, unless the circumstances were not only such as afforded the party an opportunity to act or speak, but such also as would properly and naturally call for some action or reply from men similarly situated." (Citing authorities.) Resuming: "The exclamation was not addressed to the accused. It was made by white persons, in the presence of his master and mistress, and in a room of their house. It was rather an emotional expression, demanding no reply. Such an expression, made in such presence, by such persons, and in such a place, did not properly and naturally call for a reply from the accused slave."

A comparatively recent work on the law of criminal evidence (Rice on Evidence), treating of the demeanor of the accused when under arrest, and

the effect of his silence, says: "What a third person says in the presence of a person charged, is admissible against him if he remains silent. His silence must be taken as an acquiescence in its truth." (Citing numerous authorities.) Further: "Still, it is a familiar elementary principle, that silence, when the accused is under no restraint, and at full liberty to speak, may sometimes be regarded as a tacit admission." (Section 318.)

What are called admissions in civil actions, in criminal law are called confessions. The terms are synonymous under this rule of evidence. The author last quoted says at the close of section 318: "In closing my observations upon this subject, it may be well to say that all confessions are prima facie involuntary and inadmissible." (Citing authorities.) "Nor are confessions presumed to have been voluntarily made when the party making it is restrained of his liberty, or is in immediate apprehension of great bodily harm."

The question whether the statement sought to be introduced was voluntarily made and under such circumstances as to constitute it evidence against the accused, is one primarily for the court (Commonwealth v. Kenney, supra Hudson v. Commonwealth, 2 Duv., 531), which, if admitted, then become matter to be weighed by the jury. In this State it has been twice before held that silence of one accused under such or similar circumstances is not evidence of guilt. (Jackson v. Commonwealth, 100 Ky., 239; Porter v. Commonwealth, 22 Ky. Law Rep., 1657.)

Other cases in other jurisdictions which show the law to be as herein stated are: Lawson v. State, 20 Ala., 65, 56 Am. Dec., 182; Wilkins v. Stidger, 22 Cal., 231, 83 Am. Dec., 64; Pierce v. Goldsberry, 35 Ind., 317; Whitney v. Houghton, 127 Mass., 527; Commonwealth v. Walker, 13 Allen (Mass.), 570.

3d. The instructions as given by the court, except the one bearing on the statements above discussed, and which we hold were improperly admitted, seem to fairly embrace all the law applicable to this case.

But for the reasons indicated the judgment of the circuit court must be reversed and cause remanded for a new trial not inconsistent herewith.

The whole court sitting.

RICH v. WOODS, &c.

(Filed October 26, 1904—Not to be reported.)

Street improvements—Sewers—Frontages—Separate assessment for each street—Under Kentucky Statutes, section 3105, providing that "the general council shall have power to construct sewers along or under any of the streets, alleys or highways of the city, and may assess the entire costs, including intersections, of constructing the same, to an amount not to exceed $1 per front foot of the abutting property upon said streets," etc.; where a lot fronts on more than one street, the fact that it has been assessed $1 for a sewer on one of the streets on which it fronts, does not exempt it from as many similar charges as it has frontages upon streets or alleys of the city.

Robert C. Simmons for appellant.

F. J. Hanlon for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant owned a lot fronting on Pike street and extending through to 11th street in the city of Covington. Heretofore her lot had been assessed $1 per front foot on 11th street for the construction of a sewer along that street. Recently the city, by ordinance, regularly passed, provided for the further improvement of Pike street by the construction of a sewer along that thoroughfare at the expense of the owners of adjoining lots, but not to cost more than $1 per front foot of the property adjoining the way so improved. The work has been done in accordance with the ordinance and contract, and this suit is by the contractor to enforce his lien against appellant's property for the sum apportioned against it.

Appellant contends that under the statute the maximum amount for which her lot is liable for assessment for sewer purposes, is $1 per front foot in the aggregate; that when this sum is reached, the lot can never again be subjected to the expense of further aiding in the building of sewers on the particular street or any street upon which it may abut. The statute under which the city gets its authority in this case is section 3105, Kentucky Statutes, containing this language: "The general council shall have power to construct sewers along or under any of the streets, alleys, or highways of the city, and may assess the entire cost, including intersections, of constructing the same to an amount not exceeding $1 per front foot of the abutting property upon the lots and lands abounding or abutting upon said streets," etc.

In view of the fact that many lots do abut on two or more streets, and are enhanced in utility and consequently in value by the multiplied public improvements accessible to them, it could scarcely have been contemplated by the legislature that for some of these the adjoining lots should bear the expense of construction, but for others of precisely the same nature they should not. The scheme adopted for the original construction, and in many instances for the reconstruction, of all public ways in the cities of various classes in this Commonwealth, is exactly contrary to appellant's theory in this case. Whether the improvement be the carriage way, sidewalk or sewer —all of the same general public benefit, but particularly valuable to the real property immediately adjacent thereto—the plan is to have it done by the public authority at the expense of the adjoining or adjacent lands. To avoid spoliation, it is provided that if the cost exceeds a certain amount or proportion of value, it shall be borne in whole or in part by the municipality. A lot fronting on two streets has more advantages, and consequently more value than if it fronted on one only. As equality of public burdens is a cardinal consideration in their imposition, it must follow that the lot that gets twice as much advantage from a public improvement as another must pay twice as much of the cost of the improvement as the latter. The basis of advantage is necessarily more or less arbitrarily fixed, yet approximate equality at least is attained by the adoption of either the front foot theory, or that of the square feet of a given area. Public sewers are as much necessities in cities as are public streets and sidewalks. It is not supposed that a given lot is the sole beneficiary of a street improvement made fronting it. Indeed it may in fact derive actual benefit of but a small share, comparatively, of the value of the improvement. Nevertheless, it is deemed, and

now generally accepted, that such improvements do enhance the value, and add to the enjoyment not only of all the abutting lots, but to the whole neighborhood, thereby reflecting an additional value upon all property brought into more general use and demand by its presence. Perchance an owner may not want to improve his lot; may prefer, for example, to raise potatoes upon it; for which improved roadways, sidewalks and sewers would be utterly useless. But he could not be allowed to stand athwart the well-being of the community, however he may want to use his property. The proximity of neighbors devolves the obligations of neighborship, as found in the law of municipalities. He must bear in part the burdens necessary for the welfare of the whole, every other person similarly situated bearing proportionable shares. If his lot, then, fronts on two or more streets, each of which must needs be improved as a whole, or for a considerable distance passing his property, he must contribute ratably with his neighbors in doing the work, although as a matter of fact some part of the work can not be shown to be of actual and direct benefit to his abutting property. While all taxation must be for public purposes, and is bottomed upon the idea that it is used for the advancement of the public good, it is never required that before a tax can be valid against a particular taxpayer it must be shown that he derives personal benefit from it. Constructing sewers and like public improvements in a city at the expense of adjoining lot owners is a species of taxation. The validity of the tax imposed is to be tested not by individual benefits to specific taxpayers or their property, but by the general purpose of the law under which it is imposed, and the relative ratio of tax exacted to the value of the property upon which it is levied. The general scheme of such public improvements in municipalities gives a clear meaning to the words of the statute quoted above—which is, that each lot fronting on public streets or alleys may be charged with a share of the cost of building sewers along any street fronting it, but providing that no sewer shall impose a cost of more than $1 per front food to each abutting lot. The lot is liable, under the same limitation, to as many similar charges as it has frontages upon streets or alleys of the city.

The public necessity (and it is solely a question of public, not individual necessity), is left to the discretion of the municipal legislative body. The benefit to all the property along the street so ordered to be improved, as well as the public necessity, is conclusively deemed to exist when the municipality, in the manner allowed by statute, has ordained the work to be done; that appellant's lot is unimproved, or of such grade as that at present the sewer is of no use to it, are matters wholly aside. The sewer is not only available to this lot when improved, thereby bringing it a new value for that reason, but the health, and welfare of the whole city, particularly of that neighborhood, are by reason of it brought up to a higher grade, from which the lot in question will derive an additional value.

The ordinance providing for the improvement directed the city engineer to fix the grade of the sewer; that is not a delegation by the council of its functions. The fixing of the grade of a sewer is more executive than legislative, and may well, and doubtless in most cases, should be, left to the engineering department. Bids were received upon the work, after the grade was so fixed, and in conformity therewith. This was not irregular.

Judgment affirmed.

INDUSTRIAL MUTUAL DEPOSIT CO.'S RECEIVER v. TAYLOR.

(Filed October 26, 1904.)

Receivers—Insolvent corporation—Authority—The receiver of an insolvent corporation appointed in equity to wind up its affairs for the benefit of its creditors, may impeach or repudiate illegal or voluntary transfers and conveyances of its property, and sue to recover the diverted assets, even though the corporation itself might not be allowed to do it.

B. T. Southgate and James G. Denny for appellant.

Hobbs & Farmer for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant's petition was dismissed on demurrer. He alleged that he had been appointed and qualified as receiver of the Industrial Mutual Deposit Co. in an equitable action pending in the Fayette Circuit Court, and by order of that court directed to sue to recover all money and property belonging to the corporation, or which it has paid out during the past six months. It was alleged that the corporation was insolvent at the time of the appointment of the receiver, and had been for six months prior. The nature of the action in which the receiver was appointed does not appear, other than it was a suit in equity against an insolvent corporation.

The cause of action set up against appellee by the receiver in this suit is to recover certain sums from appellee alleged to have been paid to him as a creditor of the corporation during the six months next before the suit was filed, paid while the corporation was insolvent, and to prefer appellee over others of its creditors, in contemplation of its insolvency. The demurrer is said to have been sustained upon the idea that the receiver could not maintain this action. At the common law preferential payments by a debtor to his creditor even in contemplation of insolvency were not illegal. They were not only good as between the parties, but as against the debtor's other creditors. By statute in this State, section 1910, Kentucky Statutes it is enacted that every sale, mortgage or assignment made by debtors, and every judgment suffered by any defendant, or any act or device done or resorted to by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion, in whole or in part, of others, shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the benefit of all his creditors (except as otherwise therein provided) in proportion to the amount of their respective demands, including those which are future and contingent. By section 1911, Kentucky Statutes, all such transfers are declared to inure to the benefit of creditors generally, subject to the control of courts of equity upon the petition of "any person interested" filed within six months after the preferential act. The title of the chapter in which these sections are contained is "Fraudulent and Preferential Conveyance." Whether or not it be fraudulent for an insolvent in contemplation of his insolvency to prefer one of his creditors to others, it is to say the least of it, regarded by the statute as an unjust act, and its intended effect is frustrated by operation of the law. It is illegal, because it seeks to do what the statute is aimed to

prevent. It is not accurate to say it is valid till attacked. On the contrary, it is invalid as to creditors from the beginning, and continues to be until the action for relief from it is barred by the statute, just as fraudulent conveyances, under the first article of the chapter are invalid, till by the lapse of time a bar is interposed to suits to avoid them. In each transaction, it is good as between the parties to it, as the saying is, not because it is favored by law at all, but because the law will not lend itself to relieve either party from his own fraudulent or culpatory act.

It does not appear whether the receiver of this insolvent corporation was appointed in a suit brought pursuant to sections 1911-1912, Kentucky Statutes, allowing actions by any one in interest to be begun within six months from the preferential act. If he was, then by section 1918, he is expressly authorized to maintain an action to recover from the creditors and other persons of the insolvent, moneys paid out within six months of the cause of the original action. It may be fair, however, in the absence of allegations showing affirmatively such right in the receiver, to construe his pleading, wherein it is silent, as not bringing him within those provisions.

The question then recurs, can the receiver of an insolvent corporation, appointed in a liquidation suit against the corporation, to conserve its assets, maintain an action, when ordered by the court appointing him to bring it, against the corporation and its creditors whom it has in spite of the statutes above cited, preferred over other creditors in contemplation of its insolvency? Admittedly the corporation could not maintain the suit. But the receiver represents more than the corporation. For certain purposes he represents it, too. But the very purpose of his appointment was to bring into play rights hostile to the continued existence of the corporation. He represents the State, as well as the creditors and stockholders of the corporation. Wherein their rights, and those of the corporation as a legal entity are in conflict, he peculiarly represents creditors and ultimately stockholders. If the corporate officers have fraudulently or illegally diverted its funds, so that they have been made to flow in different channels from their lawful ones, tending to the loss of its creditors or stockholders, it is his business to reclaim them; to carry out the legal obligations of the corporate contract to creditors and stockholders to fairly and justly administer its assets to the liquidation of their lawful demands. Every corporation impliedly agrees with every person becoming its creditor, that it will observe the laws of its existence enacted to secure the certain payment of its debts, and will honestly apply its assets to that end. Its breach of this implied undertaking is actionable if damage flows from it to any creditor. When the nature of the breach is such that it affects the rights of all creditors, of course all are entitled to the same remedy. But, where those primarily appointed to conserve the rights of creditors, namely, the directors, and then stockholders, have refused or fail for such time as to amount to their refusal to bring appropriate action, or have themselves so acted that they can not bring it, to recover the diverted assets, manifestly some remedy is open to the injured creditors The one most direct, simple and efficacious, is that of appointing a receiver for the recreant corporation, who will do what it will not or can not do, and which its creditors under the law are entitled to have done, to wit, administer its assets so as to carry out the

original agreement implied in its organization, and to pay them out ratably to all equally entitled to them. This is the practice in nearly every jurisdiction in this country. The adjudged cases allowing the receiver to maintain such actions are well nigh unanimous. Consequently it is held that the receiver of an insolvent corporation, appointed in equity to wind up its affairs for the benefit of its creditors, may impeach or repudiate illegal or voluntary transfers and conveyances of its property, and sue to recover the diverted assets, even though the corporation itself might not have been allowed to do so. As the receiver in that case acts for the creditors, his action, to every intent, may be deemed theirs for that purpose. For that reason it is generally held that where a receiver has been appointed and authorized to act in recovering such property, the creditors may not do so. We are unable to distinguish between the principle which allows a receiver to maintain such an action to recover property fraudulently disposed of by the corporatoin in violation of the rights of its creditors, and one to recover property which by reason of our statute against preferences in contemplation of insolvency, holds the property so disposed of subject to all the debts of the insolvent debtor, if the conveyance be attacked within six months from its occurrence or of its being recorded. In each instance the act of the insolvent corporation (which it itself could not avoid) is impeached by the representative of all the creditors, acting in their behalf.

The following cases selected from a great number will fairly illustrate the extent of the principle on which the action is allowed: (Peabody v. New England Water Works Co., 184 Ill., 625; 75 Am. State Rep., 195; Franklin National Bank v. Whitehead. 149 Ill., 560; 63 Am. State Rep., 312; National State Bank v. Vigo Co. National Bank, 141 Ind., 359; 50 Am. State Rep., 330; Mandeville v. Avery, 124 N. Y., 376; 21 Am. State Rep., 678; Porter v. Williams, 9 N. Y., 142; 59 Am. Dec., 519; Scovitt v. Palmer, 8 N Y., 19; 51 Am. Dec., 333 note).

It is stated in argument that the learned circuit judge felt constrained by the opinion of this court in Ray, Receiver v. First National Bank of Louisville, 23 Ky. Law Rep., 717, to decide that the receiver could not maintain this action. Toward the close of that opinion there appears an expression seeming to negative such right in the receiver. It is not clear that this court intended to decide that point if it was involved in the case. Certain paragraphs in the petition which seem to have been treated by the pleader and the court of minor impotance, may have raised some such question, but they were stricken out by the lower court. This court did not discuss the action of the lower court in compelling the election between the paragraphs of the petition. The sole question decided was whether the paragraph which was selected by the appellant as containing its cause of action was sufficient. It was alleged that the bank and the defunct insurance company had entered into an unlawful conspiracy to deceive the insurance commissioner of Kentucky, by the bank's falsely certifying that the insurance company had on deposit with it a certain amount of money so as to show it to be solvent, and to get the commissioner's consent for the company to continue business, and that in pursuance the bank did falsely certify that the insurance company had over $200,000 on deposit, whereby the company was licensed to engage in its business of taking insurance obligations, and

became involved to creditors more than it could pay by some $300,000, and in consequence failed; that a part of this scheme was effectuated by the bank's pretending to loan a certain sum, about $60,000, to the insurance company, but which was in reality not done, the pretense being for the fraudulent purpose of aiding in the deception alluded to. The receiver was appointed to wind up its affairs, and was authorized to bring suits to recover its property, etc. The receiver sued to compel the bank to pay over to him for the benefit of the insolvent insurance company's creditors the $60,000 pretended to have been loaned to it by the bank. The sharp distinction between the cases is this: In the Ray case the receiver was suing to recover something that the corporation for which he was appointed, never in fact owner, and never in truth had any right to recover from any one. Here, the receiver sues to recover property that the corporation did own, and which it has illegally diverted. While it is true the receiver of a corporation in liquidation in equity represents its creditors as against it and those liable to it, his rights are such only as are derived through the corporation. They are confined to such as the corporation at one time had, and by reason whereof the creditors had also a right therein. But where persons have ground of complaint against another for fraudulently inducing them to credit a corporation, or for giving it fictitious standing, their right of action is in no sense corporate property, and never was. Consequently it could not pass either to the coproration's assignee or receiver.

The judgment of the circuit court is reversed and cause remanded, with directions to overrule the demurrer to the petition, and for further proceedings not inconsistent herewith.

Whole court sitting.

GERMAN PROTESTANT ORPHAN ASYLUM v. BARBER ASPHALT PAVING CO.

SAME v. FIGG.

(Filed October 26, 1904—Not to be reported.)

1. Street Improvement—Squares—Meaning of statute—Principal streets—Under Kentucky Statutes, section 2833, it is not meant by the statute that the squares are rectanuglar figures, or having figures of uniform shape or size. Whenever territory is bounded by "principal streets" it is a square in the meaning of the statute.

2. Same—The fact that one square, contiguous to a way ordered to be improved, is small and one on the opposite side is large, in nowise detracts from the mandatory requirement of the statute as to the apportionment of the cost of the improvement of the highway abutting on them, nor is that fact repugnant to its constitutionality.

Whether the squares are large or small is not material, for the cost is not upon the square, but upon the number of square feet in the lot within the taxed territory, whether contained in a big or little square.

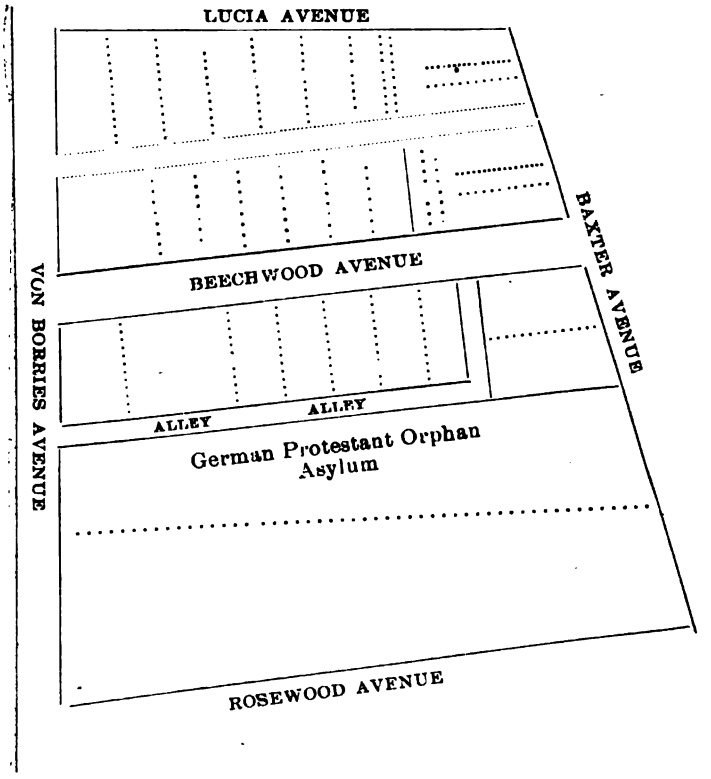
Lane & Harrison for appellant.

Wm. Furlong and J. L. Woodbury for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge O'Rear.

Appellant owns a lot of land as shown on the subjoined map:



The city of Louisville by ordinance regularly adopted, provided for the original construction or improvement of Beechwood avenue from Von Borries avenue to Baxter avenue, at the expense of the abutting property. Section 2883, Kentucky Statutes, is: "When the improvement is the original construction of any street, road, lane, alley, or avenuue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square to be equally apportioned by the board of public works, according to the number of feet owned by them, respectively. * * * Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square."

In this instance the city ordered the cost apportioned among the owners of lots in each fourth of a square, according to the number of feet owned by them respectively. The section above quoted from, further provides that if the contiguous territory be not defined into squares by principal streets, the ordinance providing for the improvement, shall fix the depth on both sides and fronting the proposed improvement to be assessed for the cost on making the same. The contest in this case is whether the territory contiguous to Beechwood avenue is defined by squares within the meaning of the stat-

ute. Appellant insists that it is not. It is not meant by the statute that squares are rectangular figures, or having four sides, or figures of any uniform shape or size. Wherever territory is bounded on all sides by "principal streets," it is a square within the meaning of the statute, though, of course, there may be territory of that description of such size as to indicate that it had not yet been divided by the city into squares at all. (Cooper v. Nevin, 90 Ky. 85.) In which event it would fall within the latter part of section 2833. The sizes and shapes of city squares do in fact vary materially. They are matters beyond the purpose or power of the courts to control. The fact that one square contiguous to a way ordered to be improved, is small, and the one on the opposite side is large, in no wise detracts from the mandatory requirement of the statute as to the apportionment of the cost of the improvement of the highway abutting on them, nor is that fact repugnant to its constitutionality. Whether the squares are large or small, is not material, for the cost is not upon the square, but upon the number of square feet in the lot within the taxed territory. If the lot is small, the cost imposed on it is the same whether it is contained in the big or little square. This in uniform taxation.

The territory in which appellant's lot is situated is bounded on all sides by principal streets. The evidence in this case shows this to be a fact. The square is larger than the average, but it is not of a size to warrant us in saying that the city has not yet determined that it shall remain as a square in its present form. Counsel for appellant urges that as in Schuster v. Barber Asphalt Paving Co., 24 Ky. Law Rep., 2346, and Snyder v. Same, Ibid., 2348, this court found as a matter of fact that this identical territory was not bounded on all sides by principal streets, we can not now say that it is. From the opinions referred to it will be observed that neither decides the fact to have been that the territory was not so bounded, but that it did not appear from the records that they were; that appellants in those cases were attacking the validity of the ordinances, and had not made it appear that they were invalid. But in each of the cases, the opinions were rested upon the idea that although the territory was in fact so bounded, each of the appellants by virtue of the fact of which he complained had not been injured, but benefited; for, if it had been as they said it was, their assessments would have been more than twice as much as it was adjudged to be. But, beyond all this, even if it had appeared in those cases that the territory was not contained in a square, that would not preclude the court in these cases, not between the same parties, from deciding that it was, when this ordinance was passed, if it was in fact.

In Snyder's case the reason is not stated for doubting whether the territory was bounded by principal streets. In Schuster's case it was. The reason given is, that Von Borries avenue at that time was not shown in that record to have been received by the city, though dedicated to the public use, a proposition not necessarily dependent upon the statutes of 1902. In these cases it is shown that Von Borries, Baxter, Lucia and Rosewood avenues all had been so accepted and improved, or ordered to be. Territory may not be bounded by principal streets one year and yet be bounded by them the next, without the two propositions being inconsistent.

The judgment of the circuit court being in conformity herewith is affirmed.

ALLEN AND ALLEN v. COMMONWEALTH.

(Filed October 26, 1904—Not to be reported.)

1. Homicide—Evidence — Competency— Statement of accused before the killing—On the trial of four brothers jointly indicted for murder in the alleged assassination of Dulaney Peters from ambush, it was competent for the Commonwealth to prove that two of the accused brothers told the witness a few days prior to the killing that they intended to kill deceased, and to put carbolic acid and Japanese oil on their shoes so that blood hounds could not follow their trail.

2. Blood hounds—Training—Effort to trail—Error in admitting—Withdrawal—Effect—Evidence of an effort to trail persons, charged with crime, by blood hounds, is not admissible unless it be shown that the dogs were of pure blood and had been well trained in the tracking of human beings; but where such evidence was admitted on the trial and was afterwards withdrawn by the court by proper admonition to the jury, Held—Not to have prejudiced the trial of the accused.

3. Fire arms—Skill of accused in use thereof—Evidence that the accused were skilled in the use of rifles was competent, where it was shown that out of six shots heard fired from the place of ambush, three of them took effect, the distance being considerable from where deceased was killed.

4. Improper question—When four defendants were being tried together for murder, one of them was asked by the attorney for the Commonwealth: "If you, Dan, Bob and Sam, had arranged for Dan and Bob to go and kill deceased by shooting him from ambush, and they had killed him in that way, would you admit it on the witness stand?" Held—That such a question was insulting to the witness, unnecessary and improper.

John C. Eversole for appellants.

N. B. Hays and Loraine Mix for appellee.

Appeal from Owsley Circuit Court.

Opinion of the court by Judge Settle.

The appellants, Robert Allen and Daniel Allen, were, together with Joseph Allen and Samuel Allen, indicted in the Owsley Circuit Court for the crime of murder, it being charged in the indictment that the four defendants entered into a conspiracy to murder Delaney Peters, and in pursuance thereof did commit the crime by willfully, feloniously and with malice aforethought, shooting and killing him.

The parties were tried together, which trial resulted in the acquittal of Joseph and Samuel Allen, and the conviction of Robert and Daniel Allen, the punishmment of each of the latter being fixed by the jury at confinement in the penitentiary for life.

The appellants urge a reversal of the judgment of conviction upon the following grounds: First, that the trial court erred in admitting incompetent evidence; second, in failing to properly instruct the jury; third, the verdict is contrary to the law and the evidence. It is disclosed by the record that Delaney Peters was fired upon and killed from ambush, June 25, 1903, at 6 o'clock in the evening. Though the six or seven shots that were fired at Peters at the time he was killed were heard by several persons, it appears that the concealed assassins were the only eye witnesses to the tragedy, but the place from which the shooting was done was sufficiently

identified by the evidence as being behind a chestnut log in the woods near the home of one Wilson, in whose yard Peters was shot, for several empty cartridge shells, such as are used with a 38 Winchester rifle, were there found, and the ground at that place had the appearance of having been trampled by more than one person. The evidence also showed that the wounds of which Peters died were inflicted by 38 Winchester rifle bullets; that the appellants, Dan and Robert Allen, each owned and habitually carried a Winchester rifle of that caliber, and that both were highly skilled in the use of that weapon.

The evidence also conduced to show that they treasured an animosity for Peters, who was, at the time of his assassination, under indictment in the Owsley Circuit Court for the murder of John Allen, their brother, and each of them had been heard to make threats against Peters.

Martha Fox testified to seeing two men with guns, whom she took to be appellants, about a quarter of a mile from the place of the killing a half hour before it occurred.

George Begley testified that he worked at Joe Allen's with him, Sam Allen, Beck Beard and Mary Allen hoeing corn during the day on which Peters was killed, being hired by the Allens to work that day; that on the previous Saturday at Stephen Green's, the appellant, Dan Allen, took him to one side and told him he knew how he could make $8 easy, but did not then tell him how. On Tuesday following, near Joe Allen's house, he (Joe Allen), in the presence and hearing of appellants and the witness, Begley, said: "There is a man in this country that ought not to be allowed to live;" the witness asked who, and he answered, "Delaney Peters." Joe then said, "if I would hoe corn with them all day and swear that Bob and Dan Allen were in the field with them at work all that day, they would go kill Delaney Peters, and it would never be found out, and he would give me $8 for it. I told him if I were to do that, I would see Peters every night when I go out. Bob Allen said there was nothing in that, that he had killed Jesse Neeley, and he had never seen him. Dan said he could drink a quart of Delaney Peters' blood. On the next day I was sick, and tried to get off; Dan said I had better do that, there would be no trouble about it, that Allen Hyden was killed, and it was not found out. I took the money and agreed to work the day Delaney Peters was killed and swear that Bob and Dan were in the field at work that day, and Joe Allen said tell Bob to get the carbolic acid and Japanese oil to put on their shoes so a blood hound could not track them. The next morning I went back to work, that was the day Delaney Peters was killed. Joe Allen and Sam Allen said Bob and Dan had gone to kill him. We hoed corn all day. I did not see Dan or Bob Allen that day, they were not in the field with us at work that day Delaney Peters was killed."

Mollie Begley, the wife of George Begley, testified that on the day Peters was killed she went in view of Joe Allen's field where he, his brother Sam and George Begley were at work, to see her husband, and that neither Bob Allen nor Dan Allen were there.

Mollie Price and Emma Smith testified that about five weeks before Peters was killed, the appellant, Robert Allen, told the Price girl that he intended to kill him, and showed her some cartridges.

It was proved by Burgoyne Botner that he and his father own a store, and that a short time before the killing of Peters he sold the appellant, Robert Allen, some Japanese oil. Proof was also introduced by the Commonwealth to show that an effort was made on the day after Peters' death to track the assassins with a blood hound, but that the hound seemed unable to find the trail.

The testimony of Martha Fox, Mollie Begley and Sarah Gum, as well as that of other witnesses, tends to corroborate that of George Begley, who was accused of being an accomplice of the Allens in the murder of Peters, in that it conduces to show that appellants were not at Joe Allen's at the time Peters was killed, and that of Botner as to the purchase of the Japanese oil by the appellant, Robert Allen, also corroborates Bagley's testimony to the effect that he had been told by appellant of his purpose to get the oil and his object in doing so. The evidence introduced for the appellants and their co-defendants was largely directed to the proving of an alibi. Each of the defendants in testifying, denied his guilt, and negatived in detail all the facts brought out by the prosecution, but their witnesses, with two exceptions, were members of the Allen family. Upon the close of the evidence, in behalf of the defendants, nine witnesses were introduced in rebuttal by the Commonwealth to impeach the defendants, and the entire number testified, without contradiction from any source, that they were persons of bad reputation. As there was evidence tending to establish the guilt of appellants, we can not disturb the verdict or judgment. Complaint is made by appellants that the court allowed W. B. Peters to testify that efforts were made to trail the assassins of Peters with a blood hound, and that though the court, after its introduction, attempted to exclude this testimony from the jury, it was of such a damaging character as to make it impossible for the jury to disregard it, for which reason the court should have granted appellants a new trial.

In Pedigo v. Commonwealth, 103 Ky., 50, it is said: "After a careful examination of this case by the whole court, we think it may be safely laid down that, in order to make such testimony competent, even when it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a trail which such circumstances indicate to have been made by him. When so indicated, testimony as to trailing by a bloodhound may be permitted to go to the jury for what it is worth, as one of the circumstances which may tend to connect the defendant with the crime of which he is accused. When not so indicated, the trial court should exclude the entire testimony in that regard from the jury."

No evidence was introduced to show that the bloodhound attempted to be used in trailing the assassins in this case measured up to the requirements

enumerated in the opinion of the court in the case supra, consequently the testimony of the witness, W. B. Peters, should not have been admitted by the court. But having admitted it, the only course for the court to pursue, after discovering its incompetency, was to exclude it, as was done. In excluding it, this language was used by the court: "Gentlemen of the jury, I am satisfied the court erred in admitting you to hear anything about a so-called bloodhound being taken to the place it is said the shooting occurred. And now I tell you not to consider the evidence for any purpose against defendants or either of them, nor anything about the dog at all offered by the plaintiff, because it is incompetent."

We think this admonition of the court was explicit enough to impress upon the jury the impropriety of their considering this testimony for any purpose whatsoever, and we are unable to see that appellants were prejudiced by its introduction, or by the failure of the court to sooner exclude it.

In Pearce v. Commonwealth, 10 Ky. Law Rep., 180, the court said: "The copy of an indictment for killing Thomas against appellant and others which was in the Bell Circuit Court, though improperly admitted to the jury, was subsequently and before the conclusion of the evidence for the Commonwealth, withdrawn by the court, and the jury was told they had no right to consider it for any purpose in making their verdict, we have no right, therefore, to presume that appellant was prejudiced by the reading of the indictment; for to do so requires the assumption that the jury disregarded their duty in their oath to try the accused, according to the evidence." (Tully v. Commonwealth, 13 Bush, 142.)

The evidence shows that nothing was done by the bloodhound in this case, as the rain of the night before had completely obliterated the tracks and destroyed the trail of the assassins.

The admonition of the court to the jury in regard to the inadmissibility of the testimony as to the dog, did not exclude from the consideration the testimony of George Begley, as to what was said by Robert and Joe Allen about the former's procuring the Japanese oil for use on his and Daniel Allen's feet, to prevent their being tracked by a bloodhound after killing Delaney Peters, and whether an attempt had been made to employ the services of the bloodhound, or not, the fact that appellants seemed apprehensive that such an attempt would be made, and their purpose of thwarting it by the use of the oil, was competent as tending to corroborate the testimony of Begley that they were the guilty parties.

It is also insisted that the testimony of Stephen and Sarah Gum to the effect that appellant kept four guns, habitually carried their Winchester rifles, practiced at targets and excelled in marksmanship, should not have gone to the jury. This testimony was not introduced to impeach appellants, as their counsel seems to think. It was, however, admissible for the Commonwealth to show appellants skilled with the rifle, and the pertinancy of this testimony can better be understood when we call to mind the facts that Peters was shot from ambush at some distance, and that three out of the six shots fired struck him, and the fourth lodged in a stick of wood he was probably carrying into the house. Only skilled marksmen could so frequently have hit the mark.

We are not certain that the testimony of John Roder objected to by appel-

lants was competent. It was that Joe Allen, under the cliff and on Sunday following the death of Peters, said in the presence of the other defendants and Roder, "he believed it was a man from Breathitt county that killed Delaney Peters, and that if he knew who it was, he would not tell it on them."

The statement was a mere expression of opinion upon the part of the declarant. It raised no implication of guilt upon his part, but might be regarded as showing an unkind feeling toward the deceased, for which reason it was perhaps competent as affecting his credibility as a witness. At any rate, we do not think its introduction was prejudicial to his rights. It is further contended by appellants that it was error to permit the witness, George Begley, to state what was said to him by the appellant, Dan Allen, on Saturday, before the killing of Peters. All that Dan then said was that he could tell him (Begley) how to make $8, but Dan did not then tell him how that sum could be made. In the following week, however, and before the killing of Peters, the witness was told by Dan or Joe Allen, in the presence of all the defendants, that he could make $8 by spending the day on which Peters was to be killed at Joe Allen's, and swearing, if necessary, to the alibi by which appellants expect to escape punishment for the assassination of Peters. There was nothing incriminating in what Dan said in the first communication, and it was only in the subsequent conversation, when the conspiracy to kill Peters was perfected by the participation of all four of the Allens, that his meaning was made plain.

In Roberson's Criminal Law, section 109, it is said: "But the general rule that the conspiracy must first be established prima facie before the acts and declarations of one conspirator can be received in evidence against another, can not well be enforced where the proof of the conspiracy depends upon a vast amount of circumstantial evidence, or a vast number of isolated facts; and in any case where such acts and declarations are introduced in evidence, and the whole of the evidence introduced on the trial taken together shows that such conspiracy actually existed, it will be considered immaterial whether the conspiracy was established before or after the introduction of such acts and declarations. The prosecution may either prove the conspiracy, which renders the acts of the conspiracy admissable in evidence, or may prove the acts of different persons, and thus prove the conspiracy."

We are of opinion that the conversation between appellant Dan Allen and the witness, Begley, was competent, and it was, therefore, properly allowed to go to the jury.

It appears that Joe Allen was asked this question by the Commonwealth's attorney: "If you, Dan, Bob and Sam, had arranged for Dan and Bob to go and kill Delaney Peters, by shooting him from ambush, and they had killed him in that way, would you admit it on the witness stand?" The answer was, "I would not admit the killing of a man in that way on trial."

Substantially the same question was asked each of the other defendants on cross-examination, and to each an answer similar to the one of Joe Allen was returned. These questions and answers are complained of by counsel for appellants. It is apparent that this question and answer amounted to only this; that the witness would not, if he had been wicked enough to commit murder, upon the trial confess the crime, upon his plea of not

guilty. It seems to us that this character of question may or may not affect the credibility of the witness adversely, according to the answer. When the answer is such as that given in this case, the credibility of the witness could not well be injured, such answer being consistent with human experience.

Rice on Criminal Evidence, volume 3, section 228, says: "It is abundantly settled that in criminal prosecutions the rules of evidence accord to the cross-examiner great latitude in any attempt to impeach the character of the witness. * * * A witness may be asked any question which tends to test his accuracy or credibility, or to impair his credit by compromising his character, but the extent to which such examination will be allowed, is in the discretion of the court."

We disapprove of the form and character of the above question. It is insulting to the witness. At most, such a question can add little to the enlightenment of the jury, and might, under some circumstances, unnecessarily harass the timid or ignorant witness, but upon the facts presented by this record we are unwilling to say that the trial court abused its discretion in allowing it to be asked or answered, nor are we able to perceive that the substantial rights of the appellants were thereby prejudiced.

Finally, counsel for appellants complains because the trial court failed to instruct the jury as to the extent and circumstances under which evidence of the acts and declarations of co-conspirators, not made in the presence of others, were to be received by the jury. We do not think such an instruction was necessary in this case, because the conspiracy was fully proved by the testimony of the Commonwealth, and the connection of each of the appellants with that conspiracy also shown by competent evidence, and no act or declaration was proven for which the appellants were not each liable. The instruction defining a conspiracy that was given by the court contained all the law that was necessary for the guidance of the jury on that subject. Indeed, the instructions as a whole presented every feature of the law applicable to the case.

Being of the opinion that no error was committed by the lower court prejudicial to the appellant the judgment is affirmed.

COOK, &c. v. LANDRUM, &c.

(Filed October 26, 1904—Not to be reported.)

1. Husband and wife—Purchase of lots—Deed to wife—Borrowed money—Mortgage to surety on note—Death of wife—Payment of note by surety—Suit against husband—Infant children of wife—Appellant Cook purchased some lots and had them conveyed to his wife, and he and his wife executed a note for money borrowed to pay for the lots, with appellee as surety, and to secure him as surety appellant and wife executed to him a mortgage on said lots. Appellee paid the note, as surety, and took an assignment thereof, and brought suit against appellant and his infant children (the wife having died) to enforce his mortgage lien on the lots. Held—That while the wife, by signing the note with her husband, did not bind her as her husband's surety to the payee of the note, the legal effect was to pledge her property described in the mortgage for the payment of her husband's debt, and at the same time to indemnify appellee as surety for her husband against loss.

2. Staying note—Endorsement on note—Limitation—An endorsement on a note "This note is stayed for twelve months by agreement," in the absence of proof to the contrary, becomes a part of the note and is presumed to have been placed there by consent of the holder as well as the makers, and such extension suspended the statute of limitation as to the surety for the one year.

3. Action by surety—Recital of mortgage—Limitation—Release of surety—Effect—In an action by the surety to subject property mortgaged to indemnify him from loss which he has paid as surety, which mortgage recites that it was given by the appellee and his wife for the purpose of securing the payment of said sum of $148.50, the fact that the surety paid the debt after he was released by limitation from its payment, will not prevent him from enforcing his lien on the mortgaged property for said payment.

4. Demand—In an action by a surety against the husband and infant children of the deceased wife on a note secured by a mortgage given by the husband and wife to the surety to indemnify him against loss, where the surety has paid the debt, no demand is necessary before bringing the suit, the action not being against the personal representative of the wife, but against the property mortgaged.

Little & Slack and W. A. Taylor for appellants.

Joe H. Miller and Samuel D. Hines for appellees.

Appeal from McLean Circuit Court.

Opinion of the court by Judge Settle.

December 2, 1893, the appellant, William Cook, purchased parts of three lots, in Calhoun, this State, of W. H. Wall, at the price of $75, which he caused to be conveyed to his wife, M. E. Cook. In order to pay for the lots and make some improvements thereon, the appellant, William C. Cook, on the same day, borrowed of Mrs. M. E. Cohen $148.50, for which he and his wife and the appellee, B. F. Landrum, executed to her a promissory note, payable December 2, 1894. The name of appellant's wife appears first to the note, and that of appellee last, and it is admitted that the latter was only surety in the note.

On this note are the following endorsements:

"This note is stayed for twelve months by agreement, December 2, 1894.

"Attest: BEN F. LANDRUM."

"I assign this note to R. C. Moseley without recourse on me.

her
"MRS. M. E. x COHEN.
mark

"Attest: BEN F. LANDRUM.

"This January 3, 1896."

"Ben F. Landrum having paid this note in full as surety thereon, I hereby assign same to said Ben F. Landrum, September 2, 1902, G. W. Moseley, executor of the will of R. C. Moseley, deceased."

Also endorsed upon the note appears this credit in pencil: "$50, paid December 10, 1897."

At the time of giving the note the appellant and his wife executed to appellee, Landrum, a mortgage upon the real estate that day conveyed the wife by Wall, to secure the payment of the note and protect the surety against loss, which was at once duly acknowledged by appellant and wife and recorded in the proper office. In 1894, M. E. Cook died intestate, and

later her husband was appointed and qualified as statutory guardian of their infant children.

The note mentioned in the mortgage was, as appears from the endorsement thereon, assigned by Cohen, the payee, to R. C. Moseley, January 3, 1896; Moseley died after that date, and the note was paid by appellee to his executor on September 2, 1902, and he received from the latter at the time an assignment of the note as shown by the writing on the back thereof.

After the payment of the note by appellee, he instituted this action in the court below, seeking to recover against the appellant, William Cook, a personal judgment for the amount thereof, and also to enforce the mortgage lien given him to secure its payment. The infant children were also made parties to the action as heirs at law of M. E. Cook, deceased, and they made defense thereto through their statutory guardian and also by a guardian ad litem.

The petition, as amended, sufficiently sets out the terms of the mortgage, and the demurrers filed thereto were properly overruled by the lower court. In addition to a traverse of the affirmative allegations of the petition, and several amendments thereto, the appellant's pleadings set up the following grounds of defense: That the only object of the mortage was to indemnify the appellee against loss as surety upon the Cohen note, that its payment to the executor of Moseley, assignee of Cohen, was made by appellee more than seven years after the maturity of the note, and after appellee had been released from liability thereon as surety by the statute of limitation, that the note had theretofore been paid by the appellant, William Cook, with money borrowed by him of R. C. Moseley, for which sum so borrowed of Moseley he gave the latter his three promissory notes, payable in one, two and three years after date respectively, and finally that the conveyance by Wall of the lots embraced in the mortgage to M. E. Cook, wife of the appellant, William Cook, was a fraud upon the latter's creditors, in which appellee participated, because of which he should not be allowed to derive any benefit from the mortgage. The judgment of the chancellor gave appellee all the relief sought by him.

From the state of the record it is safe to say that the wife of appellant, William Cook, by signing the note and executing the mortgage in controversy, did not become the surety of her husband to the payee in the note, the only legal effect of the transaction was to bind or pledge her property described in the mortgage for the payment of her husband's debt, and at the same time indemnify appellee as surety for her husband against loss. The same result would have been accomplished if she had executed the mortgage without attaching her name to the note.

In the case of Hobson v. Hobson's Ex'or, 8 Bush, 665, it was said by this court: "The right of a married woman under our statute regulating conveyances to alienate or convey her general estate, even by mortgage, to secure the prior debts of her husband, is now too well settled to admit of doubt."

In Lane, &c. v. Traders' Deposit Bank, 14 Ky. Law Rep., 873, this court also said: "That the case of Hobson v. Hobson's Ex'or, 8 Bush, 665, holds that a married woman does not become responsible as surety by reason of the existence of a mortgage to secure the husband's debt, it is a pledge to

secure the payment only and the right of an ordinary surety can not be urged as a defense, such as a plea of the statutes of limitation, or even indulgence given by a creditor." * * * The same doctrine is announced in Tipton v. Traders' Deposit Bank, 17 Ky. Law Rep., 962; Postell v. Crumbaugh, 23 Ky. Law Rep., 2193; Deposit Bank v. Stitt, 107 Ky., 49; Russell v. Rice, 19 Ky. Law Rep., 1613, all decided since the enactment by the legislature of section 2127, Kentucky Statutes, regulating the property rights of married women.

The latest utterance from this court in regard to the effect of the statute supra, upon the right of a married woman to bind her estate for the debts of her husband, will be found in Hall v. Hall, ante, 553., wherein it is said: "It is impossible now, as it was then, for a married woman to become personally bound as surety for any one; nevertheless, she may now, as she might then, bind her specific estate by an appropriate conveyance or pledge; that did not constitute her a surety; nor could she as against such a conveyance be availed of the provisions of the seven years' statute of limitation for the benefit of sureties."

It is insisted for the appellant, that appellee was released by the seven years' statute of limitation from liability upon the note as surety before his payment of it, and that the mortgage lien was discharged by his release, for which reason it can not now be enforced for his benefit. It appears that the note became due December 2, 1894, on which day the following entry was made on the back thereof:

"This note is stayed for twelve months by agreement. December 2, 1894.
"Attest: BEN F. LANDRUM."

Appellee testified that this endorsement was written by him at the request of appellant, William Cook, and with the consent of Mrs. Cohen, the then holder. It is denied by appellant that it was done at his request, but not denied by him that the entry was made with Mrs. Cohen's consent, and as of the date it bears. If, as contended by counsel for the infant appellants, the testimony of appellee was incompetent as to them, or because of the death of their mother who was the legal holder of the title of the property upon which the mortgage was given, that of William Cook was also incompetent because both Mrs. Cohen and R. C. Moseley, to whom she afterwards sold and assigned the note, were dead at the time he testified. But with the testimony of both these witnesses excluded, it is yet true that the endorsement is upon the note, and it is not only self-explanatory, but must be presumed to have been placed there with the consent of the holder as well as the makers. In other words, it is to be treated as a part of the note, and, in the absence of proof to the contrary, must be presumed to be correct. Besides, its genuineness is to be inferred from the fact that the indulgence therein provided for was actually given, for no attempt was made by the payee, during the year allowed by the extension, to enforce its payment; upon the contrary, the note was thereafter held by Mrs. Cohen for more than a year before its sale and assignment by her to R. C. Moseley. If the extension was valid, limitation did not begin to run as to the surety until the end of the year, and the note was paid by him within the seven years next succeeding the expiration of the extension.

Moreover, it is not reasonable to suppose that appellee in the absence of a

request from the appellant, Cook, to that effect, would, without apparent cause, have voluntarily increased the risk of his suretyship by asking or agreeing to the extension given by the payee.

The question as to whether the lower court properly adjudged appellee entitled to the enforcement of the mortgage lien, should, in our opinion, be determined upon another ground than the one just indicated.

The mortgage, after setting forth the execution of the note to Mrs. Cohen, contains the following covenants: "Now, therefore, we, William Cook and his wife, M. E. Cook, do for the purpose of securing the payment of said sum, together with all interest and costs which may accrue thereon, hereby mortgage and convey unto the said Ben F. Landrum, his heirs and assigns forever. * * * To have and to hold the said property to the said Ben F. Landrum and his assigns forever, provided nevertheless that if the aforesaid, William Cook, and his wife, M. E. Cook, or their personal representatives, pay to said M. E. Cohen, the sum of $148.50 on the 2d day of December, 1894, then this deed of mortgage, and such other writings as may exist as evidence of said debt, shall be null and void, otherwise to remain in full force and effect."

Under the provisions of the mortgage there is no question but that the holder of the note could have subjected the mortgaged property to its payment by suit, even though the appellee, Landrum, had been released as surety by the statute of limitation.

In the case of Magoffin v. Boyle National Bank, 24 Ky. Law Rep., 586, Magoffin borrowed of the Boyle National Bank $10,400, for which he gave a note with his wife and D. C. Tucker as sureties, and he and his wife executed to Tucker a mortgage upon her lands. Two years later Magoffin borrowed from the same bank an additional $1,000, for which a note similar to the first was given, and a second mortgage on the land was executed to the surety, Tucker. There were three renewals of the larger note, which were signed by Magoffin, his wife and Tucker, but after this she refused to sign the renewal notes which were executed by her husband and Tucker from time to time, at intervals of six months, until May, 1895, the interest for six months in advance being included in the new note at each renewal. After this Tucker became bankrupt, and the bank sought by suit to enforce a lien upon the wife's land by virtue of the mortgages executed to Tucker.

The wife defended upon the grounds, first, that the bank had no lien upon her land, and could not be subrogated to the mortgage lien of Tucker; second, she was only surety upon the note, and her land was discharged by the renewals of the note which she declined to sign; third, that the action was barred by limitation. The mortgage in that case, like the one here, was given to secure the debt, as well as to hold the surety harmless.

This court affirmed the judgment of the lower court in favor of the bank, in doing which it said: "Mrs. Magoffin was a stranger to the debts and in no way personally liable therefor, only her land was pledged for their payment. Being a married woman her signature to the note of her husband imposed no personal liability upon her. * * * The language (of the mortgage) pledges the land to the payment of the debt, and the rule is that when the security is given to secure the debt in order to relieve the surety, or to enable the creditor to make his debt, the latter will be subrogated to

the rights of the surety. We, therefore, conclude, that although Tucker has become bankrupt, and is thereby released from the debt, and has paid nothing, still the bank may enforce the mortgage. The proof offered by the wife to the effect that the mortgage was only intended to indemnify the surety, is not sufficient to overcome the language of the instrument itself. * * * Although there is a conflict of authority on the question, it is settled in this State that where a wife executes a mortgage on her property to secure the debt of her husband she does not stand as his surety, and her property is not released by a novation that would release one who is a surety in the note." (Jarboe v. Shively, 107 Ky., 402.)

We think the case supra is so nearly like the one at bar that it leaves no room to doubt the right of the appellee to the relief sought by him in the lower court, if the note in controversy was not satisfied by the appellant before its assignment to appellee. The only evidence in the case to show the payment of the note by the appellant, William Cook, is furnished by his own deposition, which, as to this point, as well as others, was clearly incompetent, for it details a transaction with Mrs. Cohen and R. C. Moseley, both of whom have since died, and being excepted to, it cannot be considered. He, however, testified that while the note was in the hands of Mrs. Cohen, he borrowed of Moseley $150 with which he paid it; that for the money thus borrowed of Moseley he executed to him three promissory notes, one of $55, one of $60, and the other of $65, payable in one, two and three years, respectively, that he thereafter paid on the first note $50, and still later furnished material and did carpenter's work for Moseley to the amount of $40, altogether, for which he seeks credit in this case.

If appellant's testimony as to these transactions with Moseley were competent, we think it is successfully contradicted by several convincing facts and circumstances. In the first place, it is not probable that appellant would have paid to Mrs. Cohen the amount of the note without requiring it to be delivered to him; secondly, it is also improbable that R. C. Moseley would have been allowed by appellant to take an assignment of the note from Mrs. Cohen to himself if it had been paid by appellant; thirdly, if he paid the Cohen note, it is altogether improbable that appellant in each of the three writings which he gave Moseley would have admitted that Moseley paid the Cohen note, and recognized his liability upon the same, as he did; fourthly, it would have been passing strange that Moseley, knowing as he did that appellant was insolvent, accepted his three notes in satisfaction of the Cohen note upon which appellee was the surety, for it is not claimed that appellee had been released by limitation as surety upon the Cohen note at the time the three writings from appellant to Moseley were executed. It is apparent that the three writings referred to were entered into as agreements to extend the time of the payment of the Cohen note, but their language excludes the idea that they were given in satisfaction of the Cohen note.

After the death of R. C. Moseley, the Cohen note with the assignment upon it over her signature, went into the hands of his executor, and was thereafter paid by appellee. We think it reasonably apparent from the record that the note was never paid by appellant, Cook, except the $50 endorsed thereon, and if so, its assignment to appellee by the executor of R.

C. Moseley carried with it the mortgage lien given to secure its payment. We can not agree with counsel for appellant that a demand was necessary before suit. The demand required by section 3872, Kentucky Statutes, applies only to actions against the personal representative. (Tipton's Adm'r v. Richardson, 21 Ky. Law Rep., 1195.)

The note in this case contains the affidavit required of a claim against a decedent's estate, and it was made before the institution of the action. The action is not against the personal representative of M. E. Cook, deceased. By it the enforcement of the mortgage lien upon the real estate of which she was the owner, is sought. No other estate that she may have left is, or can be made, liable for the debt sued on. We are unable to sustain the contention of counsel that appellee should fail of a recovery because of his knowledge of the alleged fraud of appellant, William Cook, in causing the lots upon which the mortgage was executed to be conveyed to his wife. As appellee was not a party to that transaction, and was in no way concerned therewith, we fail to see how he can be affected by appellant's fraud in that matter, if there was any.

We do not think the chancellor erred in rejecting the further credit of $40 claimed by appellant. The claim was not even supported by affidavits as required by the statute. The testimony of appellant was wholly incompetent, and while there was some evidence from two or three witnesses that they saw appellant at work upon R. C. Moseley's house, they did not undertake to say what or how much material he furnished, how much labor he did, or the worth of either labor or material. One witness did venture the opinion that appellant's material and labor were worth $40, but no reason was given for this opinion, and in the absence of more definite proof, we think the court properly rejected the claim.

Being unable to say that the judgment of the chancellor was against the weight of the evidence, the judgment is affirmed.

WOOD v. REAMER.

(Filed October 28, 1904.)

1. Ante nuptial contract—Trust deed by husband and wife—Separate use of wife—Death of trustee—Right of wife to convey—Where, in pursuance of an ante-nuptial contract made in contemplation of marriage, the husband and wife after marriage, and after the wife became of age, united in a deed to the wife's mother, conveying to her, as trustee, all the wife's property, to the wife's separate use. At the death of the mother, the wife's husband was appointed her trustee and at the husband's death one Sanders was appointed upon whose petition in the proper court, judgment was rendered to the effect that the trust had terminated and that the wife was entitled to take the property in fee simple, Held—Upon sale by the wife (appellee) of some of the property by title bond and tender of deed to appellant which he refuses to accept, that she has the fee simple title in said property, she being fifty-seven years of age, without children and her only relatives being collateral kindred.

2. Deeds—Recitals—"Descendants"—"Heirs"—Construction—The several deeds made to the mother of appellee as trustee, after reciting that they were made in pursuance of an ante-nuptial contract recites, as follows: "Do

hereby bargain and sell, convey and assign, to Amelia Cornwall all the property of every kind which the said Anna (appellee) owned at the time of her marriage with said W. C. Reamer, in trust for the sole and separate use of the said Anna during her life, and after her death, if she should die intestate, to convey the same to the descendants of the said Anna, if any, in the same proportions as if it had descended from her, or to her heirs, if she should die intestate, and without descendants living at the time of her death. But the said Anna may dispose of the same by will as if she were a feme sole, and the said Amelia, or any trustee appointed by the Louisville Chancery Court or any court exercising its present jurisdiction, in place of the said Amelia, may, with the written consent of the said Anna, sell and convey the said property or any part thereof, and dispose of the proceeds as the said Anna may, in writing request," Held—That the marriage contract, in connection with the conveyance, gave to appellee a separate estate in her property. The use of the words "descendants" and "heirs" was intended to exclude her husband from all interest in her property after her death, in the event she died before he did.

C. B. Blakey for appellant.

Strother & Hardin for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

This is an appeal from the Jefferson Circuit Court by appellant. It appears that appellee sold appellant a piece of real estate in the city of Louisville for the price of $810 and executed to him a bond for title and took his note for the purchase price. When it became due she tendered him a deed for the property and demanded the money, which he refused to pay, and she brought this action. He based his refusal to pay the purchase price upon the claim that appellee could not make him a good and perfect title to the piece of land for the reason, as he claimed, that she only owned the life estate in the property. The lower court disagreed with him, and he has appealed.

The history of this title, wherein appellant claims that defects occur, is as follows: On the 31st of October, 1867, the appellee, then being Anna L. Cornwall, and an infant, together with her mother, Amelia Cornwall, entered into an ante-nuptial contract with William C. Reamer, upon consideration of their approaching marriage, by which Reamer agreed in effect, that as soon as appellee should become of age, he would unite with her in a deed to her mother as trustee, setting apart all of the property of appellee to her separate use. Pursuant to this agreement on the 27th of January, 1868, William C. Reamer did unite with appellee in a deed conveying all her property to her mother in trust for her sole and separate use. Afterwards John L. Cornwall, who was the only brother of the appellee, died intestate, and she inherited from him certain estate, and William C. Reamer again united with her in a deed to Amelia Cornwall, reciting the ante-nuptial contract and stating that it was the spirit and intention thereof to cover any estate subsequently acquired by appellee, and conveyed the property inherited from appellee's brother to the separate use of the appellee as in the former deed. Afterwards, on the 18th of February, 1890, Amelia Cornwall conveyed to George Lochre the interest which had descended to her by the

death of her son, John L. Cornwall, and her interest as widow of John Cornwall, father of appellee. On the next day, February 19, 1890, George Lochre reconveyed all of the property conveyed to him by Mrs. Cornwall to her in trust for the separate use of appellee as in former deeds declared.

Subsequently, Mrs. Amelia Cornwall died, and William C. Reamer was appointed trustee for appellee. The property in suit had been owned jointly by John Cornwall, father of appellee, and one William Cornwall, Sr., and had never been partitioned. William Cornwall, Sr., made a deed of assignment to the Louisville Trust Co., and in a suit to settle his assigned estate a deed of partition was made and the property in suit, with other property, was conveyed to William C. Reamer, husband, as trustee of appellee upon the same basis as in the deeds above mentioned. Subsequently, in 1897, William C. Reamer, the husband of appellee, died, and appellee, believing the trust terminated, took possession of all her property and afterwards sold certain pieces of it, and when the title was examined the purchaser claimed that he could not get a good title without the intervention of the trustee. Mrs. Reamer then had H. V. Sanders appointed her trustee, and he, after conveying the property which had previously been sold by Mrs. Reamer, filed a suit for the settlement of his trust, in which Mrs. Reamer filed her answer and counterclaim, alleging that the trust had terminated with the death of her husband, William C. Reamer, and that she was entitled to take the property in fee simple. In this suit the court rendered a judgment to the effect that the several deeds aforesaid only created a separate estate in Mrs. Reamer, and were only so intended, and that same had terminated with the death of William C. Reamer, and directed the trustee to convey to Mrs. Reamer in fee, simple free of any trust, which conveyance Sanders executed. Afterwards, Mrs. Reamer made the contract in suit with appellant, which he has refused to carry out, claiming that the heirs of Mrs Reamer took an interest under the deeds aforesaid, and that she could not convey without the intervention of a trustee: that the judgment of the chancellor was not binding upon the heirs, as they were not parties to that action, and that appellant could not obtain a safe title under the circumstances.

The appellee is now a widow, fifty-seven years of age, and has never had any children, and has no descendants; her only relatives are collateral kindred further removed than either mother or brother, and as to who, at the time of her death, will inherit from her is a question impossible to ascertain. The question in brief in this case is, do the heirs at law of Mrs. Reamer take an interst in her property under the deeds referred to, and does the trust created by the deeds still exist and can not be terminated?

The language of the ante-nuptial contract is as follows: "That with the consent of the party of the third part, the parties of the first and second parts have agreed to marry and that in consideration thereof the said Reamer agrees that all the property of every kind which the said Anna L. may own at the time of her marriage with him, shall belong to her for her sole and separate use during her life with the power to her to dispose of the same by last will and testament in the same manner as if she were unmarried; and that upon her obtaining the age of twenty-one years the said Reamer will unite with her in conveying the said property to the party of

the third party or to any person who may be designated by the party of the third part, in trust for the purposes aforesaid, and with power to the said trustee or to any new trustee who may be appointed at the request of the said Anna L, by the Louisville Chancery Court or any court exercising its present jurisdiction, to sell, convey and dispose of the said property or any part thereof with the written consent of the said Anna L, and to dispose of the proceeds thereof as the said Anna L. may, in writing, request."

Each of the deeds above referred to recites this marriage contract as the consideration therefor and all are made upon this consideration and the usual $1. The point of contention in this case is the granting clause in the first deed and the habendum clause in the subsequent deeds, which, however, are all in the same language, and which is as follows: "Do hereby bargain and sell, convey and assign to the said Amelia Cornwall all the property of every kind which the said Anna owned at the time of her marriage with the said William C. Reamer, in trust for the sole and separate use of the said Anna during her life, and after her death, if she should die intestate, to convey the same to the descendants of the said Anna, if any, in the same proportions as if it had descended from her, or to her heirs, if she should die intestate and without descendants living at the time of her death. But the said Anna may dispose of the same by will as if she were a feme sole, and the said Amelia, or any trustee appointed by the Louisville Chance ry Court or any court exercising its present jurisdiction in place of the said Amelia, may, with the written consent of the said Anna, sell and convey the said property, or any part thereof, and dispose of the proceeds as the said Anna may, in writing, request; and the receipts of said Anna for profits, rents or other proceeds of said property shall be good and sufficient vouchers to her trustee for any money paid to her."

Appellant contends that it was intended and that the above language does create a voluntary settlement in favor of the heirs at law of the appellee which has not been and can not be terminated. Appellee contends that there was no intention to create any estate other than a separate estate for a married woman, which should be free from the marital rights of William C. Reamer, and that the trust created was a special trust which terminated with the death of Reamer. And that the same was not a voluntary settlement, nor was there any intention to protect either the descendants of the appellee or her heirs except from the marital rights of her husband, William C. Reamer.

We can not agree with the argument of appellant that the reason for making the contract and the deeds do not appear upon the face of the papers, nor can it be inferred from the papers or from any omission in the papers that it was the intention by executing them to protect Mrs. Reamer against her own improvidence. In fact, the contrary is shown by the papers themselves The ante nuptial contract recites that it is made in consideration of marriage and the agreement is entirely upon the part of William C. Reamer. Anna L. agreed to do nothing and is not bound to do anything by the same, which seems to us conclusive that nothing more was intended by the contract than is usual in such contracts, that is to say, that the husband waives and relinquishes his marital rights in the property of the wife. The first deed made pursuant to this marriage contract recites a consideration of $1

and for the purposes of executing and carrying into effect this marriage agreement between William C. Reamer and the other parties thereto, and then follows the granting clause above mentioned. It will be observed that the granting clause of this deed is in a large measure in the exact words used in the marriage contract, except that it goes further and says: "And after her death, if she should die intestate, to convey the same to the descendants of the said Anna, if any, in the same proportion as if it had descended from her or to her heirs if she should die intestate, and without descendants living at the time of her death."

Considering the purpose of the marriage contract and the language used in all the conveyances, we are of the opinion that this language is not at all inconsistent with the intention to create a separate estate for Mrs. Reamer, but for the reasons hereinafter shown was necessary, as the parties believed, and is not unusual in the creation of a separate estate for a married woman.

It appears that it was clearly the intention of the parties to exclude the marital rights of Reamer in the property of his wife, not only during her lifetime, but after her death.

The cases of Cox v. Coleman, 13 B. M., 452; Hart v. Soward, 14 B. M., 218, and the later case of Brown's Adm'r v. Brown's Ex'or, 11 Ky. Law Rep., 799, all hold, and it is the settled law of this State that where a separate estate is created for a married woman and she dies, unless there are words excluding the marital rights of the husband after her death, that at her death the separate estate is terminated, and the husband takes his marital rights in the property to the exclusion of the descendants or collateral heirs. The clause in controversy and the deeds show that they were drawn carefully by an experienced draftsman with a view to effectuate the intention of the parties. Therefore, to exclude the marital rights of Reamer, in the event his wife should die before him, it was necessary to make this additional clause directing a conveyance to her descendants.

The words "heirs" or "descendants," used in the creation of a separate estate for a married woman, will not, at her death, exclude the marital rights of the husband except as to the children. And in order to exclude the marital rights of the husband as to collateral heirs, there must be a clear intention shown to prefer the collateral kindred to the exclusion of the marital rights of the husband. Therefore, it was necessary to go still further and direct a conveyance to the heirs of appellee, failing descendants.

It is our opinion that the marriage contract, considered in connection with the conveyances, gave to appellee a separate estate in her property, and the use of the words "descendants" and "heirs" was intended to exclude her husband from all interest in her property after her death, in the event she died before he did. In view of these conclusions it necessarily follows that when appellee's husband died, the trust ceased, as the purpose for which it was created no longer existed, and consequently when her husband died she took the fee simple title to all her property.

Wherefore, the judgment of the lower court is affirmed.

HILES v. HILES, JR., &c.

(Filed October 27, 1904—Not to be reported.)

Estates—Settlement of—Parties to action—Where one prosecuted a suit for the settlement of an estate, but set up by no pleading any interest that he had in his intestate's estate, upon an appeal from the judgment directing a sale of the land owned by the intestate, by the administrator, in which a reversal is sought because he owned a one-half interest in one of the tracts, the relief will not be granted, there being nothing in the record which would justify a judgment for the administrator for the interest claimed by him.

Montgomery & Lee for appellant.

W. S. Kelley for appellee, O. O. Hedger, Gdn. &c.

T. L. Edelin for infant appellees.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Hobson.

Appellant, Lee Hiles, qualified as the administrator of his father, T. B. Hiles, and filed this suit for the settlement of his estate. He alleged in his petition, among other things, that the intestate owned a tract of land on which he resided containing 47½ acres; also another tract of 2½ acres. Afterwards, he filed an amended petition in which he alleged that at the time he filed his original petition there was a suit pending in the same court, of W. D. Jones against his intestate, in which Jones sought to recover from his intestate an undivided one-half interest in a tract of 25 acres of land which he described fully in the amended petition; that upon the hearing of that case the court decided that his intestate, T. B. Hiles, owned three-fourths of the tract and W. D. Jones one fourth. The court entered a judgment directing a sale of the three tracts owned by T. B. Hiles, or so much of them as might be necessary for the payment of his debts. From this judgment Lee Hiles individually has prosecuted an appeal, claiming that he owned one-half of the 25 acre tract, and that his intestate in fact owned no part of it. But this claim was in no manner presented to the circuit court either by Lee Hiles personally, or as administrator of his father. He filed no pleading individually, and in the pleadings filed by him as administrator nothing was alleged as to his owning in any way any interest in the 25-acre tract. The record of the suit of Jones v. T. B. Hiles, Sr., is copied into the transcript, and that suit it seems was consolidated with this case. But in that case, although Jones alleged that Lee Hiles owned one half of the land, Lee Hiles himself filed no pleading, and set up no claim, and so in neither action was the claim of Lee Hiles, which is now urged upon the appeal before us, presented to the circuit court, and what defense might have been made to such a claim, if presented, we can not know. The matter presented to us by the appeal having been in no way presented to the circuit court, and there being no pleading which would justify a judgment in favor of Lee Hiles for the land, the circuit court properly entered the judgment complained of. From the facts shown in the record, moreover, we do not see that Lee Hiles has been prejudiced. He claims the land as heir at law of his brother, William Hiles, but it appear

that William Hiles, in his lifetime, conveyed it to his father, T. B. Hiles. Though this deed was voluntary, it was valid as between the parties, and the fact that it was made by an infant did not render it void, but only voidable. (Hoffert v. Miller, 86 Ky., 572.)

Judgment affirmed.

LOUISVILLE COLLEGE OF PHARMACY v. CITY OF LOUISVILLE.

(Filed October 27, 1904—Not to be reported.)

1. Taxation—Education—Where an institution is organized, not for gain or profit, but that persons may be educated in pharmacy, and its income is devoted solely to the cause of education, it is exempt from taxation under the provisions of section 170 of the Constitution.

2. Same—The charter of appellant providing that "should said corporation be dissolved, the funds and property thereof, shall, after its debts and obligation be discharged, be paid into the treasury of the State of Kentucky, for the benefit of the common school funds," and the fact that the institution is not operated for gain or profit, and all of its income being devoted to purposes of education, it is an educational institution and is exempt from taxation.

O'Neal & O'Neal and Isaac T. Woodson for appellant.

Henry L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Paynter.

By the consolidated actions the city of Louisville sought to recover from the appellant, the Louisville College of Pharmacy, ad valorem taxes on property situated on the corner of First and Chestnut streets for the years of 1892 to 1899 inclusive. The defense relied on is that the property is exempt from taxation under its charter and section 170 of the Constitution.

It is claimed that it is an institution of education, not used or employed for gain by any person or corporation, and that the income of which is devoted solely to the cause of education.

The institution was chartered before the present Constitution. The charter provides that: "Should said corporation be dissolved, the funds and property thereof, shall, after its debts and obligations be discharged, be paid into the treasury of the State of Kentucky for the benefit of the common school funds."

Section 170 of the Constitution provides: "There shall be exempt from taxation * * * institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education." * * *

There are no shareholders of this corporation. No individual is entitled to the income from it or to its property, if it should cease to exist. By the express terms of its charter if the latter contingency should happen, its property goes to the State of Kentucky for the benefit of the common school fund. The property is worth about $20,000. There is a lien on it of about $10,000. It is evident from the amount of its income and the necessary expenses of carrying on the institution, it must cease to exist if it is forced to

pay back, and future taxes. A small part of the property rents for about $20 a month. Another part of the college building is rented for a like sum and the balance of the income of the institution is derived from nominal membership fees, an initiation fee of $3, and moderate tuition fees, which are charged to the students. The secretary and teachers of the institution are paid small salaries. The entire income is applied to the purposes of the institution. If it is an institution of education, then the fact that a small amount of rent is derived from the use of the property and applied to the purposes of the institution does not deprive it of the right of exemption from taxation. Nor does the fact that it has the necessary officers and teachers to successfully conduct the institution, render it liable for taxes. No institution of education can be successfully maintained unless it has officers to conduct its affairs and teachers to instruct its students.

The court said in Trustees of Kentucky Female Orphan School v. City of Louisville, 100 Ky., 486: "Upon the whole it would seem that when the statute exempts the 'institution' from taxation, and no qualifyng words are used showing or tending to show that only the property 'used' by the institution, or 'connected' with the institution, is to be exempt, then the associated entity, the corporate being, with its estate as an entirety, is embraced by the word 'institution.'"

In Commonwalth v. Y. M. C A., &c., 25 Ky. Law Rep., 940, the court said: "In each case the appellee owns a large and valuable building, used in part for other purposes than directly by the association. Rooms in the building are rented to raise revenue to help to maintain the institution. A considerable part of the buildings are constantly used by the association for their meetings and other work. In each case also the appellee owns a vacant lot, and other property, pending its sale. The lots were taken in donations to the institutions. Appellee's claim of nonliability to taxation depends upon the character of the institutions."

To the same effect is Commonwealth v. Gray's Trustee, 25 Ky. Law Rep., 58, where the court said: "It was argued in that case for the city, claiming the right to tax certain property in which the endowment fund of the orphan school had been invested, that the word institution refers alone to the buildings and grounds used by the schools as a place employed for the purpose of accommodating the pupils and teachers. The court, however, rejected this narrow construction, and found the word embraced not alone the buildings and grounds so used, but that it included the endowment and other funds of the school or corporation which were dedicated solely to the cause of education. What the convention which framed the constitution evidently had in mind was to exempt from taxation all property that was dedicated solely to the cause of education, and not used or employed for gain by any person or corporation whether that property was buildings or money, or owned by natural or artificial persons. Buildings alone and the grounds upon which they stand are not adequate to provide education; in addition, money must be used to employ teachers, provide textbooks, etc. Indeed, the buildings, so far as ownership by the educator is concerned, could be dispensed with, but not the other means. Nor can we believe that it was the purpose of the convention to require those dedicating their property to this unselfish mode of education to use it

in connection with real estate likewise owned and used before the exemption should apply. It is not a complete definition to define 'institution' as simply a building or a plant, or a body corporate. It may be all of these; but, more broadly speaking, it is that which is set up, provided, ordained, established, or set apart for a particular end, especially of a public character or affecting the community. So when money or other property is set apart, the exclusive use and income of which is to be applied to the cause of education, or pedagogy, the property impressed with that character becomes an institution without regard to the particular form of its investment. When the dedicator in his munificence sets apart property or a fund to this end, the people in a kindred spirit have declared by their organic law that such property, when so used without gain or profit to the giver or owner, shall be exempt from taxation."

As the institution is not operated for gain or profit, and all of its income is devoted to the purposes of the institution, the question remains, is it an "institution of education."

The Constitutional Convention did not use the words "institution of education" in any narrow or restricted sense. It was used in its broadest and most comprehensive sense. An institution where the three "R's" alone are taught to children is no more an institution of education than is Harvard, Yale, Princeton, or the University of Chicago, where the classics, law, medicine, and many other branches are taught, with a view of giving the students mental accomplishments, and enable them to achieve success in the learned professions and business vocations. If the teaching of law, medicine, chemistry and pharmacy in universities does not deprive them of the character of "institutions of education," it seems to us that an institution which confines its instructions to one of them is no less an institution of education. This court in German Gymnastic Ass'n v. City of Louisville, 25 Ky. Law Rep., 2105, said: "If one institution affords an opportunity to acquire this perfect education, it is one of education. If three institutions are organized, one seeking by a cours of instruction to cultivate the mind, one by a method of instruction to improve students' religious or moral conditions, and another to teach physical culture to produce a better physical development, each is an institution of education, as much as the one at which the student can acquirethe threefold knowledge. It is simply a matter of judgment or convenience on the organization of in stitutions of education whether one shall furnish all the opportunities for the acquisition of an education, or whether there shall be separate institutions for that purpose."

If one of these great institutions of education mentioned was transplanted to this State, no one would ever suggest it should be taxed, because it educated students in law, medicine and pharmacy. Those who framed, and those who adopted our Constitution, were not apprehensive that there would be too much education, but were fearful lest there would be too little, hence to induce those who had the public welfare at heart and those who had the spirit of charity fully developed to organize institutions of education, not to be conducted for gain or profit, the exemption clause was inserted in the Constitution. We can conceive of no more useful and important branch of knowledge than that of pharmacy. That knowledge is necessary to protect

the lives and health of the citizens of the Commonwealth. So important is this branch that the general assembly has taken the matter in hand and has prohibited any one from compounding medicines, unless he had been graduated from some institution of education where pharmacy is taught. We have a case before us where public spirited persons have associated themselves together and organized an institution, not for gain or profit, but that persons might be educated in pharmacy, so that the drug business might be conducted according to law, and the public protected from the uneducated and ignorant pharmacists. It is a home institution, infantile in the matter of age, and merits the protection given by the Constitution. We are of the opinion that it is exempt from taxation.

The judgment is reversed for proceedings consistent with this opinion.

Whole court sitting.

Chief Justice Burnam and Judges Hobson and Nunn dissent.

SHADOAN'S ADM'R v. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R. CO.

(Filed October 27, 1904—Not to be reported.)

Railroads—Peremptory instruction—Where a brakeman on a train had left his train to go on another to get a drink of water (both trains having been stopped under orders) an action for damages for his death can not be maintained where his own train by some means started, running into the train he was on, killing him, as he was not in his place of business, or in the discharge of any duty imposed by reason of his employment. In this state of case a peremptory instruction to find for the railroad company was authorized.

W. A. Mororw and J. W. Colyar for appellant.

O. H. Waddle and John Galvin for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Barker.

J. L. Shadoan was a brakeman in the employ of the Cincinnati, New Orleans & Texas Pacific Railroad Co., a corporation operating a railroad through the State of Kentucky. At the time of the injury complained of in this action, he was first brakeman on No. 38, which was a freight train running north. At Whitley, Ky., it met No. 35, a freight train running south. These two trains stopped, under orders, at the point of meeting, so as to allow No. 31 to pass them. No. 35 was on the siding and No. 38 on the main track, the switch of the siding being open, and the two trains stood facing each other at from thirty to fifty yards apart. The road at this point was down grade looking north, No. 38 being on the higher elevation.

The day being warm, the entire crew from each train alighted for the purpose of rest and recreation while waiting for No. 31. Appellant's decedent had gone forward and thrown open the switch of the siding, and then he seems to have climbed into the cab of No. 35, in order (it is said) to obtain a drink of ice water, there being none on his train. At this time, whether from a defect in the throttle of the engine of No. 38, or because the

air had so leaked from the airbrake as to release them from the wheels, train No. 88 suddenly started and rolled down against No. 85, with such force as to crush the decedent between one of the cars and the tender of the engine of the latter train, inflicting such injuries as caused his death within an hour or two thereafter.

To recover damages for this injury, this action was instituted, it being alleged in the petition that it was caused by the gross negligence of appellee's agents and servants. On the trial of the case, at the close of appellant's (plaintiff's) evidence, the court sustained the motion of appellee for a peremptory instruction in its favor Assuming that the collision of the trains was the result of the negligence of appellee's servants, we think the trial court ruled correctly in granting the peremptory instruction complained of. Appellant's decedent was on train No. 85 for his own convenience, and not in the discharge of any duty to appellee. In the case of the L. & N. R. R. Co. v. Hocker, 111 Ky., 707, one of the employes of the railroad company, for his own convenience, had gone between cars in its yard, where he was injured (it is alleged) by the gross negligence of its employes in backing a train against the cars between which he was standing. In the opinion, it is said: "It seems to us from the undisputed facts of this case that, as appellee was not in his place of business, or in the discharge of any duty imposed upon him by his employment, the appellant company owed him no duty except to avoid injuring him after it had discovered his perilous position."

This principal is conclusive of the case at bar, and the judgment is affirmed.

THE LOUISVILLE & ATLANTIC R. R. CO. v. HORN, &c.

(Filed October 27, 1904—Not to be reported.)

1. Lands—Conveyances—Where William Pigg and his wife conveyed to Jane Horn and her husband, a tract of land with the provision in the deed that should they separate, and continue to live apart that his interest in the land should cease, and a further provision to the effect that the grantees if they desire to sell and reinvest the proceeds they may do so with the consent of the grantors, or the survivor, and Horn separated from his wife and subsequently died, a deed by the wife, her second husband and Mrs. Pigg, one of the grantors (the other having died) conveying a part of the land, a suit by the children by the first marriage to Horn to recover the land so sold on the idea that they were joint owners with their mother, will not lie, because by the terms of the deed, Horn's interest ceased upon his separation from his wife, and the surviving grantor having joined in the conveyance to appellant, it acquired a perfect title.

2. Same—Constructon of statutes—By the provisions of section 4846, Kentucky Statutes, the purchaser of land is not bound to look to the application of the purchase money, unless he is required to do so by the deed of conveyance.

Gourley & Roberts, Chester A. Gourley, Wallace & Harris and A. E. Richards for appellant.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Hobson.

William Pigg and his wife executed and delivered the following deed:

"Know all men by these presents; that William Pigg and Elizabeth Pigg, his wife, of the county of Lee and State of Kentucky, for and in consideration of $1 to them in hand paid, the receipt whereof is hereby acknowledged, and the further consideration of recognized kinship and natural love and affection, have this day bargained, sold, conveyed and transferred, and by these presents do give, grant, sell, convey and confirm unto Mary Jane Horn and her husband, William Horn, of the county aforesaid, the following described real estate lying and being in Lee county, Kentucky, on the Kentucky river, and bounded and described as follows: (here follows boundary); containing by supposition eighty acres, be the same more or less, to them, the said Mary J. Horn and William Horn, her husband, and the legitimate heirs of their bodies, for the purpose of providing a home for them during their natural lives, preparing for the welfare and comfort of their children, but should said Horn and his wife separate and continue to live apart, being divorced, or without divorce, then and from such time as said separation shall take place, said William Horn's interest in said land shall cease and this conveyance shall be null and void as to him; and if, at any time, said grantees shall decide to sell said land and reinvest the proceeds in other lands to be owned and held by them and their heirs in the manner provided in this deed, they may do so with the written consent of grantors herein or the survivor of them, if one of them shall be dead, but said sale and reinvestment shall not otherwise be made by said grantees.

"And William Pigg and Elizabeth, his wife, hereby covenant with said William Horn and Mary Jane Horn, his wife, that they will forever warrant and defend the title hereby conveyed against the claims of all persons whomsoever, and Elizabeth Pigg, wife of said William Pigg, joins in this deed and relinquishes all her prospective and potential rights to dower and homestead in and to the premises hereby conveyed.

"In witness whereof said grantors have hereunto subscribed their names this 3d day of September, 1885. If said grantees shall die without leaving issue of their bodies surviving them, the title hereby conveyed shall revert to the grantors, or either of them that may be living, or the living heir or heirs that may survive said grantors "

After this deed was made William Horn sepa ated from his wife and subsequently died. She then married Thomas G. Watson. Subsequently her father, William Pigg, having died in the meantime, she and her husband, Thomas Watson, and her mother, Elizabeth Pigg, united in a deed to the Louisville & Atlantic Railroad Company in consideration of $675 cash in hand paid, by which they conveyed to the railroad company a strip of land 66 feet wide and 5,494 feet long, containing 8 3-10 acres, and being the right of way of the railroad. Thereafter appellees, who are the children of Mrs. Watson by her first husband, Horn, brought this suit against the railroad company to recover the strip of land, or their interest in it, on the idea that they were joint owners with their mother, and were not affected by the deed which she and Mrs. Pigg had made. The circuit court held that Mrs. Watson held a life estate in the land and that the railroad company acquired this and no more by the deed executed by her and her mother. From this judgment the railroad company appeals.

William Horn having separated from his wife and being divorced from her, his interest in the land, by the terms of the deed, ceased. William Pigg having died, his wife, Elizabeth Pigg, was the only surviving grantor. The deed provided that the grantees might sell the land and reinvest the proceeds in other lands by the written consent of the grantors, or the survivors of them. Elizabeth Pigg, the surviving grantor, having joined with Watson and wife in the deed to the railroad company, it acquired a perfect title to the tract conveyed to it, unless the railroad company was bound to see to the reinvestment of the proceeds; for it is clear from the deed that by the word "grantees" is meant William Horn and Mary J. Horn. The conveyance is made "unto Mary J. Horn and her husband, William Horn," and in the last clause of the deed it is stipulated that if the grantees shall die without leaving issue of their bodies surviving them, the land shall revert to the grantors, or the survivor. It clearly was not contemplated that the infant children of Horn and wife were to join in the deed if the land was sold for reinvestment. So the naked question is presented whether the railroad company was bound to see to the application of the purchase money

Section 4846, Kentucky Statutes, provides: "Where lands are devised to be sold on special or general trust, or are conveyed or devised to trustees or executors in trust to be sold generally or for any specific purpose, the purchaser shall not be bound to look to the application of the purchase money, unless so expressly required by the conveyance or devise."

There is nothing in the deed requiring the purchaser to look to the application of the purchase money. It is entirely silent on this subject, and the rule is settled that where the obligation of the purchaser to see to the application of the purchase money is not clearly indicated by the deed, his title is not affected by the failure of the trustees to make the reinvestment. (Grotenkemper v. Bryson, 79 Ky., 853; Owsley v. Eads, 22 Ky. Law Rep., 2243; Miller v. Stagner, 25 Ky. Law Rep., 651.) When Mrs. Watson sold and conveyed the land, she held the proceeds as trustee under the original deed for reinvestment in other lands; but her failure to make the reinvestment does not affect the title of the railroad company.

Judgment reversed and cause remanded, with directions to dismiss the petition.

THE H. B. PHILLIPPS CO. v. PRUITT.

(Filed October 27, 1904—Not to be reported.)

1. Damages—Negligence—Appellee in this action against the appellant alleged that upon entering into appellants' store and its passenger elevator for the purpose of going to the second floor, stepped inside the door and fell to the cellar floor, severely injuring her ankle. She saw a boy there and assumed the elevator car was in place. The young lady cashier had noticed that the door was open and had directed a bundle boy to lower the car which had worked up and to close the door, and the boy was in the act of obeying these directions when appellee stepped in and fell to the floor below. The court overruled a motion for a peremptory instruction and the trial resulted in a verdict for appellee for $7,225. Appellee's injuries resulted from her misunderstanding the action of the boy. All the circumstances were for the jury under instructions which were correctly given by

the lower court, but the evidence showing that appellee's ankle was sprained, some of the ligaments torn, and a fracture of one of the bones, there is nothing approximating a total loss of the foot, and the verdict seems flagrantly excessive.

J. D. Atchison and C. S. Walker for appellant.

W. T. Owen and George W. Jolly for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barker.

The H. B. Phillips Co. is a corporation which, at the time of the accident out of which grew this litigation, was operating a large retail merchandise business in Owensboro, Ky. On the day of her injury, the appellee, Mrs. Leah Pruitt, entered its store, and being desirous of going to the second floor, walked back to the passenger elevator used for the accommodation of customers, and finding the door open and a boy seemingly in charge, erroneously assumed that the car was in place, stepped in and fell to the bottom of the shaft, a distance of about ten feet, receiving severe injuries, to recover damages for which she instituted this action. In her petition she alleges, substantially, the facts as above stated, and, in addition, that her injuries were caused by the negligence of appellant. The specific acts of which are, first, that the store, at the point where the elevator was situated, was so dark that she could not see whether or not the car was in place; second, that the boy in charge opened the door, and invited her in, and that she thereby supposed that everything was prepared for her entrance in safety. The answer placed in issue all of the allegations of negligence obtained in the petition, and affirmatively pleaded appellee's contributory negligence in bar of the action. This was in turn controverted by reply, thus completing the issues. A trial resulted in a verdict in favor of appellee for the sum of $[illegible], of which appellant is now complaining.

The elevator in appellant's establishment is operated by means of hydraulic power, and it seems that when the river is muddy the silt enters the valves, and has the effect of making the elevator car move up almost imperceptibly, without any fault or defect in the machinery. At the time appellee entered the store, and was making her way to the elevator (she being familiar with the premises), the young lady cashier of appellant, whose duty it was to see that the door of the elevator was kept shut when not in use, observed that it was ajar, and the car had, under the influence of the [illegible] current, moved slightly forward some twelve or fifteen feet, [illegible] to the approach of appellee, told one of [illegible] to close it, which [illegible] did, and shut the door; this [illegible] the approach of appellee, [illegible] the rope, and [illegible] the door. [illegible] reached in for the rope, and [illegible] as before described. [illegible] on his part seems to have [illegible] the door of the [illegible] she did, falling as before described. [illegible] at the close of all the evidence as to the [illegible] of appellant for a peremptory instruction, the court [illegible] the jury that it was the duty of the defendant,

in the operation and management of its elevator, to exercise the highest degree of care and skill, usually exercised by prudent persons in the same business, in the management and operation of elevators, and if the jury believes from the evidence that the plaintiff entered the storehouse of defendant for the purpose of purchasing goods and while in said house for said purpose, and in the exercise of ordinary care, she, by invitation or suggestion of defendant's servants or employes attempted to enter the elevator cage in said storehouse to go to the second story of same, and by reason of the negligence and carelessness of the defendant, the said elevator cage was not in the proper position and the plaintiff, in the exercise of ordinary care, failed to discover such fact when she attempted to enter the said elevator, and fell down into the elevator well, injuring herself by said fall, the law is for the plaintiff and the jury should so find.

"2d. If the jury find for the plaintiff, the measure of their finding should be such as will reasonably compensate the plaintiff for the physical and mental suffering, if any be proved, by reason of and as the direct and proximate result of her injuries, as supposed in instruction No. 1, and in estimating her damages, the jury should consider any permanent lessening or diminution in her power of earning money, if any be proved, in all not exceeding the sum of $20,000, the amount claimed in the petition.

"3d. The court further instructs the jury that it was the duty of the plaintiff to use ordinary care for her own safety when attempting to enter the elevator cage or shaft, and if the jury believe from the evidence that the plaintiff saw or might, by the exercise of ordinary care, have seen, that the elevator cage was not in the proper position in the elevator shaft and thereby have prevented the injury and she failed to do so, and so contributed to her own injury, and but for her own negligence and carelessness the accident and injury complained of in the petition would not have happened, then, the law is for the defendant and the jury should find for the defendant.

"4th. By ordinary care, as used in these instructions, is such care as a person of ordinary prudence and judgment would use under similar circumstances."

These embody the law of this case. (Kentucky Hotel Co. v. Camp, 97 Ky., 424.)

Appellee's injuries were, undoubtedly, the result of her misunderstanding the action of the boy, who seems, so far as this record shows, not to have been regularly in charge of the elevator, but went there on this occasion under the direction of the cashier, as before stated. He did not see appellee, although it is quite clear that she supposed he did, and accepted his action, of throwing open the door as an invitation to enter, which she very naturally complied with.

As to whether appellant was guilty of negligence by opening the elevator door, and so leaving it (for even so short a time) that appellee, one of its customers, could fall in; or whether appellee was guilty of contributory negligence in accepting what she assumed to be an invitation of the boy in charge to walk into the elevator, without making a careful examination herself, so as to see if the car was in place, or whether the bundle boy, Homer Bradley, was acting within the scope of his employment when he opened the elevator door under the direction of the cashier, were questions for the

the lower court, but the evidence showing that appellee's ankle was sprained, some of the ligaments torn, and a fracture of one of the bones, there is nothing approximating a total loss of the foot, and the verdict seems flagrantly excessive.

J. D. Atchison and C. S. Walker for appellant.

W. T. Owen and George W. Jolly for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barker.

The H. B. Phillips Co. is a corporation which, at the time of the accident out of which grew this litigation, was operating a large retail merchandise business in Owensboro, Ky. On the day of her injury, the appellee, Mrs. Leah Pruitt, entered its store, and being desirous of going to the second floor, walked back to the passenger elevator used for the accommodation of customers, and finding the door open and a boy seemingly in charge, erroneously assumed that the car was in place, stepped in and fell to the bottom of the shaft, a distance of about ten feet, receiving severe injuries, to recover damages for which she instituted this action. In her petition she alleges, substantially, the facts as above stated, and, in addition, that her injuries were caused by the negligence of appellant. The specific acts of which are, first, that the store, at the point where the elevator was situated, was so dark that she could not see whether or not the car was in place; second, that the boy in charge opened the door, and invited her in, and that she thereby supposed that everything was prepared for her entrance in safety.

The answer placed in issue all of the allegations of negligence obtained in the petition, and affirmatively pleaded appellee's contributory negligence in bar of the action. This was in turn controverted by reply, thus completing the issues. A trial resulted in a verdict in favor of appellee for the sum of $7,225, of which appellant is now complaining.

The elevator in appellant's establishment is operated by means of hydraulic power, and it seems that when the river is muddy the silt enters the valves, and has the effect of making the elevator car move up almost imperceptibly, without any fault or defect in the machinery. At the time appellee entered the store and was making her way to the elevator (she being familiar with the premises), the young lady cashier of appellant, whose duty it was to see that the door of the elevator was kept shut when not in use, observed that it was ajar, and the car had, under the influence of the cause heretofore explained, crept slowly upward some twelve or fifteen feet, whereupon she, without knowing of the approach of appellee, told one of the bundle boys, Homer Bradley, to pull it down and shut the door; this he proceeded at once to do, being equally ignorant of the approach of appellee; going to the door, he opened it wide, reached in for the rope, and attempted to pull the car down. This movement on his part seems to have been understood by appellee (who, by this time, had reached the door of the elevator) as an invitation to enter, which she did, falling as before described.

At the close of appellee's evidence, and again at the close of all the evidence, the court overruled the motion of appellant for a peremptory instruction, and gave the jury the following:

"1st. The court instructs the jury that it was the duty of the defendant,

in the operation and management of its elevator, to exercise the highest degree of care and skill, usually exercised by prudent persons in the same business, in the management and operation of elevators, and if the jury believes from the evidence that the plaintiff entered the storehouse of defendant for the purpose of purchasing goods and while in said house for said purpose, and in the exercise of ordinary care, she, by invitation or suggestion of defendant's servants or employes attempted to enter the elevator cage in said storehouse to go to the second story of same, and by reason of the negligence and carelessness of the defendant, the said elevator cage was not in the proper position and the plaintiff, in the exercise of ordinary care, failed to discover such fact when she attempted to enter the said elevator, and fell down into the elevator well, injuring herself by said fall, the law is for the plaintiff and the jury should so find.

"2d. If the jury find for the plaintiff, the measure of their finding should be such as will reasonably compensate the plaintiff for the physical and mental suffering, if any be proved, by reason of and as the direct and proximate result of her injuries, as supposed in instruction No. 1, and in estimating her damages, the jury should consider any permanent lessening or diminution in her power of earning money, if any be proved, in all not exceeding the sum of $20,000, the amount claimed in the petition.

"3d. The court further instructs the jury that it was the duty of the plaintiff to use ordinary care for her own safety when attempting to enter the elevator cage or shaft, and if the jury believe from the evidence that the plaintiff saw or might, by the exercise of ordinary care, have seen, that the elevator cage was not in the proper position in the elevator shaft and thereby have prevented the injury and she failed to do so, and so contributed to her own injury, and but for her own negligence and carelessness the accident and injury complained of in the petition would not have happened, then, the law is for the defendant and the jury should find for the defendant.

"4th. By ordinary care, as used in these instructions, is such care as a person of ordinary prudence and judgment would use under similar circumstances."

These embody the law of this case. (Kentucky Hotel Co. v. Camp, 97 Ky., 424.)

Appellee's injuries were, undoubtedly, the result of her misunderstanding the action of the boy, who seems, so far as this record shows, not to have been regularly in charge of the elevator, but went there on this occasion under the direction of the cashier, as before stated. He did not see appellee, although it is quite clear that she supposed he did, and accepted his action of throwing open the door as an invitation to enter, which she very naturally complied with.

As to whether appellant was guilty of negligence by opening the elevator door, and so leaving it (for even so short a time) that appellee, one of its customers, could fall in; or whether appellee was guilty of contributory negligence in accepting what she assumed to be an invitation of the boy in charge to walk into the elevator, without making a careful examination herself, so as to see if the car was in place, or whether the bundle boy, Homer Bradley, was acting within the scope of his employment when he opened the elevator door under the direction of the cashier, were questions for the

jury to decide under the instructions of the court; but, we are unanimously of the opinion that the verdict of the jury is flagrantly excessive. The evidence on this subject shows that appellee's ankle was badly sprained, some of the ligaments torn, that there was a fracture of one of the bones; that she suffered severe pain, and was, at the time of the trial, which took place some three months after the injury, unable to walk without the aid of a stick, and even then with great difficulty. The testimony of the physician in charge shows these facts, and also expresses his opinion that her injury will be permanent. But we do not understand that there will be anything approximating a total loss of the use of the limb, and, while appellee may never regain the full strength of her ankle, and to this extent her injury may be considered permanent, she may, nevertheless, be able to walk fairly well, and attend to her household duties.

This being true, the verdict of $7,225, under all the circumstances of the case, is, in our opinion, flagrantly excessive, and the judgment is, therefore, reversed for proceedings consistent herewith.

BROCK v. COMMONWEALTH.

(Filed October 27, 1904—Not to be reported.)

Criminal law—Evidence—Upon the trial of appellant for killing Harrison Taylor, evidence to the effect that deceased had made several wills in which he had failed to make any provision for the stepchildren of appellant, and the testimony of a daughter of deceased that appellant had told her he had heard that deceased was going to try to take his stepson to the house of correction, and that she responded that the child was as much to her (being her sister's child) and to leave him with her and she would see her father and see that he did not take him off, when appellant replied, "No, by God, he will go back with me, and if a man ever comes after him I will take this big gun and he will not get him." There was nothing in this testimony of which appellant complains, that affected his substantial rights.

B. B. Golden and J. D. Black for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Jesse Brock, was indicted for the willful murder of Harrison Taylor, and being put upon his trial before a petit jury was convicted of voluntary manslaughter, and his punishment fixed by the jury at confinement in the penitentiary for three years. Upon this appeal he asks a reversal because of alleged errors of the lower court in admitting incompetent evidence to go to the jury which was prejudicial to his substantial rights.

The deceased, Harrison Taylor, was a farmer, residing in Knox county. He had been twice married. The wife of the appellant, Jesse Brock, was a widow of Grant Taylor, a son of the deceased by his first wife, and who had been killed several years before, leaving surviving him a wife and two children, William and Cordie Taylor. During his life, Grant Taylor and his father had had a controversy with regard to the ownership of a boundary of

timber land located in the neighborhood in which both of them lived. This controversy on one occasion resulted in a shooting between them, and was continued after the death of the son, between his family and the deceased. The appellant, Brock, after his marriage to the widow of Grant Taylor, took up the controversy over the timber land, which he claimed belonged to his wife and her children, and began to lay plans to have the timber cut and removed. Taylor threatened that he would forcibly resist any effort to have it removed, and these threats were met by similar threats by appellant, that he would cut and remove the timber in spite of the objection of the deceased. Presumably for the purpose of carrying out his purpose, he purchased a large-sized Winchester rifle, which he habitually carried about with him for the avowed purpose of protecting himself against any assault which might be made on him by deceased or any member of his family. The stepson of appellant and grandson of deceased, a boy of sixteen, sympathized with his stepfather's purpose to cut and remove the timber, and he also habitually went armed with a gun, and was frequently seen in company with his stepfather This condition of affairs existed for several months. On the 12th of April, 1904, appellant killed Taylor on the public highway in front of his residence. The only eye witnesses to the killing, who testified upon the trial, were the two grandchildren of deceased, William and Cordie Taylor. They testified in substance that the appellant had started to mill riding a mule "with a turn of corn to be ground," with his rifle in front of him; that deceased, also riding a mule in the same direction about one hundred and fifty yards behind the appellant, was traveling at a more rapid rate, and soon overtook him; that when he had gotten within ten steps of him, he pulled his glove off of his right hand, drew his pistol, rode up by the side of appellant and said, "I am going to kill you;" that appellant after these words were spoken raised his gun from his lap and shot the deceased in the breast; knocking him from his mule and killing him instantly. The witnesses for the Commonwealth testify that when the body of Taylor was first seen by them, he was lying on his back with a small 32 calibre pistol in his right hand, which was held by his thumb and little finger, the other three fingers having been cut off in an accident in a saw mill; that the pistol had not been fired, and that the body had evidently been moved after the deceased had fallen.

The first error in the admission of testimony complained of is that the trial court permitted the prosecution to show that the deceased had made several wills during his life, in which he had failed to make any provision for the children of his son, Grant Taylor. This evidence appears in the testimony of John Taylor, a son of deceased, as follows:

"Q. I will ask you if your father had made a will some time before his death, and before this trouble with Jesse Brock about the timber, or shortly after it?"

"A. Yes."

"Q. Tell the jury if you know who were the beneficiaries of the will, or if any of his children or grandchildren were left out of the will?"

"A. He made three or four wills."

"Q. I will ask you if he left any part of his children out?"

"A. Yes, sir."

"Q. Which one?"

"A. The children of Anthony Broughton, who married one of his daughters, and Grant Taylor's children."

This testimony was objected to by the defendant, and the court thereupon admonished the jury that it was only competent for the purpose of showing the state of feeling between the deceased and the family of his dead son, Grant. We hardly think this testimony was competent for this purpose. But as the bad feeling between the appellant and his family and the deceased is so conclusively shown by other testimony in the record, we are unable to see how this evidence could have seriously prejudiced the rights of appellant. W. T. Slusher was introduced as a witness to prove a conversation with the appellant shortly after the homicide, in which he admitted the killing, and detailed the facts incident thereto. He also testified to conversations with appellant prior to the homicide in regard to the timber land, and that for about a month before the death of deceased appellant had carried about a large gun, with which he finally shot the deceased. He was then asked if he had ever warned the deceased to be on his guard against appellant and his stepson, William Taylor. This question was objected to, the objection overruled, and the witness answered that he had on one occasion told the deceased what he had heard that appellant and his stepson had said. The answer was objected to and the objection sustained, and the testimony excluded. We are of the opinion that this was not such prejudicial error as to affect appellant's substantial rights. Susan Broughton, a daughter of the deceased, testified that appellant had, on one occasion shortly before the homicide, said to her that the deceased, Taylor, had heard that he was waylaying him for the purpose of killing him; and that Taylor said that he was going to have his grandson, William Taylor, sent to the house of correction; that he was afraid that he would come in the night and try to take the boy; that she responded that Willie was as much to her as he was to him, and that if he would leave him with her that she would see her father and see that he did not send him off, and satisfy him that the boy was not waylaying him; that appellant answered: "No, by God, he will go back with me, and if a man ever comes after him I will take this big gun and he will not get him." She also testified that a short time before the killing, she overheard appellant say to her husband, Anthony Broughton, "I would just as soon Willie would kill him as any man;" that she thought he referred to her father; that her husband responded that he did not reckon he wanted to kill anybody; that she then asked appellant who he was putting Willie up to kill, and he said it was Lincoln Taylor. This testimony was objected to, and the court excluded that part which referred to Lincoln Taylor. Considering the relations between the parties, which has been shown by the testimony in this record, we are of the opinion that this testimony was competent to go to the jury for what it was worth.

Several other objections are made to the testimony which was admitted to go to the jury, which we deem of too little importance to notice.

Upon the whole case we have reached the conclusion that there was nothing in the testimony complained of prejudicial to the substantial rights of the defendant. The instructions fairly presented the law to the jury,

and we think there was sufficient evidence to justify the submission of the case to the jury, who are, by law, made the sole judges of the facts.

We, therefore, feel constrained to affirm the judgment and it is so ordered.

NOLAND v. CINCINNATI COOPERAGE CO.

(Filed October 27, 1904—Not to be reported.)

1. Contracts, statute of frauds—In this action appellee undertook to avoid the contract because it had not signed it, and that it is one not to be performed within a year. But appellee accepted the contract and lease and, after taking possession of the property under it, will not be permitted to avoid the payment of the contract price.

2. Contracts—Pleading—Where appellee in its contract agreed to erect a stave mill and to furnish appellant certain wood for fuel, in consideration of certain lots of ground upon which to erect the mill which were leased to appellee for that purpose, in an action upon this contract, the petition of appellant setting out the contract and alleging that appellee had accepted the lease and had put it to record, and had taken possession of the land and begun to use it, but had refused to carry out the contract to furnish the wood for fuel, the petition states a cause of action.

Riddell & Riddell for appellant.

L. A. West for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Hobson.

Appellant, Theophilus Noland and wife, executed and delivered to appellee the following contract:

"This indenture of lease, made and entered into on the 26th day of June, 1900, between Theophilus Noland and Belle Noland, his wife, of the first part, of the county of Estill, and State of Kentucky, and Cincinnati Cooperage Co., of the State of Ohio, county of Hamilton, of the second part; Witnesses, That whereas the said company is contemplating the immediate erection of a stave factory at or near Wisemantown, Ky., and being desirous of obtaining lots and grounds whereon to erect the necessary building, now, therefore, in consideration of $50 in hand this day paid by said company to said Theophilus Noland, receipt of which by him is hereby acknowledged, and the further consideration that said company is to furnish to the said Noland, from the refuse of the staves at said factory, wood for his house and steam grist mill at Wisemantown, Ky., to be taken from the premises of the said company at the said Noland's expense of hauling, etc., the said Theophilus Noland and wife hereby lease, confirm and let for the period of ten years, one lot in Wisemantown, Ky., bounded and described as follows (here follows description): To have and to hold the same with all the privileges that pertain to fee simple owners for the period of the time above specified, with the exceptions that the mill site now occupied by the said Noland is to remain and be the same and to have the use and operation of same without hinderance on the part of said company.

"It is further understood that the said Theophilus Noland and wife are to furnish, without charge to the said company, other than above specified, a

good and sufficient outlet both to and from the premises described herein to the county road.

"It is further understood that the said Noland is to give to the said company the privilege of using water for the operation of the said factory and machinery thereon from the spring just across the line and between said Noland's mill and the schoolhouse.

"It is further understood that the building erected by the said company in the operation of its business at Wisemantown, and on the lot herein described, is to have the privilege at the close of its business at said place of taking down and removing all buildings erected thereon.

"It is also further understood that if the company, at the close of the period of ten years herein, desire to further operate its business at said place of manufacturing staves, it shall have the privilege from said Noland of continuing same on said lot on the consideration of $5 per year and the further consideration of furnishing wood for each year as above specified. The said parties of the first part are to keep the second party in the quiet, peaceable and uninterrupted possession of the premises and privileges set out herein for the period of ten years specified, and for any year or years thereafter that the said second party may desire to use the same.

"In testimony whereof witness our signature the day and date first written.

"Interline action made before signatures attached.

"THEOPHILUS NOLAND,
"ISABELLE NOLAND,
"Appellants."

Afterwards, on March 17, 1903, appellant instituted this action against appellee setting out the above contract and alleging that appellee had accepted the lease and had had it recorded in the Estill county clerk's office; that it had taken possession of the land under the contract and begun to use it, putting upon it logs and timber for the purpose of erecting a stave mill thereon, and yet held possession of it and the timber thereon; that it had paid the $50, the cash payment referred to in the lease, but had refused to carry out the contract to furnish at its stave mill from the refuse of the staves, wood for fuel for his residence or for his mill situated on the adjoining property; that such fuel was worth $63 a year, for which he prayed judgment and $200 damages. The defendant demurred to the petition, its demurrer was sustained by the court, and the plaintiff failing to plead further the action was dismissed.

It is insisted for appellee that no action can be maintained against it on the contract because it did not sign the lease, and the contract is not one to be performed within one year from its making. But appellee accepted the lease, and after taking possession of the property under it it will not be permitted to keep the property and avoid the payment of the contract price. It was held in Hunter v. Simrall, 15 Ky., 62, that the vendee of land who had accepted the deed could not escape liability for the contract price under the tatute of frauds. This case was followed in Lewis v. Crimes, 30 Ky., 336; also in Grant v. Settle, 1 Ky. Law Rep., 344, and Gaines v. Fitch, 14 Ky. Law Rep., 620. In Dante v. Head, 90 Ky., 255, it was held that the statute as to contracts not to be performed within one year has no application where one party has entirely performed the contract by making a deed. Under

these rulings, which are in accord with the current of authority, the statute of frauds is no bar to the action.

It is also insisted for appellee that by the terms of the contract appellee was only contemplating the erection of a stave mill, and that there is nothing in the contract requiring it to erect one, and appellee was bound to know that the fuel could not be furnished unless the stave mill was erected. Still the fact remains that appellee only pays $5 a year for the rent of the property, when manifestly the main consideration which appellant was to receive for the lease was the fuel. By reason of the contract appellee enjoys the use of the land and appellant is deprived of its use and can not rent it to another so as to make it bring him something; appellee is, therefore, holding the property under a nominal rent, and appellant is not receiving the consideration which it was contemplated he should receive for it The land was leased as a location for a stave mill, and if the mill has not been erected the contract has not been complied with. Appellee can not be allowed to avoid liability for failing to pay the rent stipulated in the contract by its own failure to erect the stave mill; for in this way it would be allowed to secure the use of appellant's property without paying the consideration which he was to receive for its use. The contract is made in contemplation of the immediate erection of a stave mill, and a part of the consideration is that "said company is to furnish to the said Noland from the refuse of the staves at said factory wood for his house and steam grist mill," etc. The obligation to furnish the wood from the refuse of the staves is thus assumed by the company. The effect of the contract is that the company undertakes that there shall be a refuse from the staves for wood for Noland's house and grist mill. We, therefore, conclude that the petition states a cause of action. (1 Chitty on Pleading, 314.)

Judgment reversed and cause remanded for further proceedings consistent herewith.

BESS v. COMMONWEALTH.

(Filed October 27, 1904.)

1. Homicide—Circumstantial evidence—Disposition of clothes of deceased—On the trial of one indicted for murder, where the evidence is circumstantial, it was competent to prove that accused carried some clothes to a certain house on the morning after the night of the homicide, where it was shown that some clothes belonging to the deceased were afterwards found, the disposition of deceased's clothes immediately after her death being one of the circumstances which strongly tended, in connection with other facts, to show the responsibility of accused for the crime.

2. Same—Where the evidence tended to show that deceased was killed on a certain Friday night, it was competent to prove that accused and deceased were seen driving together that afternoon and engaged in an excited conversation.

3. Conversation with deceased—Competency—Where a witness on cross-examination by the accused was permitted to tell what deceased said to her on Wednesday before her death on Friday, it was not error to allow the attorney for the Commonwealth to interrogate the witness relative to the conversation had with deceased at that time.

4. Leading question—The accused was not prejudiced by a leading ques-

tion asked by the attorney for the Commonwealth of a medical expert, as to the cause of the death of the deceased, where other questions were asked which laid the foundation for the admissibility of his opinion as to such cause.

5. Handwriting—Competency of witness—A witness who stated that she knew the handwriting of accused from seeing him write a receipt for her on one occasion, was competent to give an opinion as to whether certain notes written to her after the killing which tended strongly to establish his guilt, was in his handwriting.

6. Evidence—Voluntary statements of accused—Testimony on former trial—Competency—Where, on a former trial of the case, the accused voluntarily testified, but did not testify on the last trial, it was competent for the attorney for the Commonwealth on the last trial to prove statements made by accused in his testimony on the former trial. Neither the organic nor statutory law was intended to relieve the accused of the incriminating effect of voluntary statements which he may have made out of court, or in court.

Henry G. Snyder and J. N. Elliott for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Paynter.

This is the second appeal from a judgment of conviction under an indictment charging the appellant with the murder of Martha McQuin Martin. The facts of the case so fully appear in the opinion delivered on the former appeal we deem it unnecessary to again state them. (Bess v. Commonwealth, 25 Ky. Law Rep., 1092.) We will not attempt to discuss every question raised by counsel for appellant in their brief, because it is evident that they have felt it their duty to call this court's attention to objections and exceptions made on the trial which, in our opinion, do not merit a discussion. In making this observation it may be added that in view of the extreme penalty imposed by the verdict and judgment it was entirely proper for counsel to bring to the attention of the court any ruling of the lower court. The court has considered every question raised by counsel, and passed upon it, whether this opinion indicates that fact or not.

Mrs. Rosa Pence was introduced as a witness for the Commonwealth. On cross-examination she was permitted to tell what Mrs. Martin said to her on Wednesday before Mrs. Martin's death. This conversation was brought out by a series of questions by counsel for appellant. After this was done it was not error of the court to allow the Commonwealth's attorney to interrogate the witness relative to the conversation had with the deceased. While the Commonwealth's attorney propounded a leading question to a medical expert as to the cause of Mrs. Martin's death, still other questions were asked which fully laid the foundation for the admissibility of his opinion as to the cause of her death. The error was not prejudicial in view of the subsequent questions propounded and the answers thereto.

The court admitted evidence of the fact that certain clothes belonging to the deceased were found at the residence of a negro woman by the name of Pasty Holmes. It is urged that the court erred in admitting this evidence, because the clothes were not found from any information which the defendant had given, and because he was not connected with the finding of them.

The evidence of the Commonwealth tended to show that Mrs. Martin was murdered on a Friday afternoon or night. There was evidence tending to show that some of the clothes which had belonged to the deceased were carried there by the appellant on the next Saturday morning. The disposition of her clothes by the appellant immediately after she lost her life was one of the circumstances which strongly tended, in connection with the other facts, to show his responsibility for the crime.

The Commonwealth's attorney asked a witness this question: "Did you ever see any woman going in and out of his room," referring to Bess, the appellant. While the question was not a proper one, as it did not confine the inquiry as to whether the witness had seen Mrs. Martin going in and out of the room, still he was not prejudiced, as the witness answered that he had not seen any woman going in and out of his room. The evidence of the Commonwealth tended to prove that Friday afternoon the deceased and appellant were driving in the country together. The witness was permitted to testify that they were engaged in an excited conversation. It was certainly competent to prove the conduct of the parties toward each other on that occasion, because there was evidence from which the jury might conclude that that was the drive which terminated in Mrs. Martin's death.

Mrs. Mary Porter was permitted to identify certain notes which it is claimed she received from appellant after the death of Mrs. Martin. If he wrote them, they strongly tended to establish his guilt. It is claimed that she did not qualify herself to testify that they were in the handwriting of the appellant. She first said that she had not seen him write. Then having her memory refreshed by the question: "Have you seen him write some receipts?" She replied: "Oh, yes, he wrote me a receipt once." She was then asked if she was familiar with his handwriting, and she responded that she was and could tell it. We are of the opinion that she qualified herself to give an opinion as to whether the notes were in the handwriting of the appellant.

The evidence introduced by the Commonwealth on the first trial, as on the last one, tended to show that deceased and appellant were driving together on Friday afternoon. On that trial appellant testified in his own behalf, and denied he was driving on Friday afternoon with the deceased, but testified that on that occasion he had Maude Fleming in the buggy with him. He did not testify on the last trial, but the court permitted the Commonwealth to prove what his testimony was on the former trial as to the person who was with him in the buggy on the Friday afternoon. The purpose of this was to show that he was fabricating evidence to destroy or impeach incriminating evidence introduced against him by the Commonwealth. Had he made the false exculpatory statement out of court it could have been proven against him. But the question here is, having voluntarily made it in giving evidence for himself on a former trial, was it competent to prove it on the last trial? A defendant can not be made to give evidence against himself. A failure to testify for himself can not be commented on or used against him on his trial. When he does become a witness for himself, he occupies the position of any other witness introduced on the trial. To prove on the last trial what he said voluntarily in giving his evidence on the former trial is not making him give evidence against himself, nor is it com-

menting upon his failure to testify for himself. To admit such evidence is not violative of the Constitution, which protects one from being forced to give evidence against himself, nor of the law which protects him from being prejudiced by having failed to testify for himself. Neither the organic nor statutory law was intended to relieve the accused of the incriminating effect of voluntary statements which he may have made out of court or in court when he voluntarily went upon the witness stand in his own behalf. The decision in the case of Tines v. Commonwealth, 25 Ky. Law Rep., 1233, was not based upon the idea that his right to refuse to give evidence against himself or the right to decline to testify in his own behalf without having such failure used against him, but upon the ground that as the sworn statement had been procured from him by a representative of the Commonwealth under the guise of using it as evidence against unknown perpetrators of a crime. The court regarded that the affidavit was procured under such circumstances that it should not be used against the defendant, because the circumstances of its obtention made the statements therein unreliable and of an inquisitorial character. The rule applied to Tines' case is stated by Wharton's Criminal Evidence, section 668, as follows: "The testimony of an accused party, taken as such, is not admissible when such accused party is put on his oath and sworn, and examined. The rule is founded upon the unreliable, as well as the inquisitorial character of such statements; and, therefore, when a man, having been arrested by a constable, without warrant, upon suspicion of having committed murder, was examined as a witness at the coroner's inquest, it was held that the statements thus made by him were not admissible against him on his trial for the murder. The same rule obtains where the defendant is compelled to answer under oath questions by the committing magistrate."

The rule thus announced does not apply to a case where a defendant is on trial and voluntarily testifies for himself. The court so held in Smith v. Commonwealth, 16 Ky. Law Rep., 169.

The court has failed to find any error in the record which prejudiced the appellant's substantial rights. It seems to the court that both the court and Commonwealth's attorney showed more than usual care to avoid committing any error to his prejudice. He has had a fair trial, and the judgment must be affirmed.

VINCENT, &c. v. WILLIS.

(Filed October 28, 1904—Not to be reported.)

1. Trespass—In this action by appellee against appellants for trespass, the evidence is very conflicting, and, therefore, the lower court could not set the verdict for him aside. It is only when there is no evidence to support the verdict, or the verdict is so flagrantly against the evidence as to indicate that it was the result of passion or prejudice that the trial court will be authorized to disturb it.

2. Instructions—In an action for trespass an instruction which does not tell the jury that in order to recover the plaintiff must have "claimed" as well as held the actual possession of the land, the omision in this case did not vitiate the instruction for the reason that as it was worded the jury were required, in order to find for appellee, to have believed that his posses-

sion of the land in controversy must have been actual, and held to a well defined boundary, and that such possession must have been adverse, that is in hostile opposition. An instruction which directed that the jury should find for appellants if they believed from the evidence that the parties agreed that a surveyor should survey and fix the line, and it was run by him, and that he by agreement marked the line as the true one, and should further believe that by such running of the line the land belonged to appellee, was inaptly expressed and erroneous because, notwithstanding his contention that appellee was not to be bound by the act of the surveyor unless his survey was true, the instruction in effect told the jury that they should not find for appellee, unless they believe that the line was agreed to by appellee, but instead of being prejudicial, this instruction was highly favorable to appellants.

J. S. Lay for appellant.

M. M. Logan for appellee.

Appeal from Elliott Circuit Court.

Opinion of the court by Judge Settle.

The appellee sued appellants in the court below to recover damages for trespass alleged to have been committed by their cutting of timber on his land. The answer denied the trespass, also denied appellee's title, and averred that in a former dispute in respect to the line dividing their lands they and appellee agreed that one B. Hodge, a surveyor, might run and fix the line between them, and the parties would acquiesce in and be bound by the result; that Hodge did survey and establish the line to which all parties agreed, and that the cutting of timber complained of by appellee in this case was done upon land owned by appellants lying on their side of the line as fixed by Hodge.

Appellee denied the fixing of the line by agreement as averred by appellants. He admitted, however, that he did agree with appellants if Hodge would run and fix the line according to the title papers of the parties he would be bound thereby, but claimed that the line as run and fixed by Hodge was not in accordance with the title papers, for which reason he refused to accept or be bound by it. The testimony of appellee to this effect was corroborated by John L. Skaggs, a witness introduced by him. Further evidence was introduced in appellee's behalf which conduced to show that the line established by Hodge was not run according to the title papers, and that the acts of trespass complained of were committed on appellee's land, if the true line is where he claimed it to be. The two deeds exhibited by appellee only carried his title back to 1852, but according to his testimony and that of several of his witnesses, he and his vendor, James Q. Skaggs, had and held the actual, adverse possession of the land of which he is the alleged owner, including the part in controversy, continuously since the year 1852.

Upon the other hand, appellants themselves, and other witnesses introduced by them, testified that the line as run by Hodge gave them the land in controversy, and the cutting of timber complained of by appellee was upon their land; that appellee agreed that the line might be run by Hodge according to the title papers of the parties; that it was so run, and appellee accepted it as run and established by him, and said at the time that he would acquiesce in the same. It does not appear from the record that

Hodge, the surveyor, was introduced as a witness. No title papers were introduced by appellants, and it does not appear from the bill of evidence that any proof of possession was made by them. The jury returned a verdict for appellee, and allowed him $25 in damages.

The evidence is very conflicting, but the lower court could not have set it aside for that reason. It is only when there is no evidence to support the verdict, or the verdict is so flagrantly against the evidence as to indicate that it was superinduced by passion or prejudice on the part of the jury, that the trial court will be authorized to disturb it. The grounds of appellants' motion for a new trial were, first, that the verdict is not sustained by the evidence and is contrary to law; second, the court erred in instructing the jury; third, the court also erred in refusing to give instruction 4 asked by the appellants.

The first ground we have already disposed of. The instructions objected to by appellants are numbered 2 and 3. No. 2 is as follows: "The court instructs the jury that unless they should believe from the evidence that the plaintiff, or his vendors under whom he claims, owned and held the land in controversy in actual, adverse possession continuously to a well-defined, marked boundary line for fifteen years prior to the alleged trespass, they should find for the defendants."

It is claimed that this instruction is erroneous because it does not tell the jury that in order to recover appellee must have "claimed," as well as held, the actual, adverse possession of the land in controversy for the time therein indicated.

It is usual, and indeed safer, to use the omitted word in this character of instruction, but we are of opinion that its omission did not, in this instance, vitiate the instruction, for the reason that as worded it required the jury, in order to find for appellee, to believe from the evidence not only that his possession of the land in controversy must have been actual and "held" to a well-defined, marked boundary for the period indicated, but that such possession must have been "adverse" as well, that is, in "hostile opposition" (for such is one of the meanings given the word by Webster) to the claim of appellants and all others. As it must be presumed that this instruction was considered by the jury in connection with instruction No. 1, which is unobjectionable, we are unable to see how the jury could have been confused or misled with respect to the law of the case applicable to the question of possession.

The third instruction told the jury in substance that if they believed from the evidence that appellants and appellee agreed that Hodge should survey and fix the line dividing their lands, and it was run by him, and that he, by agreement of the parties, marked the line so run as the true line, and should further believe that by such running of the line the land in controversy belonged to appellee, they should find for him. But, upon the other hand, if the jury believed from the evidence that by such running of the line the land in controversy belonged to appellants, they should find for them. This instruction is inaptly expressed, and as to the appellee erroneous, because, notwithstanding his contention that under the agreement as to the running of the line he was not to be bound by the act of Hodge in fixing it, unless it was the true line according to the title papers, and his further

contention that the line as fixed by Hodge is not the true line because not run by the title papers, the instruction in effect told the jury that they could not find for appellee unless they believed from the evidence that the line as run by Hodge was agreed to by him as the true line, and that the land in controversy was by the running of the line left on his side of it. In other words, no matter how much of his land appellee was deprived of by the line as established by Hodge, or how incorrect the line, the jury were not authorized by this instruction to find for him unless he agreed that the line as fixed by Hodge was the true line. The jury were, however, authorized by it to find for appellants if the land in controversy was left on their side of the line established by Hodge without regard to the correctness or incorrectness of the line. This instruction, instead of being prejudicial to appellants, was highly favorable to them.

Instruction No. 4, asked by appellants, might properly have been given by the court, but in view of their having received practically the same thing through instruction No. 3, the refusal by the court of No. 4 was not prejudicial to appellants.

Judgment affirmed.

CITY OF LOUISVILLE v. OBERLE.

(Filed October 21, 1904—Not to be reported.)

New trial—A motion for a new trial in this action was properly overruled where appellant sought to make it appear that the injury resulted from an accident other than the one complained of, but the affidavits by appellee in resisting the motion were to the effect that the former accident affected his right arm instead of his left one, and it was for injuries to the left shoulder for which the judgment was rendered. The newly-discovered evidence relied on is not of a decisive or a controlling character, and would not necessarily have a preponderating effect on the trial of the case.

Henry L. Stone for appellant.

Bennett H. Young for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Paynter.

The appellee sought to recover a judgment, and did recover one for $1,500, against the appellant for an alleged injury to his left shoulder, which resulted from catching his foot in a hole in an iron covering over the gutter in the sidewalk on Frankfort avenue, between Haldeman street and Coral avenue, in the city of Louisville. He averred that he was thrown to the street, in consequence of which his left shoulder was dislocated and the use of his arm has been greatly and permanently impaired. The appellee testified that the accident occurred in the manner averred by him. His son testified to the same facts, who claims to have been present at the time the injury was received. There was evidence tending to show that there was a hole in the iron gutter as claimed by appellee.

The appellant seeks to reverse the judgment, because it is claimed that the court and jury were misled by his testimony on the trial of the case;

that instead of having received the injuries in the manner and at the place stated, he received it in jumping off a street car and striking his shoulder against a car. And again, in stating that he had received no injury to his left shoulder and arm prior to the alleged accident, when in fact he had been injured and crippled in that arm and shoulder for many years prior thereto. Upon the motion for a new trial the appellant filed affidavits for the purpose of sustaining the grounds for a new trial based upon newly-discovered evidence. The affidavits of Sweeney and Martin were filed, in which it was stated that the appellee told him that he had received his injury when he got off of a street car by striking his shoulder against a car, and that the appellee had suffered from the injury to the arm or shoulder which had been received prior to the accident in question. Another affidavit was filed which tended to show that the appellee's left arm was crippled before the time of the dislocation of his shoulder. On this motion the appellee filed an affidavit of a party who had not testified on the trial, but who stated that he saw the appellee fall on Frankfort avenue at the time claimed by him. He also filed several affidavits, in which it was made to appear that it was his right arm and not his left arm that was crippled previous to the accident in which his left shoulder was dislocated.

The decided weight of the evidence presented by affidavit on the motion for a new trial sustains appellee's claims, and clearly shows that it was his right and not his left arm which was injured before the accident complained of. And these affidavits fully explain the evidence offered by appellant upon the motion for a new trial which tended to show that the appellee's injury existed prior to the accident in question. While Sweeney stated that the appellee claimed he was injured in getting off of a car, his evidence is overbalanced by the statements of another witness (who did not testify on the trial) in his affidavit that he saw the appellee fall at the time claimed by him. In addition to that the appellee and his son testified that the injury was received in the manner averred in the petition. The newly-discovered evidence relied upon for a new trial is not of a decisive or controlling character, and would not necessarily have a preponderating influence on another trial. (Lambert v. Hicks, 15 Ky. Law Rep., 240; Stout v. Adams Oil Co., 19 Ky. Law Rep., 758; Johnson v. Stivers, 95 Ky., 158; Brommel v. Clark, 6 Ky. Law Rep., 220.)

The judgment is affirmed.

NORTON'S EXECUTORS AND TRUSTEES, &c. v. CITY OF LOUISVILLE

(Filed October 25, 1904.)

Wills—Taxation—Exemptions—By the will of W. F. Norton, deceased, certain real estate was bequeathed to his executors for the benefit of the Baptist Orphans' Home, to be held by them for five years, during which time it should be converted into money and the proceeds paid to said home. Held—That said home by the terms of its charter, under section 170 of the Constitution, is a purely public charity, and not employed for gain, and while the beneficiary is not given the immediate care and control of the fund, it is the equitable owner thereof, and, under the statute, it is exempt from taxation in the hands of the executors.

Humphrey, Hines & Humphrey for appellants.

Henry L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Paynter.

The purpose of this action is to determine whether George W. Norton and John W. Barr, Jr., as executors and trustees under the will of the late Wm. F. Norton, should pay the taxes upon certain real estate in the city of Louisville which was the property of the testator at the time of his death. Sundry bequests were made by the testator, and the pleadings admitted that the personal estate in the hands of the executors is sufficient to meet all demands against the estate. The proceeds of the real estate sought to be taxed will go to the Louisville Baptist Orphans' Home by the terms of the codicil to the will dated April 2, 1903. It reads as follows: "Finally, I wish said executors, after all bequests in my will and codicils have been paid, to establish a trust fund, to be known as 'The Norton Trust Fund,' the trustees of which are to be the same as the executors named in this will. The duration of said 'trust fund' to be five years from the date of my death; in which five years' time I hope they will be able to dispose of all my real estate hereinbefore not disposed of, wherever the same may be found, at the best cash prices; and when all the remainder of my estate has been reduced to cash, then I wish the 'trust fund' to be terminated by the said trustees and also the executors of this will, by paying all the gross proceeds of said 'trust fund' to (first settling two little 'trust funds' named in the will of Ann E. Norton—one to Charles J. Norton, son of her deceased brother, Charles J. Norton; the other to Ann Norton Gaines, the granddaughter of her sister, Mary F. McCutcheon) the proper authorities for the 'endowment fund' of the Louisville Baptist Orphans' Home."

The object of the Louisville Baptist Orphans' Home is stated in the original charter in language as follows: "The object of this corporation shall be to procure the control of orphans and destitute children of Baptist parents, and of such other destitute and helpless children as the managers may think proper to receive, for the purpose of supporting and educating them in an institution to be prepared and provided for that purpose by said managers; or, when deemed best in any case, to secure any such child a home and education outside of said institution, as more fully hereinafter expressed."

By the terms of the charter it is exempt from taxation, and it is likewise exempt under the terms of section 170 of the present Constitution as construed by this court in several cases. It is purely a public charity and not employed for gain. (Trustees of Kentucky Female Orphan School v. City of Louisville, 100 Ky., 470; City of Louisville v. Southern Baptist Theological Seminary, 100 Ky., 506; City of Louisville v. Board of Trustees, 100 Ky., 518.) Other cases of this court are to the same effect. In fact it is not argued that if the property sought to be taxed had been converted into money and paid over to the Louisville Baptist Orphans' Home, or if it owned the property, it would be required to pay taxes upon it. So the question is, is the property subject to tax while in the hands of the trustees under the will? Because the testator provided that the trustees should dispose of the undevised real estate within five years from his death, and that the "trust fund" should continue for that period of time before being turned over to

the Orphans' Home, it is contended that the real estate, although it is admitted that its proceeds and income will go to it, should be taxed. While the beneficiary of the trust fund is not given the immediate care and control of it, it is the equitable owner of it, and it could not rightfully be diverted to any uses or purposes other than those designated by the testator. If the condition required it, the beneficiary could, by appropriate proceedings, rescue the fund from any misappropriation of it. It is the owner of the fund, though temporarily controlled by others. While Norton and Barr are designated as trustees under the will, still they are the trustees for the beneficial owner. They are accountable to it for the management of the property and the execution of the trust. The practical effect of the provision of the will under consideration is that the fund is given to the Orphans' Home, but it is to be managed for it for the specified time by the trustees named by the testator. If the income from the property or from its proceeds were to go to another during the five years, then it would be very clear that the property or fund should be taxed during that period. When one is the equitable owner of property and is entitled to the income from it, he has the enjoyment of every benefit that could come to any one who might own the property. To hold that the property should be taxed because it is controlled by others than the trustees of the Orphans' Home for a specified period, is giving effect to the shadow, and not the substance, of things.

Section 4023, Kentucky Statutes, reads as follows: "The holder of the legal title, and the holder of the equitable title, and the claimant or bailee in possession of the property, on the 15th of September of the year the assessment is made, shall be liable for taxes thereon; but, as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment."

This court in City of Lexington v. Fishback's Trustee, 109 Ky., 770, held that it was the duty of the equitable owner to list it for taxation and pay the taxes thereon. It was also decided in the same case that the residence of the beneficial owner of personal property held by a trustee is the situs of the property for taxation. (Boske, Sheriff v. Security Trust and Safety Vault Co., Adm'r, 22 Ky. Law Rep., 182.) These cases show that it is the situation of, or the character of, the beneficial owner, not of the legal title holder, which determines the question of taxation The doctrine of Spaulding, M. C. v. Commonwealth, 83 Ky., 125, and Youtsey, Receiver, &c. v. Commonwealth, 22 Ky. Law Rep., 1904, does not apply to the facts of this case. In the Spalding case the fund in the hands of the master commissioner belonged to heirs, and was for distribution, and until the end of the litigation no one could tell what portion each would recover, therefore, neither could tell what amount to list for taxation, hence the court held the fund should be listed for taxation by the master commissioner. In Youtsey, Receiver v. Commonwealth the fund belonged to creditors, but it could not be told what each would receive until the final order of distribution, and the rule in the Spalding case was held to apply. In the case at bar it is admitted that the entire proceeds of the property sought to be taxed, and the income arising therefrom, will go to the Orphans' Home under the will. In our opinion the property is exempt from taxation.

The judgment is reversed for proceedings consistent with this opinion.

LOUISVILLE ROCK CO., &c. v. CAIN & RAHM.

(Filed October 28, 1904—Not to be reported.)

1. Deposition—Where it appears that a deposition was taken by appellants a year and a half after the issues had been formed, and that on the day they took his deposition they desired to ask the witness questions which the examiner refused to allow, and upon being granted leave to retake the deposition, did not do so, and made no statement as to what they expected to prove, it was error for the court to submit the case for trial.

2. Depositions—Where the certificate of the officer who took the deposition does not show that the answers of the witness were read to him and not signed by him as required by the Code of Practice, eighteen days were sufficient time to have these errors corrected, and not being corrected in that time an exception to the deposition was properly sustained.

3. Evidence—Where the contract between the parties showed appellants were partners, and the preponderance of evidence taking upon the trial was to the effect that they were partners, the view of the chancellor that they were is sustained.

R. L. Colston for appellants.

Chas. H. Taylor for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

The appellees brought their action in the lower court against the appellants, R. L. Colston, James Green, William Bryant, R. N. Pfeiffer and Margaret Bryant, whom they charged were partners, doing business as the Louisville Rock Co.

Appellees alleged that they were machinists, materialmen, supplymen, engaged as such in the city of Louisville, and as such they furnished appellants labor and material in repairing an engine and other machinery situated in the structure or building upon a tract or parcel of land, the property of appellants, or some of them. This piece of land was described in the petition, and they also alleged that within six months after the labor and material were furnished, their claim, which amounted to a balance of $240.71, was filed in the county clerk's office, as required by statute, for the purpose of retaining their lien on the real estate as the statute provides.

The appellants, Colston & Green, filed their joint answer, denying that they were members of this partnership; the other appellants filed a joint answer, by which, in a general way only, they controverted the amount of the account (except one item) in this way: They alleged that the appellee agreed to perform the labor within two days' time, but that they failed to comply with this agreement and it took them ten or twelve days to do the work; that if they had performed the contract as they agreed the cost would not have exceeded about $170, and this difference, together with the loss of the use of the machinery for the eight or ten days damaged them in the sum of $500. The excepted item referred to in the account was a pump for which was charged the price of $40. They alleged that they received this pump under a contract that if it was not a good and serviceable pump they were to have the right to return it; that it proved to be worthless, and they ceased to use it and notified appellees that it was there subject to their order or disposal.

Appellees, by reply, traversed all these allegations. Many depositions were taken by the parties, the case was tried and the court found in favor of the appellees for the full amount of their claim against all the appellants, and enforced appellee's lien on the real estate.

The appellants suggest several errors as reasons why the judgment of the lower court should be reversed. The first was the action of the court in overruling their exceptions to the deposition of James H. Saunders, taken on behalf of the appellees. It appears in the record that all the appellants, except R. L. Colston, filed this exception. It appears from the notice that Colston alone was served, and it also appears from the deposition of Saunders that his testimony affected only Colston, and did not affect the other appellants in any way. We think that the court properly overruled this exception. They say the court erred in submitting the case for trial before they could retake the deposition of Walter C. Graves. We are of the opinion that the court did not err in this matter. The record shows that appellants took the deposition of Graves on the 22d of May, 1902, about a year and a half after the issues had been formed. It also appears that on the day on which they took his deposition that they desired to ask him other questions which the examiner refused to allow. They took no steps to get leave from the court to retake until the 19th of June. The court granted the request, and the case was submitted for trial on the 7th of July, and they had not then retaken the depositions. Graves' deposition covered twenty-eight pages of typewritten matter. As appears from the record the appellants did not make any statement, either orally or in writing, as to what they expected to prove by this witness in addition to what he had already stated. They also complain that the court erred in sustaining the exceptions of appellees to the deposition of Thomas Furguson taken on their behalf.

The record shows that this deposition was taken on the 18th of June, 1902, some eighteen days before the case was submitted for trial. The certificate of the officer who took the deposition does not show that the answers of the witness to the questions were read to the witness, and the deposition shows that it was not signed by him, as required by the Code of Practice. They claim that the court did not give them time to have these errors corrected. The record shows that the witness, the officer who took the deposition, and all the parties to the action resided in the city of Louisville, and we are of the opinion that eighteen days was sufficient length of time to have these errors corrected. And if read the case was still with appellees.

Their next contention is that the court erred in holding that the appellants, R. L. Colston and James Green, were members of the firm doing business as the Louisville Rock Co. The written contract between all the appellants shows in effect that they were partners. (Howe v. Dupoyster, 8 Ky. Law Rep., 520; 21 Ky. Law Rep., 78.) And in addition the preponderance of the oral testimony shows that they were partners, and that Colston contracted with these appellees to perform this labor and furnish the material, and promised them that they should be paid therefor. We deem it unnecessary and unprofitable to refer to the evidence in detail, but it is sufficient to say that the evidence fully sustains the conclusion of the chancellor.

Judgment affirmed.

SAUNDERS v. HAMILTON, &c.

(Filed October 28, 1904—Not to be reported.)

1. Lands—Dower—Where the husband of appellant and one Carrico exchanged lands, but appellant did not join in the conveyance, she is not entitled to dower in both tracts, owning as she does the greater part of the land received from Carrico in the exchange. Moreover, the proof shows that the husband furnished the money with which he purchased the land in controversy after its sale for a purchase money debt of his vendor by the commissioner.

2. Same—Where a widow claims dower in land which her husband conveyed in his lifetime, she should not be permitted to recover upon a doubtful right. She should be required to make out a clear case. Where the grantor has conveyed with covenant of general warranty to the party against whom or his vendees the widow is claiming, and she is in possession of an estate from her husband worth more than the dower claim, the law rejects her claim, thus avoiding circuity of action.

J. W. Lewis and C. C. Fairleigh for appellant.

J. Morgan Richardson for appellees.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Nunn.

This is an appeal from a judgment denying the appellant the right to dower in lands now in possession of and claimed to be owned by the appellees. The history of the matter in brief is as follows: William R. Saunders, the husband of appellant, was the owner of a tract of land in Meade county containing 250 acres. In the month of January, 1857, he made a trade and exchange of lands with one James Carrico. Carrico received his tract of land at the price of $2,500. Saunders received from Carrico a tract of land of 368 acres in the same county at the price of $3,500. Saunders executed to Carrico five notes for $200 each, due annually. Carrico executed to Saunders a bond for title, agreeing to convey when all the purchase money was paid. Saunders prepared a deed for himself and wife to sign, conveying to Carrico the 250 acres, which he signed and acknowledged, but his wife, the appellant, failed to sign and acknowledge it. Appellant's husband died in the year 1901 and she brought this action against these appellees to recover dower in that part of the 250 acres which these appellees own as the remote vendees of Carrico, the part which they own being about 150 acres.

The appellees filed an answer controverting her claim for dower, stating several reasons why she was not entitled to dower, but we deem it necessary to notice only one of them, and that is their claim that she is not entitled to dower in the land conveyed to Carrico for the reason that she now owns the greater portion of the land received from Carrico; that she is not entitled to dower in both tracts. She replied and stated that her husband did not own a foot of land at the time of his death; that Carrico, in the sale to her husband, warranted the land free of incumbrance. She stated that after her husband had paid the $1,000 due to Carrico, he (her husband) found that the title to the land was in the heirs of one H. L. Board, and he brought suit against the heirs and executors of Board and Carrico for a conveyance.

Board's executors answered in that suit and claimed that there was a large

sum due on the purchase price from Carrico. Carrico and Board's executors litigated that question, and the court finally determined and adjudged that Carrico still owed on the purchase price the sum of $520.61, and gave judgment on behalf of Board's executors for that sum, and directed that the lien be enforced and the land, or so much of it as was necessary to pay that sum and costs, be sold. The commissioner made a sale of the land, less 100 acres which Saunders and wife had previously conveyed to one Teare, and one Herndon became the purchaser for the amount of this judgment, interest and costs. The report of sale was confirmed, and a writ of possession was awarded him, but was never executed. Herndon sold and conveyed to one Kendall, and Kendall, on the 21st of December, 1874, conveyed this land to appellant for the recited consideration of $683.75, and she claims the land in her own right.

Appellees, by rejoinder, traversed the material allegations of the reply, and alleged that the purchase price was paid to Kendall by William R. Saunders. This the appellant denies. Appellant was seventy-one years of age when she gave her deposition. She stated that she paid Kendall with means she had received from her father's estate, but she did not state when her father died, nor how much she received, nor from whom or when nor where her father lived when he died. She was asked if Herndon dispossessed her and her husband after he became the purchaser, and she answered that he did not; that a good Samaritan furnished them the money to redeem the land from him. She stated that they did not pay Herndon any rent, but stated that "we paid him interest." She was asked if they paid Kendall any rent after he bought it, and she answered, "no, we paid him interest until we redeemed it." It also appears in the record that her husband recovered of Carrico a judgment for the amount which Board's executors had asserted and recovered as a lien upon the land, together with the attorney's fees and costs. The appellant was asked in her deposition why they did not pay Kendall for the land with the money collected from Carrico on this judgment, and she answered that they did not get it; that one Walker collected that money and spent it. The record in this case shows a receipt executed by W. R. Saunders, alone, for $765 in full of the judgment against Carrico, and this receipt was executed by Saunders on the 15th of December, 1874, just six days previous to the conveyance by Kendall to appellant. From this it is certain that appellant was mistaken when she said that they did not have that money at that time.

In view of these facts, and the further fact that appellant and her husband joined in a conveyance of 100 acres of this land, received from Carrico, to one Teare and conveyed another small piece to another party, we are of the opinion that it would be inequitable to sustain her claim against the appellees, as it is evident that Herndon and Kendall, the good Samaritan, advanced for appellant's husband the money and held this land in their names, as friendly acts, until W. R. Saunders was able to collect his judgment against Carrico.

Where a widow claims dower in the land which her husband has conveyed in his lifetime she should not be permitted to recover upon a doubtful right; she should be required to make out a clear case. Where the grantor has conveyed with covenant of general warranty to the party against whom

or his vendees the widow is claiming, and she is in possession of an estate from her husband worth more than the dower claim, the law rejects her claim, thus avoiding circuity of action. (9 Dana, 181; 85 Ky., 539; 22 Ky. Law Rep., 202; 3 Dana, 588.)

It appears that the husband conveyed to Carrico by deed of general warranty, and that she received from her husband an estate of greater value than her dower interest in the land in the possession of these appellees.

For these reasons the judgment of the lower court is affirmed.

BRAIN, &c. v. BAILEY, &c.

(Filed October 28, 1904—Not to be reported.)

1. Lands—Conveyances—In this action the land in controversy was conveyed in trust for Nancy Brain. The conveyance passed the fee to the land. She was the sole beneficiary and the equitable owner, and a conveyance by her and her husband to appellants vested them with complete title.

2. Same—Construction of statutes—By the enactment of the married woman's act of 1884 all the property owned by married women became separate estate, and in the revision of the Kentucky Statutes the act of 1868, providing for the joining by the trustee of the wife in the conveyance of herself and her husband, was omitted.

James E. Clark for appellants.

A. W. Young and Reuben Gudgell & Son for appellees.

Appeal from Rowan Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 29th of February, 1868, G. F. Green and wife, in consideration of $350, conveyed a small tract of land, supposed to contain about three acres, situated in Rowan county, on the Licking river, to John W. Brain in trust for Nancy Brain. Nancy Brain was the mother of John W. Brain, and the wife of James M Brain, and shortly after the purchase of the lot she and her husband took possession of and occupied the property. John W. Brain died in July, 1876, but prior to his death he sold and conveyed to C. W. Honaker and James Cary about two acres of the land covered by the conveyance of Green and wife. After the death of the trustee Nancy Brain and her husband sold and conveyed a part of the remainder of the lot to Floyd Tolliver. Tolliver conveyed the part so sold to him to one Blair, and Blair sold and conveyed to the appellant, Henrietta Green. Another part of the lot was, after the death of the trustee, sold and conveyed by Nancy Brain and her husband to Thomas and ——— McClanahan, who afterwards sold and conveyed it to Lewis Emery, Jr. They also sold the remainder of the lot to Lewis Emery, Jr. J. M. Brain, the husband of Nancy Brain, died in 1886, and in April, 1888, after the death of her husband, Nancy Brain sold and conveyed another part of the lot to the appellant, A. M. Brain. Nancy Brain died intestate on the 23d of December, 1894, and on the 22d of January, 1898, the appellants, two of her children, brought this action against the other heirs at law and parties in possession under the conveyances from

Nancy Brain and J. M. Brain, in which they allege that their deceased mother only had a life estate in the property, and that at her death it descended to her children and heirs at law; and that her deeds were ineffectual to convey any greater interest, and asked for a sale of the property and the division of the proceeds of such sale among her heirs at law. The defendants answered, claiming that Nancy Brain was the equitable owner of the property conveyed by her; and that her deeds passed a perfect title to her vendees. The pleadings being made up, it was adjudged by the trial court that Nancy Brain had only a life estate in the property and that her conveyance to Lewis Emery, Jr., McClanahan, Thomas; A. M. Brain and Floyd Tolliver only passed to them the use of the property during her life, and that at her death the fee simple vested in her heirs at law. But the court further adjudged that the vendees of Nancy Brain should be reimbursed for the purchase money paid by them for the property and the value of their improvements thereon offset by a reasonable rent of the property, and the defendants have appealed.

It is hard to understand upon what theory the judgment of the trial court is based. If Nancy Brain only had a life estate in the property sold and conveyed by her, her vendees acquired by their purchase no greater interest, and they were not entitled to have refunded to them their purchase money or the value of the improvements placed by them upon the land. But, as a matter of fact, there is nothing in the conveyance made by Green and wife in 1868 which limits the interest of Nancy Brain in the property conveyed to a life estate. On the contrary, that conveyance passed the complete fee simple title to the property to John W. Brain in trust for Nancy Brain. She was the sole beneficiary of this conveyance, and the equitable owner of the property. John W. Brain was only the dry title holder, without pecuniary interest or power to sell or convey same unless the beneficiary, Nancy Brain, and her husband united therein. In the early case of Whitaker v. Blair, 26 Ky., 236, this court decided that a conveyance by a husband and wife of land conveyed to a trustee for the separate use of the wife was effectual to pass the title of the wife in the trust estate without the trustee uniting therein. The doctrine of this case was reaffirmed in Ship v. Bowmar & Freeman, 44 Ky., 163, and it was held that a feme covert to whose separate use land had been conveyed to trustee might, in connection with her husband, convey her interest therein without the trustee uniting therein. In 1868, the general assembly, by statute, provided that "separate estate and trust estate conveyed or devised to married women may be sold and conveyed in the same manner as if such estate had been conveyed or devised absolutely, if there be nothing in the deed or will under which they were held forbidding same, and if the husband and trustee, if there be one, unite in the conveyance. But her interest shall be the same in the proceeds as it was in the estate." (Section 17, article 4, chapter 52, General Statutes.)

This statute was in force at the date of all the conveyances made by Mrs. Brain and her husband. The question was again before this court in Benley v. Curtis, &c., 13 Ky. Law Rep., 703, and it was decided that when land was held in trust for a married woman her deed and that of her husband conveyed her equitable right thereto, although the trustee did not unite in the deed. By the enactment of the married woman's act in 1894, all the property owned

by married women became separate estate, and in the revision of the laws in the Kentucky Statutes the act supra was omitted. We are, therefore, of the opinion that appellants were, by the deed executed to them by Nancy Brain and her husband during his life and by Nancy Brain after his death, vested with the complete fee simple title to the property.

For reasons indicated the judgment is reversed and cause remanded, with instruction to dismiss the plaintiff's petition.

DURR, &c. v. DURR, &c.

(Filed October 28, 1904—Not to be reported.)

Decedent's estate—Settlement—Claiming set-off—In an action for the settlement of decedent's estate claims were filed by appellees for services in taking care of, nursing, etc., of decedent, the claimants being the son and daughter in law of decedent. Held—That the son having lived on decedent's farm for seven years prior to his death, under an agreement to support him, and without paying any rent, his claim of $500 should not be allowed. So much of the claim of the son's wife as was for domestic service rendered in her husband's household should not have been allowed, but for extraordinary menial services to decedent in the last year of his life she ought to be compensated.

Robert C. Simmons and Rardin & Rardin for appellants.

Walker C. Hall for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Settle.

Appellants and appellee, R. F. Durr, are the children and heirs at law of H. Durr, who died September 18, 1898.

He left a farm of 151 acres in Kenton county upon which he was living with the appellees, R. F. and Mary Durr, at the time of his death. The little personal property left by the intestate, which consisted of an insignificant sum of money, went by consent of the heirs into the hands of appellant, C. Durr, with the agreement that it should be used in paying the costs of an amicable suit brought by them in the county court for a partition of the farm left by their father. There being, as supposed, no debts owing by the intestate, it was agreed among the heirs, including appellee, R. F. Durr, that the appointment of an administrator was unnecessary. Notwithstanding this agreement the appellee, R. F. Durr, more than a year thereafter, had himself appointed administrator of his father's estate, and at once instituted this action as such administrator for the ostensible purpose of settling the estate.

The petition mentions but two debts alleged to be owing by the estate, one of $500, held by the administrator, and the other of $1,000 going to his wife, the appellee, Mary Durr, the claim of the husband being as alleged for labor done and personal care rendered for and to the intestate from April 1, 1891, to September 19, 1898, inclusive, and that of the wife for washing of the intestate's clothing and care and nursing of him for and during the same time.

The case was referred to a commissioner to report the liabilities of the

estate, and his report contained only these two claims, which were allowed in full. All exceptions filed by the appellants to the report were overruled by the court, and judgment was rendered declaring them payable out of the estate, and there being no personal estate, the judgment directed a sale of the land left by decedent for their payment, which had in the meantime been partitioned among the heirs; that is, the land was ordered sold to pay six-sevenths of these debts, or $1,285 68, the court holding that one-seventh of the land, which was the interest inherited by R. F. Durr himself, and by him conveyed to his brother, the appellant, C. Durr, on the day of the intestate's death, was not liable for the debts.

It appears that the intestate was 78 years of age at the time of his death; his health was poor for some time before he died. The precise time of his being in this condition was in controversy, but the weight of the evidence is to the effect that he was very feeble for a year before his death, and that during that time he required and was given by appellees unusual care and attention; especially was this true of his last illness of several days, during which he was bedridden and helpless. Much of the time during the last year of his life he had little control of his bowels and urinary organs, for which reason his person required extraordinary attention and his clothing and bed clothing frequent washing.

It appears that some years before his death the intestate appointed his son, Thomas Durr, his agent or attorney in fact to care for him and his property, and by arrangement between the agent and the appellee, R. F. Durr, the latter went upon the father's farm and was to have the same rent free for boarding and taking care of his father and doing his washing, and the farm was occupied and used by him from 1892 until March, 1899, under this arrangement, which seems to have been renewed each year his father lived with him, and in these years he paid no rent for the farm. This arrangement seems to have been mutually satisfactory to all concerned and was helpful to appellee, as he was much in debt when he went upon the farm with a judgment then and yet hanging over him, which may explain his haste in selling and conveying to C. Durr his interest in the land on the day of his father's death.

Waiving the question as to whether his agreeing that there should be no administration of his father's estate, his conveying his interest in the land, and his further agreeing that the small amount of money left by the intestate might be used to pay the cost of dividing the land, should be made to operate as an estoppel to appellee's right to assert the claim sued on, we are convinced that the claim against the estate presented by him is wholly without merit. His claim that the rent of the land only paid the intestate's board is not supported by the evidence; upon the contrary, we think it is reasonably and fairly shown by the evidence that for all the services included in his account, including the ordinary washing done by his wife, and for which she also asserted a claim against the estate, he was paid and satisfied by his and his family's use of the intestate's farm. Besides, if any part of either claim is recoverable, at least the first two years covered by them is barred by limitation, after deducting the six months' time during which no suit can be brought against an administrator.

It further appears from the evidence that the condition of the intestate's

health the last year of his life required additional care upon the part of appellees, and R. F. Durr then, and for the first time, demanded increased compensation, which he fixed at $250, over and above the rent of the farm. This was in March, 1898, and if, as he contends, this increase was agreed to by the intestate's agent, and there is some evidence that the latter did tacitly consent thereto, as the intestate died September 18th of that year, and appellee continued to occupy the farm for six months thereafter, viz., until March, 1899, for which time he rendered no return, it will do him no injustice to refuse him the $250 to which he would have been entitled if the intestate had lived out the year. As to the claim of the wife, we are of opinion that though the law of this State recognizes the wife's right to her own earnings, we do not think the statute ought to be so construed as to allow the wife, in the absence of a contract to that effect, express or implied, to recover, as in this case, for ordinary services, purely domestic in character, rendered in the household of her husband, and which were such as he, under his contract to take care of his father, was bound to require the members of his family to perform.

In the case of Brooks v. Schwerin, 54 N. Y., 349, which construed a statute of that State conferring upon a married woman the right to her earnings, the court said: "The statute effects a radical change of the common law which gave the husband the right to the labor, services and earnings of his wife. The services of the wife in the household in the discharge of her domestic duties still belong to the husband, and in rendering such services she still bears to him the common law relation."

But we do not think that such extraordinary and menial services as were performed by the appellee, Mary Durr, during the last year of the life of the intestate ought to be regarded as household work, appertaining to the domestic duties of the wife, and which she is bound to perform for her husband to another without compensation, and we are, therefore, of opinion that for the last year's services rendered the intestate she ought to receive just compensation. (Dance's Adm'r v. McGruder, 26 Ky. Law Rep., 20, and cases there cited.)

From all the testimony in the case we are of opinion that the extraordinary services performed by the appellee, Mary Durr, for that year should be estimated as of the value of $150.

The judgment is, therefore, reversed and cause remanded, with directions to the lower court to dismiss the claim of appellee, R. F. Durr, and allow to the appellee, Mary Durr, $150, to the payment of which the land described in the judgment, except the interest conveyed by her and her husband, may be subjected.

WILLIAMSON v. BLACKBURN.

(Filed October 28, 1904—Not to be reported.)

Execution sale of land—Purchase by creditor—Previous parol sale by debtor—Rights of parties—Appellant, under an execution levy and sale bought a tract of land for $75 worth $750, which was at the time in the possession of the appellee, who had bought it by parol from his father, the exe-

cution debtor, and had paid him $100 and taxes for ten years, and built a house thereon worth $750. In an action by the execution purchaser to recover the land, Held—That appellant was entitled to subject the land to the payment of his debt, but in view of the parol sale to appellee and his payments and improvements thereon he could not be treated as a fraudulent transferee so as to bring the case within the rule of Scott's Ex'or v. Scott, 85 Ky., 385.

Roscoe Vanover and J. F. Butler for appellant.

York & York for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Burnam.

In July, 1894, the appellant, James W. Williamson, recovered costs against G. R. Blackburn in two ordinary actions which aggregated about $75. In July, 1902, seven years after the rendition of these judgments, executions were issued thereon which were levied by the sheriff of Pike county upon a tract of 150 acres of land on which the appellee, Tolbert Blackburn, lived as the property of G. R. Blackburn. Plaintiff became the purchaser thereof for the aggregate amount of the two executions, and the title to the land was conveyed to him by the sheriff on the 29th day of September, 1902. On the 16th of October thereafter he brought this action against appellee for possession, claiming the land by virtue of the sheriff's deed. The defendant in his answer claimed to be the owner of the land by purchase from his father, and to hold a title bond therefor dated June 15, 1893. Plaintiff, by way of reply, charged that the title bond relied on was never delivered by G. R. Blackburn to appellee until after the institution of this suit, and was without consideration and for the fraudulent purpose of delaying him in the collection of his debt, and alleged that at the date of the title bond the land was actually worth $750, while the consideration expressed was only $100. G. R Blackburn testified that whilst the bond was executed in June, 1893, he had actually sold the land to his son two years previously and put him in possession thereof; that this son had subsequently erected on the land a dwelling house, smoke house, corn crib and other improvements which greatly increased the value of the land, but he also testified that he did not deliver the title bond to appellee until after the rendition of the judgment against him. It also appears that about the same time G. R. Blackburn conveyed another tract of land belonging to him to another son and removed from this State. Under this showing the trial court decided that appellant was entitled to subject the land claimed by appellee to the payment of his debt, but that in view of the fact that appellee had actually paid $100 for the land and had subsequently erected thereon valuable improvements, paid the taxes on it for about ten years, that he could not be treated as a fraudulent transferee so as to bring the case within the rule of Scott's Ex'or v. Scott, 85 Ky., 385. In our opinion appellant is given by this judgment all the relief to which he is equitably entitled.

Judgment affirmed.

ILLINOIS CENTRAL R. R. CO. v. MOORE.

(Filed November 1, 1904—Not to be reported.)

Railroads—Damages—In an action against appellant for damages to land by permitting drift to float upon it, an instruction by the court that while appellant had the right to pass timber under or over its line of railroad without liability to adjacent owners, provided the act was done with ordinary care, yet it did not have the right to leave timber upon its own right of way where it was liable to float in large quantities upon adjacent property to its damage, correctly stated the rights of the parties.

Robbins & Corbett, Pirtle & Trabue and J. M. Dickinson for appellant.

J. B. Wickliffe for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant maintained a line of railway through appellee's farm. It was made up of a fill and a trestle throughout the length of from fifteen to seventeen feet high. The railroad is located some two and one half miles south of the Ohio river, and runs nearly parallel to it, and at the point complained of is about five miles from the mouth of the river. The country it traverses is low and flat, subject to inundation when the Ohio and Mississippi rivers overflow.

In March, 1903, there was an unusual stage of water in these rivers, which flooded the lowlands from ten to fifteen feet or more. Considerable quantities of logs, trees and other drift was washed southward against the embankment of the line of railroad, much of which lodged against the trestle first mentioned. It was charged in the petition that appellee in removing this drift and floating debris did it so negligently and carelessly as to cause great quantities of it to lodge upon appellee's land to his damage. In the course of the evidence it was shown that the most of the timber that was so floated over and lodged upon appellee's land was that which had been cut upon appellant's adjacent right of way, and which had for some months been allowed to lie there without attempting to remove it, or to destroy it so as to prevent its becoming a menace to property below in case of high water. It was clearly shown that this section was subject to frequent inundations, especially during the winter season, and, therefore, presumably within the knowledge of the residents and those doing business in that section as appellant was. Although the act allowing the down timber to remain upon appellant's right of way at the point complained of was not one of the grounds of negligence set up in the petition, yet it was proven by the plaintiff below without objection, and evidence tending to rebut the fact was likewise introduced by appellant. Thus the question was tried by the parties as having been at issue, and was, therefore, not improperly submitted by the court to the jury in its instructions. While the court properly told the jury that for other timber floating upon the high waters that lodged against appellant's trestle it had the right to pass it under or over its line of railroad without liability to adjacent owners who might be damaged by the fact, provided the act was done by the railroad company with ordinary care, yet that appellant did not have the right to cut and leav

timber upon its own right of way where it was liable to be floated out in large quantities upon adjacent property to its damage, and that for such the railroad company was liable, although it was not negligent in passing it beneath the trestle after it became afloat. We think this view of the rights of the parties was properly stated by the court.

Judgment affirmed, with damages.

PETTIT, &c. v. NORMAN'S COMMITTEE, &c.

(Filed November 1, 1904—Not to be reported.)

1. Conveyances—In a conveyance by a husband to another in trust for his wife, with remainder to her children forever after her, the words "her children" are construed to mean all of the children of which the wife was the mother, whether by the husband who made the conveyance or a second husband.

2. Construction of written instruments—In construing a will, deed or other written instrument the court must keep in mind the cardinal rule that the meaning of the words used should be declared, and if the words employed are such as to convey a single meaning, extrinsic facts from which a different meaning might be inferred can not be considered.

O'Neal & O'Neal and Isaac T. Woodson for appellants.

Percy N. Booth for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Settle.

By this action against their half sister, Joanna Norman, a lunatic, and the Louisville Trust Co., her committee, the appellants, G. Clarence Pettit and Ben W. Pettit, sought to obtain a decree for the sale of two lots in the city of Louisville, and a division of the proceeds according to the rights of the parties, it being averred in the petition that the lots were indivisible; that one of them was jointly owned by and in the possession of appellants, and that the other was jointly owned by and in the possession of appellants and the appellee, Joanna Norman.

One of these lots was by deed of December 18, 1848, conveyed by W. J. Lampton to Napoleon L. Pettit in trust for the latter's wife (who was the grantor's daughter), and her children forever, the recited consideration being $1 and love and affection.

The other lot was, by deed of date November 7, 1849, conveyed by Napoleon L. Pettit to W. J. Lampton in trust for the wife of the grantor for life, with remainder to "her children." The consideration expressed in this deed was $1. Napoleon Pettit died several years after the deeds were made. By his wife, named in each of the foregoing deeds as Mildred J. Pettitt, Napoleon Pettit had four children, viz.: G. Clarence Pettit, Ben W. Pettit, Willis, who died in infancy, after the execution of the deeds, and before the death of his father, and Mattie, who died after she became an adult, and after the death of her father.

After the execution of the deeds Mildred J. Pettit was divorced from Napoleon L. Pettit, and afterwards intermarried with one Norman, from whom she was likewise divorced. The appellee, Joanna Norman, was the

fruit of her marriage with Norman. After the death of Napoleon L. Pettit and children, Willis and Mattie Pettit, Mildred J. also died. In the decree of sale which was rendered by the chancellor it was adjudged that the appellants, G. Clarence Pettit and Ben W. Pettit, each owned in fee simple sixteen forty-fifths, and the appellee, Joanna Norman thirteen forty-fifths' undivided interest in the lot conveyed by the deed of trust from Napoleon L. Pettit to W. J. Lampton, and that appellants each owned thirty one ninetieths, and appellee twenty-eight ninetieths' undivided interest in the lot conveyed by the deed of trust from W. J. Lampton to Napoleon L. Pettit, and the proceeds of the sale of the lots were ordered to be divided among the parties in interest upon the foregoing basis.

In view of the fact that there is now no denial of the right of appellee to the interest of twenty-eight ninetieths in the lot conveyed by W. J. Lampton to Napoleon L. Pettit, it is deemed unnecessary to consume time in showing how that interest was arrived at by the chancellor; it should, however, be said that by the judgment of the chancellor the deed from W. J. Lampton to Napoleon L. Pettit was held to embrace the afterborn children of Mildred J., and, therefore, to include the appellee, Joanna Norman, as a beneficiary. This part of the judgment was excepted to by appellants, but it is not now contended by their counsel that the chancellor erred in thus construing that deed. It is, however, strenuously contended by counsel for appellants that the construction given by the chancellor to the deed of trust of November 7, 1849, from Napoleon L Pettit to W. J. Lampton was erroneous, in that it was held to extend to the afterborn children of the grantor's then wife, including the appellee, Joanna Norman. In other words, it is insisted for appellants that as to the lot deeded by Napoleon L. Pettit the title passed as follows: First, to his wife, Mildred J., for life, with remainder at her death to her children by the grantor; that this remainder was a vested remainder in their child, Willis, then living, subject to open for the benefit of afterborn children of Mildred by the grantor; that upon the death of Willis in infancy his share under the statute descended to his father, who was then living. But upon the death of Mattie, which occurred after the death of her father, and after she arrived at twenty-one years of age, her share descended to her mother, who survived her; that upon the death of the father the share inherited by him from Willis descended to his own children, including Mattie, and upon her death the interest in Willis' share she inherited from her father, together with the share of one-fourth in remainder given her by the deed, passed to her mother, and upon the death of the latter this share, including that part of Willis' share inherited by Mattie from her father, descended to appellants and appellee in equal parts, which gave to appellee a one-ninth interest in the lot in question, and this one-ninth is conceded to her in the petition as amended; that is to say, that Mattie's share, one-fourth in this lot, plus one-third of Willis' fourth, which descended to her from her father, making one-third interest in the lot, descended at her death to her mother, and at her mother's death to appellants and appellee equally.

The chancellor, however, held in the judgment rendered that appellee took one-fifth under the deed of trust from Napoleon L. Pettit to W. J. Lampton, as one of the "children" of Mildred J.; that she also took one-third of one-fifth as her part of Mattie's original share and one-third of

Willie' share, which descended to Mattie from her father and was derived by the latter from the death of Willis in infancy, thereby making her interest in the lot thirteen forty-fifths, as before stated. The deed from Napoleon L. Pettit conveys to W. J. Lampton the lot herein described in trust "for the separate use and benefit of Mildred J. Pettit during her life, and for the fair and equal use of her children forever after her."

The question presented for our consideration is: Should the words "her children" be construed to mean all of the children of which Mildred J. Pettit (alias Norman) was the mother, whether by her first or second husband, and thereby include the appellee, Joanna Norman, as an equal beneficiary?

In construing a will, deed or other written instrument the court must keep in view the cardinal rule that the meaning of the words used should be declared, and if the words employed are such as to convey a single meaning, extrinsic facts, from which a different meaning might be inferred, can not be considered. In discussing the admissibility of extrinsic evidence in construing wills this court, in Allen v. Vanmeter, 58 Ky., 276, said: "But this extrinsic evidence must always be such as, in its nature and effect, simply explains what the testator has written, and not what he intended to have written. In other words, the question in expounding a will is not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he has used?"

In L. & N. R. R. Co. v. Louisville Southern Ry. Co., 100 Ky., 695, it is said: "The rule applying to the construction of contracts is that when there is no ambiguity in the words employed the courts can not put upon them any interpretation contrary to that which the words signify, and this rule applies equally to the construction of statutes and every kind of written instrument." (Connelly v. McGowan, 3 Mon., 153.)

In Spurrier Heirs v. Parker, 16 B. Mon., 274, the question was whether extrinsic evidence should be allowed to show the meaning of certain words in a deed providing for the emancipation of a slave, in discussing which the court said: "But would such extraneous proof be competent to illustrate a deed sufficiently plain of itself? Surrounding circumstances may be brought in aid of the construction of an instrument where its terms are of doubtful solution, but certainly where the language of an instrument is susceptible of clear solution no resort can or should be had to extraneous testimony to illustrate it." (Cromie's Heirs v. Louisville Orphans' Home Society, 3 Bush, 379.)

It will be observed that in the deed under consideration the grantor nowhere mentions or refers to Mildred J. Pettit as his wife. While it is not customary for a father to voluntarily permit one who is a stranger to his blood to share with his children in his bounty, he may do so if he choose, and the fact that it is unusual will not per se authorize a court to disregard the plain meaning of the words in the deed conferring such bounty. It is not made to appear that the grantor did not understand the legal meaning and effect of the words "her children" as used in the deed. The words themselves are free from ambiguity, and there are no other words in the instrument that conflict with them, or throw any doubt upon their meaning, nor is it intimated that at the time of making the deed the grantor was deceived or misled, or that he was subject to any undue or improper influence.

It must be presumed, therefore, that the instrument in all its parts expresses the intention of the grantor. It follows, therefore, that the chancellor's construction of the deed from Napoleon L. Pettit to W. J. Lampton was authorized by its language. It would unnecessarily lengthen this opinion to enter upon a discussion of the several authorities cited by learned counsel for appellants in support of their contention. We think, however, that a critical examination of them will demonstrate that they do not militate against the views herein expressed. They can readily be distinguished from the case at bar. Each of them involved the construction of a will or deed, because of ambiguities or indefiniteness of language that rendered it impossible to arrive at the intention of the testator without the aid of extraneous circumstances. Take, for example, appellants' leading authority, the case of Davis v. Hardin, 80 Ky., 674, it appears that the deed in controversy conveyed to one Thompson certain land in trust for "Mary E Jones and Wm. P. Jones, and any other child or children of her begotten by D. W. Jones." The deed provided for the enjoyment of the land by the grantor and his wife, unless the trustee should take possession of it, and in that event he was to pay the entire rent and profits to the wife.

On this state of case it was held by the court that the wife took a life estate, with remainder to the child of herself and grantor then living, and such as were thereafter born. The only point of difficulty under the uncertain language of the deed was as to the character of estate the wife took. With that fact determined, there was no difficulty as to the interest of the children; the deed was certain and definite to the effect that its provisions included not only the one child of the grantor and wife then living, but also any other child or children of the wife thereafter begotten by the grantor. The restricted rule of construction as to the word "children" referred to by counsel for appellants as applying to insurance cases is not in point here. Obviously the word "children" in an insurance contract would be held to mean children of the insured, for in law the children of others have no insurable interest in his life.

Judgment affirmed.

INGRAM v. FUSON.

(Filed November 1, 1904.)

Police courts—Jurisdiction outside of city limits—Under Constitution, section 143, providing that "a police court may be established in each city and town in this State, with jurisdiction in cases of violation of municipal ordinances and by laws occurring within the corporate limits of the city or town in which it is established, and such concurrent jurisdiction within said limits as justices of the peace have," the general assembly has no power to confer upon police courts jurisdiction to hear and determine offenses occurring outside of the corporate limits of the city or town in which it is established. Therefore, Kentucky Statutes, section 3496, part of the charter of cities of the fourth class, which provides that the police jurisdiction of the city shall extend to any point in the county within two miles of the boundary of the city, is in violation of section 143 of the Constitution.

Weller & Points for appellant.

E. G. Wilson for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, W. H. Ingram, operates a distillery in Bell county about a half mile outside of the corporate limits of the city of Pineville. On the 23d of March, 1904, the appellee, B. A. Fuson, who was at that time the police judge of the city of Pineville, a city of the fourth class, issued a warrant charging the appellant with unlawfully and without license selling whisky by the retail in the county of Bell, and delivered this writ to the chief of police of the city, with instructions to arrest appellant and bring him before the police court for trial. Thereupon the appellant brought this action against the appellee, alleging that unless prevented by order of the circuit court he would, as judge of the city court, proceed to try appellant upon the charge, and other similar charges, of which he had no jurisdiction, to his great and irreparable injury, and asked that a writ of prohibition should issue against appellee, as judge of the Pineville police court, restraining him from proceeding farther in the premises.

Appellee answered, admitting that he had issued a warrant against the appellant for selling liquor illegally outside the boundary of the city, but claimed that under sections 3496 and 3517 of the Kentucky Statutes, which are provisions of charters of fourth class cities, that he had jurisdiction of the offense, and asked that plaintiff's petition be dismissed. Appellant demurred generally to the answer, which the trial court overruled, and the demurrer was carried back to the plaintiff's petition and same dismissed, and from that judgment he has appealed.

Section 3496 provides that "the police jurisdiction of the city shall extend to any point in the county within two miles of the boundary of the city."

And section 3517 provides that "all fines and forfeitures recovered in the police court in the name of or in favor of the Commonwealth of Kentucky for violations of the penal laws committed within said city's police jurisdiction are hereby granted to the city, and when collected, after payment of all fees and cost, shall be paid to the treasurer of said city."

In 1 Black's Judgments, section 215, the word jurisdiction is defined as follows: "The power and authority constitutionally conferred upon a court or judge to pronounce the sentence of the law, or to award the remedies provided by law upon a state of facts proven or admitted, referred to the tribunal for decision and authorized by law to be the subject of investigation or action by that tribunal in favor of or against persons who present themselves, or who are brought before the court in some manner sanctioned by law as proper and sufficient."

The section of the statute relied on as conferring jurisdiction upon appellee to try the defendant on the warrant issued for offenses committed outside of the boundary of the city of Pineville is, we think, in palpable violation of section 143 of the Constitution of the Commonwealth of Kentucky, which provides that a "police court may be established in each city and town in this State with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within the corporate limits of the city or

town in which it is established, and such criminal jurisdiction within said limits as justice of the peace have."

Under this section of the Constitution the general assembly has no power to confer upon police court's jurisdiction to try and determine offenses occurring outside of the corporate limits of the city or town in which it is established. We, therefore, conclude that the trial court erred in overruling appellant's demurrer to the appellee's answer and in dismissing his petitions.

For these reasons the judgment is reversed and cause remanded, with instructions to sustain appellant's demurrer to appellee's answer, and to grant a writ of prohibition restraining appellee from proceeding farther with the trial of the warrants against the appellant, and for such other orders as may be necessary to carry into effect this opinion.

MACE v. ASHLAND COAL AND IRON RAILWAY CO.

(Filed November 1, 1904.)

1. Master and servant—Mischievous injury by servant—Liability of master—The plaintiff, who was captain of a steamboat, alleged that he was asked by defendant's servant to assist him in adjusting a coal car upon an incline used by defendant to load coal from a bluff upon barges below, and after the car had been adjusted and plaintiff was about to step from the incline, the servant, in a loud, warning voice, either michievously or maliciously and with intent to frighten him, when he was really in no danger, called out, "for God's sake, Cap., jump; jump for your life," and believing that his life was in danger he jumped from the incline to the deck of the barge, thereby sustaining the injuries sued for. Held—That the averments of the petition not only fail to allege that defendant's servant was representing the company in any way in the use of the words which caused him to jump, but in substance allege that the words were false and either mischievously or maliciously spoken, and not in the discharge of any duty to the master.

2. Same—While we think it may be fairly deduced from the decisions in Kentucky that the master is liable in this State for the mischievous or malicious acts of his servant in the line of his duty and within the scope of his authority, this rule has no application where the injury complained of resulted from the malicious or mischievous act of the servant when not acting in the line of his duty or in the scope of his authority or for the purpose of furthering the interest of the master.

Howard M. Benton for appellant.

Procter K. Malin and Hager & Stewart for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Chief Justice Burnam.

This is an appeal from a judgment sustaining a demurrer and dismissing appellant's petition. The only question to be decided upon this appeal is whether the facts alleged are sufficient to support a cause of action.

The plaintiff alleged in substance that appellee was operating a double track incline to convey coal from its drum house on the bluff to coal barges in the river; that plaintiff was the captain of a steamboat anchored in the Ohio river to a deck barge of appellee, which was at the end of the incline;

that he had walked down the incline from the drum house close to its lower terminus, when he was called upon by one of defendant's servants to assist him in turning back upon the track a coal car which had been upset; that after the car had been properly adjusted and he was on the point of stepping from the incline, appellee's servant, in a loud and warning tone of voice, said, "for God's sake, Cap., jump; jump for your life," and believing his life to be in danger, he jumped from the incline to the deck of the barge, a distance of five or six feet, thereby sustaining the injuries sued for; that as a matter of fact neither his life nor person were in danger at the time, but the words were spoken by defendant's servant either mischievously or maliciously, with the design to alarm and terrify him.

This court in a number of cases has held the master liable for the malicious acts of the servant when acting in the line of his duty and within the scope of his authority. In Smith, By, &c. v. L. & N. R. R. Co., 95 Ky., 11, the plaintiff, a trespasser, complained that a brakeman had kicked him off of a moving train. It was decided that the company was liable "if the servant in the exercise of his legitimate authority and within the general scope of his employment and in the line of his duty, used unnecessary force, and used it under circumstances or at a time when the consequences would ordinarily seriously injure the person ejected. But if the servant went beyond the scope of his employment he was as much a stranger to his master as to any third person, and his acts were in no sense to be regarded as the acts of the master. In Lexington Ry. Co. v. Cozine, 23 Ky. Law Rep., 1130, a car conductor demanded fare of a passenger who had, by mistake, pulled the wrong cord and rung up a fare. The passenger responded that he had already paid his fare, and that if the car was not stopped to let him off at his alighting point he would pull the cord again. The conductor thereupon assaulted him. In that case a recovery was permitted on the ground that whilst the assault was unjustifiable, the conductor in the transaction was acting in the line of his duty and in the scope of his authority. This question was again before the court in Williams' Adm'r v. Southern Ry. Co. in Ky., 24 Ky. Law Rep., 2214. That was a case instituted to recover damages of the railway company for injuries alleged to have been caused by a brakeman throwing a trespasser off the train. It was decided that the plaintiff had a good cause of action against the company, for the reason that the alleged acts of the brakeman were in the discharge of a duty to them, but unnecessarily and brutally performed. So we think it may be fairly deduced that the master is liable in this State for the mischievous or malicious acts of his servant whilst acting in the line of his duty and within the scope of his authority. But this rule has no application where the injury complained of resulted from the malicious or mischievous act of the servant when not acting in the line of his duty or the scope of his authority, or for the purpose of furthering the interest of the master. (Winningar's Adm'r v. Central Passenger Railway Co., 85 Ky., 547.)

The averments of appellant's petition in this case not only fail to allege that appellee's servant was representing the company in any way in the use of the words which caused appellant to jump from the incline, but in substance allege that the words were false, and either maliciously or mischiev

ously uttered, and not in the discharge of any duty to appellee. We are, therefore, of the opinion that the averments of the petition fail to state a cause of action.

Judgment affirmed.

COMMONWEALTH, BY, &c. v. JONES, JUDGE.

(Filed November 1, 1904.)

1. The facts in this proceeding show that F. J. Hagan was mortally wounded by John R. T. Barbour in Bullitt county on August 11, 1904, and was taken to Louisville, Ky., on that day for treatment in a hospital, where he died the next day of his wound. Barbour was arrested in Bullitt county on August 11 for malicious shooting and wounding with intent to kill, and on an examining trial before the county judge of said county was released on bail to answer said charge. Upon the death of Hagan, in Jefferson county, Barbour was rearrested in the city of Louisville on a charge of murder and committed to jail without bail. He has not been indicted in Jefferson county, but has been indicted in Bullitt Circuit Court. Held—That under section 1147, Kentucky Statutes, providing "if a mortal wound or other violence or injury inflicted in one county and death ensue in another the offense may be prosecuted in either," and under section 24, Criminal Code, providing "if the jurisdiction of an offense be in two or more counties the defendant shall be tried in the county in which he is first arrested unless an indictment be pending in another county." The fact that the authorities of Bullitt county first took jurisdiction of the offense by arresting the accused and holding him to trial affixed its jurisdiction as the exclusive one in the prosecution.

2. The fact that the accused was first arrested in Jefferson county on the charge of murder, when there was no indictment pending in Bullitt county for murder, does not oust the jurisdiction of Bullitt county previously acquired by the arrest of accused and holding him to bail, as it was competent for the examining court in Bullitt to have changed the charge upon which he was arrested so as to fit the facts of the case at any time pending the inquiry, and the prisoner was no less in the custody of the court because he was on bail.

3. Sections 1147, Kentucky Statutes, and 24 Criminal Code, supra, are not in violation of section 11 of the Constitution, allowing a defendant accused of crime to be tried by "a jury of the vicinage," as where a crime has been commenced in one county and finished in another, either county is deemed to be the vicinage.

Aaron Kohn, Loraine Mix and J. M. Huffaker for complainant.

Wm. Carroll, Chas. Carroll, Fairleigh, Straus & Fairleigh and H. B. Lee for respondent.

Opinion of the court by Judge O'Rear on motion for writ of prohibition.

J. M. Huffaker, Commonwealth attorney for the 10th Judicial District of Kentucky (which is comprised of Jefferson county), has filed a petition in this court against Hon. S. E. Jones, judge of the 10th Judicial District (in which is situated Bullitt county), praying that a writ of prohibition issue out of this court against the respondent to prevent his taking jurisdiction of the person of one John R. T. Barbour for trial under a charge of murder, said to have been committed upon F. J. Hagan on or about the 12th day of

August, 1904. The facts of the homicide are alleged to be that Barbour shot and mortally wounded Hagan in Bullitt county on August 11, 1904, but that Hagan survived until August 12, when he died from the effects of the wound; that Hagan, after the wound was inflicted, was taken to Louisville, in Jefferson county, for treatment at a hospital situated there, and died as aforesaid while in Jefferson county. Barbour was arrested in Bullitt county on the 11th of August, 1904, upon a warrant issued by the county judge of Bullitt county, charging him with the felony of malicious shooting and wounding, with intent to kill, the shooting and wounding above alluded to. He was presented before the county judge of Bullitt, sitting as an examining court, when he was released upon bail for his re-appearance at a later day to answer the charge. Immediately after the death of Hagan, Barbour, who had gone to Louisville, where he had been in business, was arrested in Louisville, charged with the crime of murder, the result of the shooting and wounding recited, and was committed without bail by the police court of Louisville, sitting as an examining court, to answer the charge before the Jefferson Circuit Court. The Jefferson Circuit Court has not indicted Barbour for the crime, but the Bullitt Circuit Court has, and the judge of the Jefferson Court, Criminal Division, has, upon the hearing of an application for habeas corpus, ordered Barbour remanded to Bullitt county for trial.

The complainant claims that the Jefferson Circuit Court has the exclusive jurisdiction to try Barbour under the charge of the murder. If the Jefferson Circuit Court has jurisdiction of the offense, and has assumed it, the circuit court of Bullitt county would be without jurisdiction to take and try the defendant upon that charge. The writ of prohibition will issue from this court to prevent the unauthorized exercise of jurisdiction by an inferior court. (Constitution, section 110; Weaver v. Toney, 107 Ky., 419; L. & N. R. R. Co. v. Miller, Judge, 23 Ky. Law Rep., 1714.) The question of jurisdiction of the Bullitt Circuit Court in the case is the one presented for decision.

At the common law it seems to have been doubtful where the jurisdiction was to try the offense where the stroke or poison was administered in one county and the death resulted in another. To obviate that difficulty the statute of 2 and 3 Edward VI. was passed, which reads as follows: "That when any person shall be feloniously stricken or poisoned in one county and die of the same stroke or poisoning in another county, an indictment therefor found by jurors of the county where the death happened shall be as good and effectual in law as if the stroke or poisoning had been done or committed in the same county where the party shall die, or such instrument shall be so found."

After that statute it was settled that the trial was in the county where the death happened. (East., 382.) As the common law of England, and the acts of parliament made in aid of the common law prior to the fourth year of King James I., which were of a general nature, were by the first Constitution of Kentucky continued in force in this State, and have been since continued in force by the several revisions of the statute law of this State except in so far as modified by our statutes (Parker v. Commonwealth, 12 Bush, 151; Ray v. Sweeney, 14 Bush, 1), it is argued that the trial must now be in the county where the death happened; that until the death the deed is incomplete.

Although there is eminent authority for the proposition that where the blow was struck in one county and the death results in another, the offense was punishable as murder in either, we have not found it necessary to carry the inquiry so far as to pass upon that phase of the question. By our statute (section 1147, Kentucky Statutes) it is provided: "If a mortal wound or other violence or injury be inflicted in one county and death ensue in another, the offense may be prosecuted in either."

Section 24, Criminal Code of Practice, reads: "If the jurisdiction of an offense be in two or more counties, the defendant shall be tried in the county in which he is first arrested, unless an indictment for the offense be pending in another county."

Counsel appearing for Barbour, but who brief the case on behalf of respondent, claim that the act giving jurisdiction to either county to try the offense is violative of the constitutional provision guaranteeing to every one accused of crime a speedy public trial by a jury of the vicinage. (Section 11, Bill of Rights, Constitution.)

Complainant takes the contrary position. He also urges that section 24, Criminal Code, can not apply though because, he says, the accused was first arrested under the charge of murder in Jefferson county, when there was no indictment for the same offense pending in Bullitt; that although accused had been arrested in Bullitt upon the charge of the malicious shooting and wounding, which subsequently resulted in the death of Hagan, yet that offense was merged into the crime of murder by the death of the person shot and the prosecution under it was at an end.

Of the first proposition the matter turns upon the meaning of the term "jury of the vicinage." Literally it signifies of the neighborhood where the crime was committed. The purpose of the requirement is to insure a person charged with crime against being transported to a distant locality for trial, where he can not have the benefit of the presence of his witnesses, and of having their statements weighed by jurors acquainted with them. Poverty or other circumstances would frequently prevent those accused falsely from presenting their defense. Oppression and injustice would be possible and likely enough frequent. A crime may be a single act and immediate in all its consequences. The locality where it was enacted is its vicinage. On the other hand, a crime may be the result of a series of acts, or as the result of a single act, the direct consequences may be made to occur at various times and in different localities. The criminal act, the motive of the perpetrator, the cause and the effect, are but parts of the complete transaction. Wherever any part is done becomes a locality of the crime, as much as where it may have culminated. The contrary notion was the basis of the confusion that led to the enactment of the statute 2 and 3 Edward VI., supra. Ever since that statute, and it seems probable that even before its passage, the vicinage of a crime begun in one county and finished in another, or where the cause occurred in one county and result in another, has been deemed to be either county. A jury summoned from either place was at the common law "a jury of the vicinage."

The perpetrator of an unlawful deed is presumed to have intended the natural and actual consequence of his act; so that when his victim does not immediately die, and goes on about his affairs, the injury and its cause

accompany him. It should not lie in the mouth of one committing a felonious assault to claim immunity from the extreme consequence of his deed because the person stricken has gone to another county before he succumbs to his wound. It was, therefore, competent for the legislature to provide that where a crime is committed in part in one county and part in another, it may be punished in either. We hold that section 1147, Kentucky Statutes, supra, and section 24, Criminal Code of Practice, are not violative of section 11 of the Bill of Rights of the Constitution of Kentucky.

Where jurisdiction is concurrent in two or more courts, it is plain that both can not at the same time exercise it. And if one takes jurisdiction of a particular offense, that another can never do so. The personal presence of the accused at his trial in cases of felony is indispensable under the Constitution. It is equally true that when once in jeopardy, the accused can not again be tried for the same offense. These constitutional provisions, aside from the familiar rules of procedure by courts having concurrent jurisdiction of offenses, point to the conclusion that where one court has assumed jurisdiction it becomes exclusive. It is concurrent only so long as neither has begun to exercise it. Section 24, Criminal Code of Practice merely defines what would probably have been the judicial course in its absence, which is that if neither court has gone so far as to find an indictment, thereby taking jurisdiction of the offense, then any other court in which it may be tried originally can, by taking the accused into custody, affix its jurisdiction as the exclusive one in the matter.

In the case at bar jurisdiction to try the accused was by statute, as above indicated, concurrent in the two counties where the crime was committed, the one in which the shot was fired, and the one in which the death resulted The authorities of the county where the shot was fired first arrested Barbour. So far as he was concerned the deed was done. It merely depended upon later developments to determine the degree of his crime, if guilty. Having him in custody, it was competent for the examining court of Bullitt county to have changed the charge upon which he was arrested so as to fit the facts of the case, at any time pending the inquiry. The prisoner was no less in the custody of the court because he was out upon bail. His bail was his goaler, as has been said, who had undertaken to have him present at the time appointed by the committing magistrate, and at all times pending the inquiry to answer not only the charge upon which he had been presented, but any charge connected with or growing out of it, of which, in the judgment of the court, the accused was probably guilty. (Sections 66-99, Criminal Code of Practice; Marking v. Needy, 8 Bush, 23; Ramey v Commonwealth, 83 Ky., 534; State v. Stout, 6 Halstead, N. J., 124; People v. Stage, 10 Wend., N. Y., 453.)

The writ is denied.

Whole court sitting.

GROSS v. COMMONWEALTH.

(Filed November 2, 1904.)

1. Filing away indictment—Absence of defendant—Effect—Appellant was indicted in this State in 1893 for horse stealing, and left the State before being arrested. After ten years' absence he was brought back on a bench

warrant and requisition from another State and tried and convicted. Held —That although the indictment had been filed away by order of court for more than eight years, without a provision in the order itself for its reinstatement, its validity was not thereby affected as against the defendant, who was not before the court, and such an indictment may be reinstated on the arrest of the defendant and a trial had thereon.

2. Conviction—Evidence—Peremptory instructions—There being some evidence circumstantial in character tending strongly to convict the defendant with the crime for which he was tried, the trial court properly refused to peremptorily instruct the jury to find him not guilty.

H. G. Botts for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Lawrence Gross, was indicted by the grand jury of Owen county at the October term of the Owen Circuit Court, 1893, for stealing a horse belonging to W. B. Duvall. Several bench warrants were issued on this indictment, which were returned not found, and at the June term, 1895, the indictment was, by order of court, filed away. On the 28th of November, 1903, more than ten years after the indictment was returned, a bench warrant issued thereon by direction of the Commonwealth's attorney, under which and a requisition defendant was arrested in the State of Ohio and returned to Owen county, where he was tried, convicted and his punishment fixed at confinement in the penitentiary for two years. Defendant brings his case to this court, and asks a reversal for a number of alleged errors.

It appears from the testimony that the horse in question was stolen about the 10th day of June, 1893, in the town of Owenton, and was discovered about two months later in Lexington. Defendant's father was first arrested for the theft, but was acquitted. Subsequent thereto the indictment was found against appellant, who lived with his father in Lexington. Shortly after the return of the indictment, but before a bench warrant could be served upon him, appellant left the State of Kentucky, and did not return thereto until the fall of 1903, having in the meantime lived in the States of Illinois, Colorado, Arizona, etc.

His first ground of complaint is that the trial court had no power to reinstate upon the docket the indictment which had been previously filed away, more than eight years before, without a provision in the order itself for its reinstatement; that the effect of the order filing the indictment away was equivalent to a dismissal of the prosecution, and the end of all proceedings thereunder. This question was very fully considered by this court in Jones v. Commonwealth, 24 Ky. Law Rep., 1434. The opinion in that case reviews the cases of Ashbrook v. Commonwealth, 46 Ky., 44; Commonwealth v. Bottoms, 21 Ky. Law Rep., 1159, and decided that where a defendant had not been apprehended, and was not before the court, that it was permissible to file away an indictment and reinstate it upon the docket upon the subsequent arrest of the defendant, but that it was not permissible under section 11 of the Bill of Rights if the defendant was before the court objecting to the order. Section 185 of the Criminal Code provides that "if the defendan

be in custody or on bail when the indictment is found, the trial may take place at the same term of the court, at a time to be fixed by the court." And section 186 provides that all criminal prosecutions and penal actions not tried at any term of a court shall be docketed by the clerk for the next term beginning with the first day thereof, "and setting them for as many days as may be necessary in the same manner as ordinary civil actions are docketed." Section 187 provides "that all prosecutions shall stand for trial on the day to which they are docketed, if the defendant be in custody, or on bail, or have been summoned three days before the commencement of the term." All these provisions of the Code are manifestly for the prompt and orderly dispatch of the business of the court. It is not the docketing of an indictment which gives it life, nor does the mere temporary filing away of the indictment against a defendant who is not before the court destroy its validity, as there is manifestly no reason why such an indictment should be carried upon the docket Such an order is not equivalent to a "nolle prosequi," and such an indictment may be reinstated upon the arrest of the defendant. Section 140 of the Criminal Code provides that a "bench warrant shall be issued by the clerk upon the order of the court, and may be issued from time to time by order of the attorney for the Commonwealth." We conclude, therefore, that the trial court properly tried appellant on the reinstated indictment.

It is next complained that the trial court erred in refusing to peremptorily instruct the jury to find the defendant not guilty on the ground that there was no evidence conducing to show the guilt of the accused. We do not think it necessary to review in this opinion the testimony in the bill of exceptions connecting appellant with the commission of the crime for which he was tried. It is enough to say that there was certainly some evidence, circumstantial in character, which tended very strongly to connect him with the crime for which he was convicted. A number of other alleged errors are complained of, but we have reached the conclusion, upon the whole case, that they were not, if errors at all, prejudicial to the substantial rights of the defendant.

The judgment is, therefore, affirmed.

WOOLLEY, &c. v. CITY OF LOUISVILLE.

(Filed November 2, 1904.)

1. Judgment—Modification—Subsequent term—While the court can not at a subsequent term modify a judgment previously rendered, it may, in executing the judgment, make such orders as subsequent events render necessary for the proper execution of the judgment according to justice and right.

2. Change of conditions—Where the mode of sale directed in a judgment was intended to meet present conditions, when the conditions changed the chancellor may control the execution of the decree to prevent injustice.

3. Taxes—Liens—Joint action—Life estate—Remaindermen—Mortgages—In a joint action against the life tenant and the remaindermen in certain real estate for taxes due the city of Louisville, where the city was adjudged a lien upon the life estate of R. W. W. in all the parcels of land for the taxes for the years 1885 to 1888, and a lien upon the life estate of R. W. W., and the remainder interest of the two children, S. W. and M. J. F. in all the

lots for the years 1889 and 1900 (and upon some of which lots mortgages were held by persons who were parties to the action), and where upon appeal to the Court of Appeals the judgment of the lower court was affirmed and the case remanded, with directions to sell the lands in certain proportions for the taxes due by the life tenant and the remaindermen respectively, and upon return of the case to the lower court the remaindermen tendered to the city the amount adjudged against both the life estate and the remaindermen in satisfaction of the judgment against their property, which being declined, they paid into court and moved the court to make an order of satisfaction of the judgment as to them, it was error in the court to overrule said motion and to sell the entire property for all of said taxes.

4. Consent of mortgagees—Authority of court—Equities of parties—Where the case was returned to the lower court and the mortgagees consented in writing that no sale should be made under their mortgages, and the remaindermen paid into court all that was a lien upon their property, an entirely different state was presented. There was then nothing to sell for but the taxes which had been adjudged a lien only against the life estate, and the court was without authority to sell the entire property for the taxes which were due only by the life tenant and divide the proceeds of the sal between the life tenant and the remaindermen in the proportion of the value of the life estate to the value of the remainder, for the remainder not being liable to taxes due alone by the life tenant, the city could not compel the remaindermen to submit to a sale of their property as a means of satisfying a liability of the life estate.

W. O. Harris and Huston Quinn for appellants.

H. L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Hobson.

Mary J Woolley owned a number of lots in the city of Louisville. The city of Louisville instituted these suits against her and her husband, R. W. Woolley, to enforce the lien of the city for taxes. Mrs. Woolley died in the year 1897, leaving surviving her two daughters, Sophia J. Woolley and Mary J. Fenley. The cases progressed to judgment, and it was determined in the circuit court that for the taxes for the years 1885-1888, inclusive, the city had a lien only on the life estate of R. W. Woolley; that for the taxes for the years 1889-1900, inclusive, the city had a lien on both the life estate of R. W. Woolley and the remainder interest of the two children. A sale was ordered to satisfy the tax liens and certain mortgages on the property. From this judgment an appeal was taken to this court, and the judgment was affirmed. (Woolley v. City of Louisville, 24 Ky. Law Rep., 1357.) The total of the taxes, interest and costs was $33,886.02. Of this $23,575.01 was a lien on both the life estate and the remainder, being the taxes for the years 1889-1900; and $10,311.01 were a lien only on the life estate, being the taxes for the years 1885-1888. On the return of the case to the circuit court the remaindermen tendered to the city the sum of $23,575.01, the amount adjudged against both the life estate and the remainder, in satisfaction of the judgment against their property. The tender was declined. They then paid the money into court, and moved the court to make an order of satisfaction of the judgment as to them. The court overruled the motion and the commissioner then proceeded to sell a number of the lots by the direction of the city attorney, the gross

amount of the sales being something over $40,000. The entire property was sold, the purpose being out of the proceeds to arrive at the value of the life estate and apply this much of the proceeds to the satisfaction of the taxes adjudged against the interest of the life tenant. Exceptions were filed to the sale, which were overruled, and the remaindermen have appealed.

It is insisted for the city that the judgment theretofore entered having been affirmed by this court, the circuit court was powerless to alter or modify it in any way, and could do nothing but execute the decree according to its terms, and that this was done by the sale made by the master commissioner. It is insisted for the appellants that as they had paid into court all that was adjudged against their property, the court should have entered satisfaction as to them, and that no sale of their property could thereafter be properly made.

The rule is that after a judgment has become final the court rendering it possesses no power at a subsequent term to set it aside or modify it, and has no further control over the case except for the purpose of executing the judgment. (Kelley v. Keizer, 3 A. K. Mar., 268; McClanahan v. Henderson, 1 T. B. Mon., 261.) But while the court can not at a subsequent term modify a judgment previously rendered, it may, in executing the judgment, make such orders as subsequent events render necessary for the proper execution of the judgment according to justice and right. Thus if property is ordered to be sold on a certain day and the sale is not then made, the court may order the sale to be made on another day, or if the person who is ordered to make it can not act, or, if the sale can not be made at the place named in the judgment, he may name another officer to make the sale, or fix another place for it. So, if part of the judgment is paid, he may direct the sale to be made for the part remaining unpaid. Thus if the land of A. and B. is ordered to be sold to pay a certain debt, and A. afterwards pays his part of the debt, the court may direct the commissioner to sell first B.'s land to pay B.'s part of the debt; or if, before the sale, B. is garnished by a creditor of the plaintiff and compelled to pay the debt, or a part of it, to the plaintiff in an attachment proceeding, the court may order the proper credit to be given and a sale of the land to be had only for the balance of the debt remaining unpaid. In Sandburg v. Papineau, 81 Ill., 446, which was a case like that just supposed, the court, speaking of the power of courts of record over their own process, said: "It is essential to the administration of justice, and it by no means depends upon statutory enactment, but the power is coeval with the common law courts; and such courts will recall their process and quash the same when it is shown that it would be illegal or inequitable to permit its further use, and to allow it to be enforced. If a judgment were satisfied, and, through mistake or by design, an execution were to issue upon it, does any one suppose the court from which it issued is powerless to recall and quash it? Or, if it was only partially satisfied, and an execution were to issue for the full amount of the judgment, would any one have the hardihood to say that the court could not order the credit to be endorsed on the execution? So the court has power, in all cases, to compel credits on judgments or executions, where it would be illegal or inequitable to proceed and collect the amount claimed."

The same rule was followed by his court in Brandenburgh v. Beach, 17

Ky. Law Rep., 560, where after judgment the debtor had paid as garnishee a part of his debt and it was adjudged that the execution should be credited thereby. In McLear v. Morgan, 5 B. Mon., 282, a judgment was rendered against the husband and another for trespass, and the execution was levied on the land of the wife. The judgment was then assigned to the husband and two others, the husband, with the consent of the other assignees of the judgment, agreeing to settle upon the wife one-half of the wife's land, and securing two-thirds of the judgment to the other assignees. It was held that the judgment might be enforced against the cotrespasser of the husband for one-half of the entire amount of the judgment.

At common law a proceeding for the purpose of entering satisfaction of a judgment or preventing its execution in a manner that by reason of subsequent events would be oppressive, was known as a writ of audita querela. (3 Blackstone, side page 505.) But in modern practice this writ has dropped out of use, and the remedy is by motion in the court rendering the judgment (1 Freeman on Judgments, section 95.) Thus in Chambers v. Neal, 13 B. Mon., 256, where the defendant had been discharged in bankruptcy after the judgment was entered against him, he was allowed, by motion, to set up his discharge in bankruptcy. (Ludington v. Peck, 2 Conn., 700; Smith v. Miller, 66 Texas, 78; B. & O. R R. Co. v. Vanderwecker, 33 W. Va., 191; Saltmarsh v. Bower, 34 Ala., 613; Rauth v. N. Y. El. R. R. Co., 23 Civ. Pro , N. Y., 95; Holden v Dunn, 19 L. R. A., 81.)

The former judgment which was affirmed by this court was in substance as follows:

1st. The city of Louisville was adjudged a lien upon the life estate of the defendant. R. W. Woolley, in all the parcels of land for the taxes for the years 1885-1888, with interest and costs.

2d. The city was adjudged a lien upon the life estate of R. W. Woolley and the remainder interest of the two children in all the lots for the taxes for the years 1889-1900, with interest and costs.

3d. The Fidelity Trust and Safety Vault Co., who held a mortgage lien created by Woolley and wife on certain lots, and the Louisville Trust Co., which held also a mortgage lien created by Woolley and wife on certain other lots, were respectively adjudged liens on the property mortgaged to them, subject to the city's lien for taxes.

4th. Some of the lots were not included in either of the mortgages, and to satisfy the tax liens the commissioner was directed to sell for the taxes first the lots not mortgaged, or so much of them as might be necessary, and then to sell those covered by the mortgages, so far as necessary.

5th. After prescribing the terms of the sale, the judgment then concluded with these words: "It is further adjudged by the court that where the plaintiff's liens for taxes, interest and costs are upon both the life estate of defendant, Robert W. Woolley, and remainder in fee of the descendants, Sophia Woolley and Mary J. Fenley, in and to certain parcels of land herein above described, that, as between the said defendant, Robert J. Woolley, and the said defendants, Sophia J. Woolley and Mary J. Fenley, the life interest of the former in the proceeds of the sale of such parcels of land shall be first subjected to the satisfaction of plaintiff's said lien claims before the remainder interest in fee of the latter in the proceeds of the sale of such par-

cels of land shall be subjected to the satisfaction thereof, and the court reserves power over the distribution of such proceeds and to ascertain and determine the shares therein of the said defendants, respectively. It is now, however, adjudged that the life interest of the defendant, Robert W. Woolley, at seventy-three years of age, according to his deposition herein, being his nearest birthday, in the proceeds of all parcels of land, wherein he has a life estate, is, under the life tables, thirty-four and fifty-one one-hundredths per cent. thereof."

The judgment is an entirety, and in determining its meaning we must look to the whole of it, and not to one clause alone. It will be observed that, in the first place, the taxes for the years 1885-1888 are adjudged a lien only on the life estate. The court did not contemplate in the subsequent part of the judgment anything conflicting with this. In other words, it was not contemplated that the taxes for these years should become a charge on the remaindermen. What was said in the concluding part of the judgment as to the rights of the remaindermen and life tenant as between themselves referred to the taxes for the years 1889-1900, which were a charge both on the life estate and the remainder, and in this connection and for this purpose the court fixed the value of the life estate. The court had in mind only in doing so adjusting the rights of the life tenant and the remaindermen. He did not have in mind putting upon the remaindermen any part of the burden which he had previously adjudged to rest exclusively on the life tenant. He was confronted with an unusual situation. All of the lots were in lien for the taxes for the years 1889-1900; the life estate in all the property was in lien in addition for the taxes for the years 1885-1888. About one half of the lots were also covered by the mortgages. To have sold the life estate alone in all the lots, and then to have sold the remainder so far as necessary, might have inflicted great loss on the life tenant as well as on the remaindermen, and might have unduly imperiled the security of the mortgagees, so that as matters stood this court affirmed the judgment on the ground that it seemed about as fair a way to subject the property as could be devised, but it was not then maintained for appellee that the judgment was aimed directly or indirectly to place a burden upon the remaindermen for the taxes which were due by the life tenant alone. When the case returned to the circuit court and the mortgagees, in writing, consented that no sale should be made under their mortgages, and the remaindermen paid into court all that was a lien on their property, an entirely different state of case was presented. There was then nothing to sell for but the taxes which had been adjudged a lien only against the life estate. The case was not substantially different from that which would have been presented if R. W. Woolley had owned individually an undivided one-half interest in fee in all of the lots and the children had owned the other half. In such a case, if the children had paid into court their one-half of the taxes, clearly the court might properly have ordered the commissioner to sell first Woolley's part of the property for his part of the taxes. The case we have is even stronger, for here the remainder was adjudged to be liable for no part of the taxes for the years 1885-1888. It is conceded in the argument that Woolley's life estate in the property sold is not in fact of value $10,311.01, and so if the judgment stands the property of the remaindermen will be taken to the extent of the

deficiency to pay the debt which they do not owe. It is also conceded in the argument by the learned city attorney that if the life tonant had died on the day before the sale he could not have then gone ahead and sold under the judgment as he did. This concession, which is evidently correct, shows that the judgment did not create a status, but merely provided a remedy for the then existing conditions, and if the life tenant had subsequently died, or if part of the taxes were susbequently paid, the court could control the execution of the judgment so as to do justice between the parties; for if the life tenant had died there would have been the same difficulty as now in executing the judgment literally without further order from the court. The court was without authority to sell the entire property for the taxes which were due only by the life tenant and divide the proceeds of the sale between the life tenant and the remaindermen in the proportion of the value of the life estate to the value of the remainder; for the remainder not being liable for the taxes due alone by the life tenant, the city could not compel the remaindermen to submit to a sale of their property as a means of satisfying a liability of the life estate. The chancellor did not intend such a thing, nor did this court in affirming the judgment. The mode of sale directed in the judgment was only intended to meet present conditions, and when the conditions change the chancellor may control the execution of the decree to prevent injustice. The order for the sale of the lots includes every interest in them, and when it becomes unnecessary to sell certain interests the chancellor can control the execution of the decree by directing only other interests to be sold. We, therefore, conclude that the court should have sustained appellants' motion, and should have entered an order as herein indicated.

Judgment reversed and cause remanded for further proceedings consistent herewith.

SWEENEY, &c. v. COMMONWEALTH.

(Filed November 2, 1904.)

In this action by the Commonwealth to recover on the bond of J. S. Sweeney, State auditor, for money paid by him to the State militia for their services and supplies without proper authority, the following state of facts appear in the record:

At the November election of 1899 T. and G. were rival candidates for governor of Kentucky. T. was declared elected and qualified as governor. At the meeting of the legislature in January, 1900, G contested the election, and pending the contest he was shot. T. called the State militia to the Capitol to preserve the peace where they assembled, under command of Collier, adjutant general. T. ordered the removal of the legislature away from Frankfort, and with the aid of the militia refused to permit it to assemble in the State House, or at any public place in the Capitol, but a quorum met secretly at the hotel in Frankfort and decided the contest for governor and lieutenant governor in favor of the contestants. G. was declared governor, and took the oath of office on January 31, 1900, and on that day issued a proclamation disbanding the militia. G. died February 3, and B., the lieutenant governor, took the oath of office, and on same day issued a proclamation disbanding the militia, and appointed Castleman adjutant general in place of Collier. Neither of the proclamations were officially communicated to the militia, but by an arrangement between Collier, who held under T.,

and Castleman, who represented B., it was agreed that the militia should remain at the Capitol until the contest was settled. Finally, the legislature was permitted to meet at the State House, at Frankfort, on February 19, 1900, when all the proceedings of the body which had been secretly held at the hotel were publicly readopted in regular session. Held—

1. Under section 1672, Kentucky Statutes, the governor of the State is the only person to determine whether the State militia should or should not be called into active service, and his determination is conclusive, and the courts can not inquire whether there was sufficient grounds to justify his action.

2. When the militia is called into active service by the governor they are not only entitled to be paid, under Kentucky Statutes, section 2705, but also to be fed, under Kentucky Statutes, section 1707, and the requisition of the adjutant general for supplies, approved by the governor, over his own signature, is a proper charge against the State.

3. The militia having been called into active service by T., who was then the legal governor, and having continued in such service after the legal determination of the contest for governor without notice to disband from either of the officers controlling them, Collier or Castleman, they could not properly disband without being subject to the charge of desertion, therefore, the claim for their services and supplies was a just claim against the State up to the time of the public action by the legislature on February 19, 1900, and the payment of said claim by the auditor was a proper payment, although not approved by the legal governor.

4. The vouchers upon which the auditor paid the money, being signed by T., as governor, and Collier, as adjutant general, the disbursing agent, if he was mistaken as to the right to the offices which they were exercising, is not responsible to the State if the justice of the claims which he paid, as debts against the State, is established.

St. John Boyle, D. W. Lindsey, H. Clay Howard and Hazelrigg, Chenault & Hazelrigg for appellants.

John W. Ray for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hobson.

Appellant Sweeney qualified as auditor on December 27, 1899, and gave bond with the Fidelity and Deposit Co., of Maryland, as surety. This action was brought upon his bond against him and his surety to recover for an alleged breach of the bond by him in issuing the following warrants upon the treasurer on account of the active militia:

No. 6280. January 31, 1900, to D. R. Collier	$10,044 13
No. 6320. February 2, 1900, to D. R. Collier	2,599 97
No. 6330. Feburary 3, 1900, to A. C. Roberts	56 00
No. 6331. February 3, 1900, to C. F. Ward, &c.	646 25
No. 6345. February 7, 1900, to C. C. Mengel, &c.	12,612 95
No. 6346. February 7, 1900, to E. E. Power, &c.	4,022 83
No. 6902. February 21, 1900, to John Shannon, &c	8 00
	$29,990 13

On the trial it was conceded that warrant 6831, for $646.25, was for a demand properly payable out of the treasury, and no recovery was sought

thereon, and no proof was offered as to warrant 6902, for $8. The other warrants were on account of active militia called into service by W. S. Taylor, as governor, on January 30, 1900, after the assassination of William Goebel. The court allowed the defendants credit by warrant 6280, of date January 31, 1900, for $10,044.13, as that was issued before the legislature had acted on the contest as to the office of governor and decided in favor of Goebel; but the other warrants he held illegal, as they were issued after the action of the general assembly declaring Goebel governor, and after he had taken the oath of office. From this judgment the defendants appeal, and the Commonwealth prosecutes a cross appeal.

It is insisted for the State that the auditor had no right to expend on account of the active militia anything outside of the military fund, under section 2704, Kentucky Statutes: "There is hereby appropriated the sum of $10,000 per annum, to be paid out of the treasury, from the resources of the Kentucky war claim as the same shall hereafter be collected from the United States, which, together with all sums received into the treasury from fines and penalties under the provisions of this law, shall constitute the military fund of this State. This fund shall be disbursed from time to time by the authority of the governor, and under such regulations as he shall prescribe, for the organization, administration, equipping and uniforming the State Guard; for the purchase of tactics, laws and regulations of the army of the United States; for instruction of the State Guard; for the publishing of regulations for their government; for the renting of armories; for the purchase of such camp and garrison equipage and military stores as may be necessary, and, generally, as in his judgment may best promote the interests of the State Guard."

The construction of this statute was before the court in Bryant v. Brown, 98 Ky., 211, and it was there held that this appropriation of $10,000 is to be expended by the governor in the organization and perfecting of the State Guard. It was there also held that when the militia are called into active service they must be paid out of the treasury. The position of appellee, that there is no warrant of law for the payment of the militia when in active service out of the treasury, can not be maintained. Section 2705, Kentucky Statutes, after providing the salaries of certain officers, further provides as follows: "Other officers and men of the State Guard, when employed in active service, shall receive pay as follows: Colonels, $8; lieutenant colonels, $2.75; majors, $2.50; captains, $2.25; first lieutenants, $2; second lieutenants, $2; sergeants of and above the grade of first, $2; other sergeants and corporals, $1.75, and privates, $1 50 per day; the same to be paid out of the treasury on warrant of the auditor of public accounts, upon company pay rolls, accompanied by copies or certificates of the orders bearing on the case, certified by the adjutant general and approved by the governor by his own signature. Each officer and each enlisted man shall also be entitled to one ration per day, and forage when mounted, the ration and forage to be the same as in the army of the United States, or commuted at the actual cost thereof, or of subsistence."

By section 2672 it is further provided: "It shall be the duty of the governor, whenever he may deem it necessary for the safety or welfare of the Commonwealth, or when any actual or threatened invasion, insurrection,

domestic violence or other danger to the public interest makes it necessary to employ military force in aid of the civil power of the government for the enforcement of the law, or to preserve the peace and the security of the rights and lives or property of the citizens, to order into active service so much of the State Guard or military force of the Commonwealth as he may deem necessary. The State Guard can be ordered into active service only by the governor."

In the case before us the governor, in the exercise of the discretion committed to him by law, ordered out the militia. He was the only person to determine whether the militia should or should not be ordered out, and his determination is conclusive. We can not inquire as to whether there was sufficient grounds to justify his action, as by the statute he was authorized to call out the militia whenever he deemed it necessary for the welfare of the Commonwealth. When the governor had called the militia into service they were in active service, and, therefore, entitled to pay as provided in section 2705, above quoted, and the statute making no other provision, this pay must come out of the general fund in the treasury. In the past twenty-five years the militia has been often called into active service, and no special appropriation has been made by the legislature to meet the charge. This construction of the statute by all three departments of the government would scarcely be departed from if this court had not heretofore reached the same conclusion in the case of Bryant v. Brown, above referred to. Warrant 6331, for $646.25, for which no claim was made on the trial, was for the active militia called into service at Nicholasville a short time before the call of the militia to Frankfort. Counsel, in conceding this item, necessarily took the view of the statute we have indicated.

When the militia is called into active service the men must not only be paid, but they must be fed, for no army can be kept together without food, and, therefore, it is provided by section 2707, Kentucky Statutes, as follows: "The acts of congress for the government of the militia of the United States are in force in this State. The articles of war and laws governing the army of the United States shall, so far as applicable, be a part of this law, and also the rules and regulations for said army, so far as consistent herewith, and subject to such modification as the governor may direct."

By the United States regulations the proper officer makes his requisition upon the treasurer for the amount of money necessary, and uses the money when paid over to him in feeding the troops and providing for them. Of necessity the same thing must be done with the State militia when called into active service. The adjutant general is ex officio quartermaster general of the militia, and the amount of check 6280, for $10,044 13, was paid to him on a requisition certified by him and approved by the governor by his own signature.

Counsel for appellee refer us to Ristine v. Sinking Fund Commissioners, 90 Ind., 328; Ingram v. Colgan, 28 L. R. A., 187; Clayton v. Berry, 27 Ark., 131, and several cases decided by this court, all to the effect that money can be paid out of the treasury only in pursuance of an express appropriation made by law. But these cases have no application, for section 2705, Kentucky Statutes, after setting out the amount paid the militia are entitled to, expressly provides: "The same to be paid out of the treasury on warrant

of the auditor of public accounts." The check in question being for a claim that was certified as required by this section, we conclude that the judgment of the circuit court as to this item was correct, and on the cross appeal the judgment complained of is affirmed.

As to the other items, a different question is presented. The defendants offered proof tending to show that the legislature did not take legal action upon the contest for the office of governor until February 19, which was after all the money here in controversy was paid out, but the court declined to admit this evidence. The defendants also introduced proof tending to show that all of the money represented by these checks were to pay claims that were just demands against the treasury, insisting that if the claims were not properly authenticated when paid, still, if they were in fact just claims, the State was not in fact damaged in any way by their payment, and there should be no judgment against the auditor on his bond. The court declined to make a finding on this subject, being of opinion that the auditor was responsible if he paid out the money on the claims without the approval of the governor. The claims were all approved by W. S. Taylor as governor, but were not approved by Governor Beckham, who qualified as governor on February 3, after the death of Goebel. In Terrell v. Roland, 86 Ky., 79, it was held that where an executor had paid a claim which was not properly verified under the statute he should be credited by it upon proof that the claim was just. So it has been held in a suit upon a sheriff's bond for failure to collect an execution that there can be no recovery where it is shown that the money called for by the execution ought not to have been collected. (Harrison v. Harrison, 1 Littell, 137.) In State v. Batz, 44 Wis., 634, an action was brought against the treasurer of the State upon his bond because he had paid $18,000 before it was due without any warrant from the secretary of state. It was held that there could be no recovery upon his bond as there had been no loss to the State. The court said: "If the treasurer pays an appropriation in advance of the time of payment appointed by law, or if he pays it without the warrant of the secretary of state, when such warrant is required, he takes the risk of being held liable upon his bond for any damages which may result to the State by reason of the irregular payment. But where the payment is made to a person to whom and for whose benefit the money is absolutely appropriated by law, and especially where the amount paid is placed to the credit of the treasurer in the books of the secretary of state (although perhaps irregularly), it is difficult to comprehend the principle upon which the State can recover the sum thus paid, in an action on the treasurer's bond, in which the payment of the money is assigned as the breach."

The action before us rests on the ground, not only that the auditor did something that he ought not to have done, but on the further ground that thereby the State sustained damage. If there was no damage done to the State by the act of the auditor, there can be no cause of action on his bond. If a just debt of the State has been paid, one which by mandamus the courts would have required to be paid in a proceeding instituted for that purpose, then the State has sustained no loss by the irregular action of the auditor in paying the money without having before him a proper voucher.

Appellee's counsel rely upon United States v. Koehler, 9 Wal., 88, and

Smythe v. United States, 188 U. S., 163, but these cases rest on the strict rule against public officers, which is upheld by the United States Supreme Court. This rule is rejected in many of the States, and the latter view has been followed by this court. (Johnson v. Fleming, 21 Ky. Law Rep., 4.) Appellant was a disbursing officer, and if he made a mistake as to the sufficiency of the voucher for which he drew his warrant, he took the risk. Still if the debt was justly payable by the State, and the same result might have been reached by mandamus, he may show the facts here in defense of this suit. The vouchers upon which he paid the money being properly signed by Taylor, as governor, and Collier, as adjutant general, the disbursing agent, if he was mistaken as to the right to the offices which they were exercising, is not responsible to the State if the justice of the claims which he paid as debts against the State is established; for in this event his action, though irregular, has in nowise prejudiced the State. We, therefore, conclude that if the demands paid by the auditor were of this character he may show that fact in this suit to avoid liability on his bond.

It remains then to determine what were the character of the claims paid by the auditor. As we understand the evidence, the money was paid upon the pay rolls of the militia while in active service, from January 30 until February 5, 1900, and for supplies for their subsistence during that time.

As we have said, the troops were regularly called into service, and the State was liable for their pay as well as for their supplies while in service, unless they ceased to be properly in the service of the State before the expiration of the time for which they were paid. It is shown in the record that on the night of January 31 a proclamation was issued by William Goebel, as governor, by which, among other things, the first and second regiments of the Kentucky State Guard were ordered to return to their homes. But this proclamation does not appear to have been communicated to the officers in charge of the militia; and it would seem that on February 2 the legislature met and declared Goebel elected, and he was then sworn in a second time, he having been sworn in the first time on January 31. It is urged that there was no regular legislative action on January 31, and in the suit to determine the right to the office only the action of February 2 was relied on. On the night of February 3 Governor Beckham issued a proclamation, in which he commanded the militia of the State, then in possession of the city and public buildings, to immediately disband and return to their homes, relieving them all from duty. He also made an order appointing John B. Castleman adjutant general and relieving D. R. Collier. While all this was put upon the executive journal, it is not shown to have been communicated in any way to the soldiers. The defendants offered to prove on the trial that there was a conference between Collier and Castleman, the latter representing governor Beckham in the conference, in which it was agreed that the militia should remain on duty at the Capitol until the suit to determine who was governor was tried, but the court declined to admit this evidence. The reason for this ruling apparently was that the governor alone has power to call the militia into active service, and when he had relieved all the men from duty the adjutant general was, without authority, to continue them in the service without action by the governor officially. This seems to be true. Still the fact remains that Castleman, as

adjutant general, issued no orders and took no steps to have the militia disbanded. The situation was a very anomalous one. There were two claimants of the office of governor. The troops had been regularly called into service; being in active service, it was their duty to obey the orders of their superiors, and to maintain discipline as soldiers. They were in the performance of the duties for which they were called into service until they were, by proper orders, discharged from service. As between the soldier and the State, while he was obeying the orders of his superior and discharging his duty to the State as directed by them, the State having called him regularly into service, should pay him while he remained in service until the State discharged him from the service by some order which a soldier could properly obey. A soldier must receive his orders from his superiors. The adjutant general has charge of the militia, and it is the duty of the adjutant general to give them orders. It is then their duty to obey his orders. It is certainly clear, from the record we have, that no regular orders were ever given these troops discharging them from active service. Soldiers who leave their post without orders are treated as deserters. When the State requires of them explicit obedience to the orders of their superiors, it can not require of them that they leave their post and take the risk of being regarded as deserters and punished as such until some orders have been issued through the regular channels which they should take notice of and properly obey. If the matter was doubtful, the soldier had a right to remain on duty. The rule applicable to the citizens of the State at large, or usually applied between master and servant, can not be strictly applied between the soldiers and the State in a case like this, where he asks pay for his services actually rendered, and the question is made that he had been discharged from the service, for the soldier is under the constraint of military discipline, and is not free to act. On January 31 Taylor, as governor, issued a proclamation adjourning the legislature to meet again at London on February 6. The meetings of the general assembly thereafter until February 19 were not held at the State House because it was in the possession of the soldiers, who, under Taylor's orders, refused to admit the legislature. These meetings were held at the Capital Hotel at night, and without notice to the members of the legislature who were not present. The validity of the action then taken was denied because the legislature did not meet at the State House as required by law, and because a large part of both houses had no notice of the meetings. When the legislature met again at the State House, on February 19, it ratified its former action, and re-adopted it. This action was publicly taken in the regular way at the State House, and after this there was no longer room for doubt as to the action of the legislature. Until then, as the meetings of the legislature had been without public notice, at night at the Capital Hotel, and no orders had been issued to the soldiers according to the usual course discharging them from the service, we do not think they were required to take the risk of being treated as deserters for leaving their posts. It was a very delicate situation, the like of which had never occurred in this State, and it is believed will never occur again It was managed with rare skill and judgment by Governor Beckham and General Castleman, and the State has reason to be proud of the conduct of her people under the trying circumstances. The State government is interested

in maintaining the discipline of her soldiers, and no rule should be laid down which would impair their efficiency, or lead them into disrespect of the orders of their superiors.

We, therefore, conclude that, under the peculiar circumstances of the case, the pay rolls for the soldiers and the expenses for their necessary subsistence were proper claims against the State, and that no recovery should be had on the auditor's bond for these things herein, although he paid them without proper vouchers. This conclusion makes it unnecessary for us to consider the other questions made in the argument, as they do not seem to be material for the decision of the case under the view we have indicated.

Judgment reversed and cause remanded for further proceedings consistent herewith.

Whole court sitting.

Judge Paynter dissenting.

ARNOLD'S HEIRS v. ARNOLD, &c.

(Filed November 2, 1901—Not to be reported.)

Lands—Conveyance by father to son—Where a father executed a deed to his son in consideration that the son would provide for him and his wife, and the son becoming dissatisfied surrendered that deed and took from the father another deed to other property, the weight of the evidence showing that the son subsequently got possession of the former deed and put it to record, having sold the latter tract the father conveyed to him, the father having been in the adverse possession of the tract since 1887, the son by his conduct having acquiesced in the ownership of it by his father, there is nothing to warrant the claim of the son to it.

E. E. Hogg and E. C. Hyden for appellants.

Gourley & Redwine, C. A. Gourley and H. L. Wheeler for appellees.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Hobson.

As shown by the weight of the evidence, the facts of this controversy are as follows: L. D. Arnold and his wife, Mary, on August 18, 1880, conveyed by deed to their son, John Carter Arnold, in consideration of his agreement to support and maintain them as long as they lived, their home farm. The son was then unmarried and living with his parents. He afterwards married, and in October, 1887, becoming dissatisfied with the arrangement he had made with his father and mother, and wanting to go to Virginia, he proposed to his father to give them back the deed made in August, 1880, which had not been recorded, if his father and mother would deed to him absolutely a similar tract of land which was a part of the home place. They agreed to the proposition. The second deed was made, which the son had immediately recorded and the old deed was delivered up to the father, who put it in his trunk. In the year 1889 the mother died. After the mother's death John and his wife moved back to the home place and lived there with his father until the father married a second time, about the year 1892, when he moved off and is now living in Breathitt county, having sold the tract of land which his father deeded to him in 1887. Some time after this, without the knowledge of his father, he got possession of the old deed and had it

recorded, and thereupon the father instituted this action, setting up the facts and praying that it be cancelled, being a cloud upon his title. These are the facts shown by the testimony of the father and a number of the witnesses, who are wholly unimpeached. The son denies that he surrendered the old deed to his father, or that the new deed was made in cancellation of the old arrangement, but the proof is overwhelmingly against him on these issues. As the father has been in possession of the land since the year 1887, no question of limitation arises. His cause of action did not accrue until the son secretly got possession of the old deed and had it recorded, which was shortly before the bringing of the action. The father has listed the land for taxation since the year 1887, and the son listed for taxation the smaller place which his father then conveyed to him. On different occasions, when the son was proposing to sell his place where he lived, the father was proposing to sell the home place where he lived, and the son being present set up no claim to it. The father was in the adverse possession of the land, claiming it as his own after the year 1887, and the son, by his conduct, plainly acquiesced in his father's ownership of the property.

There is nothing in the record warranting a judgment in favor of the son on his counterclaim. His services previous to 1887 were settled by the deed then made, and there was no agreement to pay for anything that he did for his father and mother thereafter. Such services as he rendered are presumed to have been gratuitous, and no claim was made at the time for compensation for them.

Judgment reversed and cause remanded, with directions to enter a judgment in favor of the father cancelling the deed referred to.

YELTON, &c. v. BLACK, &c.

(Filed November 2, 1904—Not to be reported.)

Wills—Miss Lizzie Wilson, aged 57 years, who had brothers and sisters living at her death, left the following paper: "At home I write these few lines as a proof that at my death it is my will that all my real and personal property shall go to my dear friend, Mary Black, and her bodily heirs forever." There being an entire lack of evidence as to want of capacity on the part of testatrix to make a will, and she being a woman of good sense, no proof of undue influence, and the weight of the evidence being to the effect that the paper was genuine, the verdict upholding it in the lower court will not be disturbed. It was not necessary to instruct the jury on the questions of incapacity and undue influence, the evidence against the will being directed to show that it was a forgery.

W. H. Wadsworth and Willis & Field for appellants.

George Doniphan and W. S. Pryor for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Hobson.

Miss Lizzie Wilson died a resident of Bracken county in January, 1901, the owner of a small farm, on which she lived, and some personal property.

She was about fifty-seven years old when she died and had a number of brothers and sisters, nephews and nieces. Some time after her death the following paper was offered for probate in the Bracken County Court as her will:

"Bradford, Ky., November 20, 1900.

"At home I write these few lines as a proof that at my death it is my will that all my real and personal property shall go to my dear friend, Mary Black, and her bodily heirs forever.

(Signed) "LIZZIE WILSON."

The county court probated the paper. The heirs at law of Miss Wilson appealed the case to the circuit court, where it was tried before a jury, who again found for the paper, and the heirs at law have appealed to this court.

The paper was found shortly before it was offered in the county court by Mrs. Black in an old envelope in a cigar box. The proof for the propounders on the trial showed that it was altogether in the handwriting of Miss Wilson, and that she had, on several occasions, expressed her intention of disposing of her property in this way. The proof for the contestants was to the effect that the writing was not the handwriting of Miss Wilson, but an imitation of it; that she wrote a cramped hand, and not so round or smooth as the paper in contest. A number of letters written by her were introduced before the jury; also checks given by her, and a number of witnesses testified on either side that the paper was or was not in their judgment in the handwriting of Miss Wilson. Mrs. Black had been taken into Miss Wilson's family about the year 1880, when the family consisted of Miss Wilson and her father, and Mrs. Black was a girl of seventeen years of age. After the father died she continued to live there with Miss Wilson, and after she married she and her husband continued to live with her. While the evidence was conflicting, there was abundant evidence to warrant a verdict in favor of the will. The original papers have been brought up for our inspection, but after inspecting them we are unwilling to disturb the verdict of the jury in favor of the genuineness of the paper.

There was an entire lack of evidence as to the want of capacity on the part of the testatrix to make a will. While only one witness speaks of her capacity, it is clear from the tone of all the evidence and the references of the witnesses to Miss Wilson that she was a woman of good sense, and that nobody doubted her capacity to make a will. There was also an entire failure of proof as to undue influence. There was nothing squinting at undue influence in the evidence. The whole effort of the contestants was to show that the paper was a clever forgery. The court, therefore, properly declined to give the jury any instructions on incapacity or undue influence, and in any event appellants were in nowise prejudiced by the failure to give these instructions, for their whole evidence was directed to showing that the paper was gotten up after Miss Wilson's death.

The ruling of the court in the admission of evidence did not prejudice the substantial rights of either of the parties. The witness, Norella Teegarden, who had come from the State of Ohio, was asked how she came to be present, and explained. She was then asked if she had not said that she came because there was a matter between her and George Doniphan, one of appellees' counsel, that compelled her to come, and that no one would ever

know what brought her there as a witness but Mr. Doniphan. She denied making the statement, and appellants proposed to contradict her as to this matter. The court properly refused to allow the evidence to be admitted, for it in nowise contradicted her testimony on any material point given in the action, and was entirely outside of the case. It did not show bias, and in no way tended to impeach the testimony of the witness, for the credibility of the witness can not be impeached by proof that he has made statements immaterial to the case on trial which he denies making. We do not see that the court erred to appellants' prejudice in the matter of experts who were allowed to testify as to their opinion of the genuineness of the writing. The proof on both sides was much the same in this respect, and the witnesses who were not experts, who were allowed to give an opinion in favor of the genuineness of the paper, qualified themselves by testimony to the effect that they had seen the testatrix write, and were familiar with her handwriting.

Judgment affirmed.

WHITE v. MANNING, &c.

(Filed November 2, 1904—Not to be reported.)

Attachments—Notice—Purchasers—By the provisions of section 2358, Kentucky Statutes, a purchaser of land is not affected by the levy of an attachment unless he has notice, and in this action, where the proof conduced to show that appellees did not have notice of such levy, the lower court properly so held.

D. K. Rawlings and Stivers & Wright for appellant.

W. W. Rawlings for appellees.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Paynter.

The appellant instituted an action against Granville Patrick on a return of nulla bona, obtained an order of attachment and had it levied on the land here in controversy, but did not give notice, as required by section 2358a, Kentucky Statutes, of the pendency of the action and that attachment had been levied upon the land. After the action was instituted the appellees, Manning and Carnahan, purchased the land from Patrick and took a deed therefor.

The section supra provides that a purchaser under such circumstances, for value and without notice, is not affected by the levy of an attachment. The record shows that Manning and Carnahan were purchasers for value. So the only question is, did they have actual notice of the pendency of the appellant's action? The purchasers, in most positive terms, state that they had no notice. The appellant introduced evidence tending to show that they had notice. The court below found the fact to be that they did not have notice. In this conclusion we concur

The judgment is affirmed.

SCHWEITZER v. SCHWEITZER.

(Filed November 2, 1904—Not to be reported.)

Lands—Advancements—This action is based upon the following writing: "Upon sale of land on the Newport and Licking turnpike road, this day deeded to me by Emma Schweitzer, I agree and promise to pay Emma Schweitzer the sum of $500 as an advancement to her, value received.

"GOTLOB SCHWEITZER."

It appears that this sum was a part of the consideration of land sold appellee by his daughter, and that a lien for this amount had been retained in the deed, and that the land had been sold and the appellee refused to pay the amount. An advancement is an irrevocable gift by a parent in his lifetime to his child on account of such child's share in the parent's estate. The averments of the petition, if true, show that the amount in controversy was not an advancement, therefore, it was error for the court to sustain a demurrer to the petition.

C. T. Baker for appellant.

James C. & B. A. Wright for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Paynter.

This action is based upon a writing which reads as follows:

"Newport, Ky., August 15, 1902.

"Upon sale of the land on the Newport and Licking turnpike road, this day deeded to me by Emma Schweitzer, I agree and promise to pay Emma Schweitzer the sum of $500 as an advancement to her, value received.

"GOTLOB SCHWEITZER."

It is averred in the petition that Emma Schweitzer is the daughter of appellee; that she owned a certain tract of land in Campbell county, Kentucky; that she sold and conveyed it to her father for $3,200; that the father agreed to pay her $500; that a lien was retained in the deed therefor; that the $500 was part of the consideration for the sale of the land; that it was to be paid when the land was sold; that it has been sold and the father refused to pay her the money. The court sustained a demurrer to the petition, and that action is here for review. The action of the court below is sought to be sustained here upon the ground that the writing must be taken and held in accordance with its terms, and that by which it is shown that it was intended to be an advancement from the father to the daughter, therefore, revocable at any time before it became complete.

An advancement is an irrevocable gift by a parent in his lifetime to his child on account of such child's share of the estate after the parent is dead. While it is stated in the writing that the father promised to pay the daughter $500 as an advancement to her, the averments of the petition show, if true, that it is not an advancement. Therefore, there is no necessity to discuss the question as to what would be the effect of the obligation if it was purely an advancement. This court has repeatedly held that where land has been conveyed by title bond by a father to a child or grandchild in consideration of love and affection, a good consideration existed, and specific performance will be decreed. It was held in Jennings v. Anderson, 4 Mon.,

445, that an action could be maintained on an obligation which read "due William Jennings $900 as a gift to his daughter, Nancy Jennings." This was so decided upon the idea that the love and affection which the promisor had for his daughter was good consideration, and the obligation upon its face showed that it was a debt in presenti. From the averments of the petition the $500 for which the writing was given was due the daughter as part of the purchase money for the land which she sold her father. It would be no advancemment to the daughter by the father for him to pay her what he owed her. An advancement is an irrevocable gift by a parent out of his own means or property to his child, not out of the child's means or property. The mere designation of it as an advancement could not change the real facts of the transaction.

It is suggested that it is not enforceable, because the time is uncertain at which the $500 was to be paid under the terms of the writing, as the father might never sell the land. It is difficult to see how any court could allow such an objection to prevent a recovery of a debt evidenced by such writing. Suppose A. sold and conveyed his farm to B. for a given sum, payable when B. should sell the farm. Could any court refuse to give A. a judgment for his money and thus allow B. to obtain the farm without the payment of the contract price? To yield to such a technical objection would be a positive denial of justice. As we do not have before us a real case like the supposed one, we forbear to express an opinion when such an objection would mature. In the case at bar the condition has happened and the objection is due under its terms, because the land has been sold.

The judgment is reversed for proceedings consistent with this opinion.

THE E. O. ESHELBY TOBACCO CO. v. McMAMARA, &c.

(Filed November 3, 1904—Not to be reported.)

Wills—Construction of—Under the will of Daniel J. McMamara, deceased, his widow, as executrix, was given power to sell and make title to any property which may be necessary to the carrying out the will. Where there was not sufficient property left to satisfy certain bequests of the testator, she was authorized to pass complete fee-simple title to property necessary to make provision for the payment of these bequests.

Ernst, Cassatt & McDugall for appellant.

W. A. Byrne for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

This appeal involves a construction of the sixth clause of the will of Daniel J. McMamara, deceased, and a determination of the power of Margarette McMamara, the executrix thereof, to sell and convey certain real estate belonging to the estate of testatrix situated in Covington, Ky. Clause six is as follows: "I hereby constitute and appoint my beloved wife, Margarette, with the assistance and counsel of my son, John McMamara, my executrix of this my last will and testament, and having complete confidence in her honesty and capability to manage and control my estate, and in carrying

out the bequests of this my last will and testament, shall have power to sell and make title to my property which may become necessary in carrying out the provisions of this my last will and testament, without applying to a court for an order other than is necessary in the premises of and in reference to the probating of this will."

It appears from the testimony that testator left no cash on hand at the time of his death with which to pay special devises made by him of $3,000 to his brother, William P. McMamara, and his sister, Mrs. Ellen Byrne, and that a factory business in which he was engaged at the time of his death proved after his death to be unremunerative and was abandoned, leaving on hand belonging to the estate the building in which it had been conducted, which remained vacant, producing no income and compelling his executrix to borrow money to pay the taxes, insurance and repairs thereon. This property was offered at public auction, and the best bid received thereon was only $5,500. It was taken down, and the executrix subsequently, with the advice and consent of her son, John McMamara, leased it to E. O. Eshelby, doing business under the name of the E. O. Eshelby Tobacco Co., for a period of five years, with the option of purchase at a cash price of $9,000. Eshelby elected to buy the property at the price named upon the condition that the executrix had power under the will to sell and convey same. And this suit was instituted in the name of Margarette McMamara, as executrix and guardian of her infant children, the adult children also being united as plaintiffs, against the appellant for the purpose of having the courts pass upon the question of the right of the executrix to sell and convey the property.

We are of the opinion that she has such right under and by virtue of the sixth clause in the will of testator; and that her deed will pass appellant a complete fee-simple title to the property.

For reasons indicated the judgment of the trial court is affirmed.

AUXIER, &c. v. CLARKE, &c.

(Filed November 3, 1904—Not to be reported.)

Decedent's estate—Sale of personalty—By the provisions of section 429, Civil Code, there is no power or jurisdiction to sell the real estate of infants to pay debts of their ancestor until the personal estate is exhausted, and in this action, where it appears that the decedent left personalty subject to the payment of his debts, it was error in not deducting the amount of the personal assets and then direct only the sale of sufficient land to pay the debts remaining.

York & York for appellants.

M. W. Maynard, A. E. Auxier, N. J. Auxier and A. J. Auxier for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Nunn.

The administrator of Calvin Clarke, deceased, instituted an action in the Pike Circuit Court against his widow, heirs and creditors for the settlement

of his estate. At the May term, 1902, of the court, a judgment was rendered directing a homestead to be assigned the widow and infant children and a sale of the balance of the land, or so much of it as was necessary to pay the claims against the estate. The homestead was assigned and the balance of the land was sold by the commissioner, and one Taylor became the purchaser at the price of $1,200. The land was appraised at this sale at $2,000. After this sale was reported, it appearing that the land did not bring two-thirds of its appraised value, another judgment was rendered, reciting that the report of the former sale had been by a previous order confirmed, which order does not appear in the record, and directing a sale of the equity of redemption. The sale was made by the commissioner, and one John H. Leslie became the purchaser at the price of $850. He then paid the first purchaser, Taylor, the amount of his bid, and took an assignment thereof to himself. The commissioner made a report of these facts, together with the report of sale. To these reports of sale the children and heirs of Calvin Clarke filed exceptions. There were many exceptions, but we will notice only two of them. One was that the price at which the land sold was greatly inadequate, and they presented a bond with good and sufficient security, signed by one C. C. Scott, principal, and Amos Spears and E. P. Nunnery as security, each binding themselves that if the land should be resold they would bid, or cause to be bid, $1,150 for the land, excluding the homestead, which sum would pay all the indebtedness of the decedent and leave the homestead free from any claims to the widow and infant children; second, because the petition did not describe the land of the decedent and the sale thereof was, for reason of many irregularities, erroneous and void. It appears from the record that it was agreed that the persons who signed the bond referred to were solvent and amply able to pay the amount thereof, and that this bond included an amount of $1,100 more than that which the land brought at the two sales.

This court has repeatedly decided that inadequacy of price alone did not authorize a court to set aside a sale. But in cases of great inadequacy of price, and where the interests of infants are involved, the chancellor's ear is open to any evidence showing, in addition to the sacrifice, any irregularity in the sale. The pleadings in this case are not copied in the record. The judgments of the lower court directing these sales are copied in the record. In our opinion, these judgments show upon their face an irregularity in the sale of this land.

By section 429 of the Civil Code it is provided, in effect, that if it shall appear that the personal estate is insufficient for the payment of all the debts, the court may order the real property descended or devised to the heirs, or so much thereof as may be necessary, to be sold for the residue of such debts. It is clear from this section that the court has no power or jurisdiction to sell the real estate of infants for the payment of debts of their ancestor until the personal estate of the decedent is exhausted, and then to sell only so much as will pay the remainder of the debt. (4 Metcalfe, 197.)

There is nothing in this record showing the amount of the personal estate left by the decedent. If there was anything in the case showing this fact, upon which the lower court based its judgments for the sale of the land, it was not copied into this record. But we do find in the judgment directing

the sale this language: "It appearing that there is not sufficient personal property belonging to said estate to pay the debts and the costs of this action, it is adjudged that the land belonging to the estate of Calvin Clarke, or so much thereof as may be necessary to pay the debts of the decedent and the costs of the action, be sold," etc.

This language clearly implies that the decedent left personal property subject to the payment of debts, but because there was an insufficient amount to pay the same the court disregarded the personalty, and directed the land to be sold to pay all the debts. It was error in the court in not deducting the amount of the personal assets from the amount of debts and costs, and then to sell only sufficient land to pay the balance thereof.

Wherefore, the judgment of the lower court is reversed.

FARRIS v. DOZIER, &c.

(Filed November 8, 1904—Not to be reported.)

Construction of statutes—Section 4225, Kentucky Statutes, and section 301, Criminal Code, authorize the circuit clerk to issue a capias pro fine on a judgment rendered imposing a fine upon an offender, and in this action the court below properly sustained a demurrer to the petition of appellant seeking to recover damages against appellees for false imprisonment, they being the officers whose duty it was to put into effect the judgment imposed in the prosecution against him.

F. D. Sampson for appellant.

Jesse D. Tuggle for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, P. B. Farris, was indicted and fined in the Knox Circuit Court for a misdemeanor. The jury in the case returned into court the following verdict: "We, the jury, agree and find the defendant guilty, and assess his fine at $100." And judgment was entered in accordance with the verdict. Thereafter the appellee, J. R. Jones, as clerk of the Knox Circuit Court, issued a capias pro fine against appellant, which was placed in the hands of the appellee, W. W. Bryley, who arrested appellant and delivered him to the jailer of Knox county, who imprisoned him in the county jail. Appellant thereupon brought this action against the clerk, sheriff and jailer for damages for false imprisonment, and also prayed that each of them be perpetually enjoined from further imprisoning or detaining him. A general demurrer was interposed and sustained to the petition, and it was dismissed. Upon this appeal it is urged as the sole ground of reversal that as neither the verdict of the jury nor the judgment pursuant thereto provided that he should be committed to jail until the fine assessed against him was paid, and that a capias pro fine did not lie. Section 1136 of the Kentucky Statutes provides: "The jury by whom an offender is tried shall fix, by their verdict, the punishment to be inflicted, with the periods or amounts prescribed by law. * * * In cases where the punishment is a fine * * *

the prisoner shall be confined in the jail until the fine or cost are paid, unless other provided."

Section 4245 of the statutes makes it the duty of the circuit court clerk to issue proper process on all judgments in favor of the Commonwealth which have not been paid or replevied in the office and placed the same in the hands of the sheriff. And a capias pro fine is one of the writs of execution mentioned in the statute. Section 801 of the Criminal Code also provides that writs of execution, as provided in the Kentucky Statutes, may issue against the person or property of the defendant upon judgments for fines, whether rendered on indictments, penal action or otherwise. These provisions of the Code and statute authorize the circuit court clerk to issue a capias pro fine on a judgment rendered upon the verdict against the defendant. (Long v. Wood, &c., 78 Ky., 393; Harp v. Commonwealth, 22 Ky. Law Rep., 1792)

Judgment affirmed.

CHESS & WYMOND CO., &c. v. SIMPSON, &c.

(Filed November 3, 1904—Not to be reported.)

Timber—Sale of standing trees—Ignorance of seller—Fraud in buyer—Rescission—In a suit to recover a contract for sale of timber standing in the forest made between two ignorant old women on the one side, who knew nothing of its market value and an expert judge of such timber on the other side, who had examined it and knew its value, where a contract of sale was made at $250, when it was worth $600 or $700, Held—Where one party has means of knowledge of the subject of the trade not available to the other, and by reason thereof knows of facts material to the transaction, but fraudulently conceals the knowledge from the other, or where one misleads the other by willful deception into believing a fact to exist that does not exist, by which the agreement is induced, the law does not deem it a meeting of the minds of the contracting parties, and the injured party is entitled to a rescission of the contract.

Carroll & Carroll and Spear & Harlan for appellants.

Baird & Richardson for appellees.

Appeal from Monroe Circuit Court.

Opinion of the court by Judge O'Rear.

Appellants, Chess & Wymond Co., are manufacturers and dealers in barrel staves. They had established in Monroe county an agency to buy white oak timber to be worked up, and which by it was worked up into staves to be shipped to their Louisville establishment. They bought timber standing in trees as well as otherwise. One Ray was their agent engaged in buying timber for them in Monroe county. He was an expert judge of this class of timber, having had long experience in the business. He claims to have been an expert, and his testimony and the record sustain his claim. He showed a remarkable capacity for accurately estimating the output of staves of a given forest after he had examined it. He was fully conscious of this faculty. His employers were doubtless also aware and appreciative of it, as indicated by his position in their service, for he made important contracts

of this character on their behalf, based alone, it seems, upon his own judgment.

He learned of a body of desirable white oak trees belonging to appellees, and determined to negotiate for its purchase. He took two neighbors of appellees with him, he says to show him the route, when he went to buy the trees. Up to that time he had not seen the timber, at least had not examined it.

The owners were two old women, one aged eighty years, the other sixty. They were spinsters, living alone in a remote and isolated locality, little used to such transaction, indeed this seems to have been among the first of the kind and largest of their lives. They were ignorant of the character and value of the timber, though they knew the acreage, lived upon the farm where it was, and had a general notion that it was their most valuable property. When Ray approached them to buy the trees they said they did not want to sell them, at least did not want to sell all of them, but wanted to preserve them, selling a few at a time, as they constituted their sole chance of income outside of a very meagre product of a poor, worn out little farm. Ray advised them to sell. Among the arguments advanced, he stated that his company in buying up this class of timber created then a market, and by their competition had enhanced prices; but that they would be moving out of that section presently, when the competition being removed, values would fall; that by selling the trees then, and putting the money in bank, it would be available for their use as needed, whereas if they let his company go without selling them the trees, they would have only the trees, which, in the emergency of sickness, and for the wants of old age, would be practically useless to them. This argument moved the women to consider the project of selling the timber then. They informed Ray, though, that they did not know how many trees they had, nor did they know anything at all about their worth. Ray responded that he would go and look over the timber, assuring them that he would give them "all there was in it." He did go, and counted and examined the trees, taking the two neighbors of appellees with him to show him the extent of the boundary, and to help in the task of counting the trees. After some hours Ray and one of the neighbors returned to the house, the other neighbor having gone home. Ray said he had examined the timber. He advised them to sell it, giving as another reason that some of it was dying out, and would soon be a loss, but by cutting out the large timber much of the smaller stuff would come on better to make merchantable product. He again said he was going to offer them every dollar there was in the timber, and did offer $240 for the boundary of 150 acres. Appellees expressed great surprise at the figures, saying that any way they thought it ought to have brought them $300. Ray, assuring them that his offer fully represented the value of the timber, buttressing it with the statement that he had bought a great deal from their neighbors at the same or less prices, including some from sawmill men (thus showing that experienced handlers of that class of timber were finding more money in it at his prices by selling to the stave dealers than by cutting it into lumber), said he would go a little above its actual value, owing to their being ladies, and "make it even money," by offering $250 for the boundary, "which was the last dollar he would give

under any circumstances." The women appear to have been considerably shaken in their original determination by these arguments and offers, and they wavered. They felt that they should be further advised about it. They called upon John Basil, a young fellow who had been working on their place, and who was present and had accompanied Ray and his companions in their tour of inspection, calling him into another room for private consultation. They asked him what he thought of it. He declined to give any opinion. They returned to Ray and asked what their neighbors, (Gentry and Tooley), who had examined the timber with him, thought of it. Ray answered, Gentry being present, and by his silence apparently assenting to the statement, that they had expressed the opinion to him that $200 was its worth. Thereupon the women yielded, and executed the contract, and Ray paid them $250.

This suit was brought by the women some few weeks later to have the contract rescinded upon the ground that Ray had overreached them, and by false statements and fraudulent misrepresentations had induced its execution. These are the particulars in which appellees claimed, and which the circuit court found, and we find, the representations to have been false. The trees were not dying, there was no evidence that one of them was dead or showed any sign of decay. They were in fact then worth in that market, at least $600. Gentry and Tooley had not said to Ray that the trees were worth only $200. Ray knew each of his statements above negatived were untrue. While we are at this point, we will state why, from the record, we conclude such was his knowledge. He had just examined the trees. No witness says that there were visible signs of decay. Ray does not say so in his testimony, though he does say that one or more trees after having been cut down and sawed into blocks or butts, showed that they were in part doty. Ray was the only representative of appellant who had examined this timber. He was required to and did report to them his purchase. Just what he reported is not shown. But a letter from appellant to one of the appellees a few weeks later, in response to a most pathetic appeal to suffer her to repurchase her timber, placed a valuation of $750 on the timber, refusing to rescind, yet offered if any one would give them $750 cash for it, they, appellants, would give appellees $250 additional. Appellants must have got their idea of the value of this body of timber from Ray. Besides, the testimony of well informed, disinterested witnesses place its value at from $500 to $700. Ray's experience and acquaintance with the value was shown to be equal to the best. So, we conclude he did know its value. What Gentry and Tooley had said to Ray was: "While you were over the hill looking at some of the timber we were guessing what you would offer for it, and we thought you would not offer less than $200." Ray responded that he was going to offer more, and they said they were not surprised. Neither expressed an opinion then as to the value of the timber, so far as the record shows. Nor does Ray now claim that they did other than is contained in the expression quoted. That Ray made every representation that he did make to induce appellees to sell him the timber can not be doubted. Upon these facts the circuit court adjudged that the contract be rescinded.

Appellants contend that the facts shown, if adopted even in their extremity, do not justify the judgment. The argument is, that misrepresentation

by the buyer of the value or quality of the seller's property will never authorize an action for damages by the seller because of the deceit, nor for rescission. We fully appreciate the difficulty of defining the line between dicker and fraud. Expressions of mere opinions or predictions by the parties as to value are generally not deemed ground for redress, even though false. They are regarded as "trade talk," and not believed ordinarily to induce implicit reliance upon their verity, nor to suspend further inquiry. A statement of value, however, may create as distinct an impression of fact as any other. Bigelow on Fraud, at page 496, says: "If one of the parties to a sale assumes to have special knowledge of the value of the property, in regard to which the other, being known to be ignorant, trusts entirely to the good faith of the former, to the former's knowledge, it may be very proper to treat representations of value as standing upon the same ground as representations of fact."

Unmoved by the pathos of the situation of these two helpless and all but indigent old women, and unmindful as the law is of negotiations of barter and trade, wherein extravagant praise by the seller, and may be unfounded detraction by the buyer, both often knowingly false, are indulged, we are to apply to the situation principles clearly established and right. It will not be questioned that parties competent to contract, and under no relation of trust to each other, may make any bargain they please, not unlawful in its purposes or execution, although one may gain by his superior wisdom and the other lose by his shortsightedness or ignorance. Nor is the better informed bound to give the less informed the benefit of the former's experience and judgment in arriving at a common basis of agreement. If they are dealing at arm's length, as the saying is, and each has equal means of knowledge, each may take care of himself.

Where, however, the parties do not deal "at arm's length," when it is not a match of skill and judgment and interest, or where one party has means of knowledge of the subject of the trade not available to the other, and by reason thereof does know of facts material to the transaction, but fraudulently conceals that knowledge from the other; or where one misleads the other by willful deception into believing a fact to exist, which does not, by which the agreement is induced, the law does not deem it a meeting of the minds of the contracting parties. Nor indeed is it. For the minds have traveled wholly diverse routes, and while apparently agreed, in truth they have not. It is not material which of the parties deceives the other; within the definition of the law the injured one can have a rescission. If the seller falsely and fraudulently misrepresents a fact concerning his property being sold, whereby the buyer is deceived into parting with his money for it, directly upon discovering the truth, the wronged party may have his own restored by surrendering what he got for it. It must be equally true in principle that if the buyer has falsely and fraudulently misrepresented a fact concerning the seller's property, whereby the latter has been induced to part with it in exchange for so much of the former's money, a restoration of the status quo will be adjudged to the person so wrongfully deprived of his own. A man is just as truly entitled to his land or chattel as to his money. It would be a strange thing if the law protected him against loss of the latter by deception, but did not as to the former.

In this case the sellers did not know the number or quality of the trees on their land, and were unacquainted with their market value for any purpose. The buyer knew of the sellers' ignorance; he knew the number of the trees, 426 in number, knew their quality, which was exceptionally good, and knew their market value to be at least twice as much as he offered for.

The buyer knew that the sellers, because of their lack of information on these points, would have to rely on what others who were informed, or were in a position to be, would tell them about it. By first arousing their fears of probable loss if they did not act promptly, then picturing other advantages of immediate action, the buyer assured them, lulled them in a measure into accepting that he had offered what was the true value of that timber in the market. When the sellers asked for the opinion of their neighbors who were in the best position, one almost equal to that of the buyer, to know whether the price offered was in truth the market value, the buyer falsely represented to the sellers, and thereby induced their acceptance of his proposition, that those neighbors had expressed the opinion that a less sum was really the market value. Thus these parties were not dealing at arms' length. One had the advantage of being acquainted with the quantity and quality and market value of the others' property, of which the latter were wholly ignorant. He voluntarily sought and took the position as advisor to these ignorant people; persuaded them to rely on his judgment and fairness; by flattery and fear they were induced to forego seeking information elsewhere, and to accept his as true. Knowing their dependence, under the circumstances, upon him for information without which they would be as helpless in the trade as babes, and having assumed to act in their behalf by giving them "all their property was worth," he was in conscience bound to tell them the truth and the whole truth about it. We have no hesitation in declaring, in agreement with the circuit judge, that appellees were defrauded in this transaction. In arriving at this conclusion we have not rested entirely upon either the extreme age or the ignorance of the sellers; nor upon the inadequacy of the price. All these things, though, make it patent that they have been overreached.

In Beard v. Campbell, 2 Mar., 125, Campbell bought of Beard, whose wife was heir to an estate, the latter's interest in the residuum for a grossly inadequate consideration, about one-third its real value. The buyer knew the true value, the seller did not. The seller was hard pressed for money, and in needy circumstances. The buyer advised the sale, Beard having confidence in him. The buyer was the executor of the estate. This court held that under the circumstances it was the duty of the buyer to have disclosed his knowledge to the seller before buying. In Cruise v. Christopher, 5 Dana, 181, Cruise bought by executed contract certain property from Christopher at a grossly inadequate price, about one-third its value, while the seller was slightly intoxicated. The seller was indebted to the buyer, who had, by various studied acts, induced the former's confidence. The court thus summed up the grounds sustaining the rescission, although it held none alone sufficient (at page 84): "Upon the combined grounds, therefore, of great inadequacy of price, the imbecility of the vendor, and his entire confidence in the friendship and good intention of the vendee, the corresponding influence of the latter over the former, on account of personal feelings,

and the additional power acquired and exerted over him as his principal or only creditor, and the evident design of acquiring, or at least using, that power for gain, of all of which the contract under consideration was the fruit, we think such a command, and such an advantage are shown on the part of the vendee, over the vendor, as amount to fraud and vitiate the contract."

In Hunter v. Owens, 10 Ky. Law Rep., 651, the court gave expression to the same principle in this language: "Gross inadequacy of price is always a badge of fraud, and sometimes when the disproportion between the value and the price given is very great the chancellor may, from that fact alone, infer fraud. We will treat, in this case, the inadequacy of price as a badge of fraud, and then inquire into the question of actual fraud. The appellee was ignorant and dull, and wholly unacquainted with the value of said land, and relied upon the appellant to sell it to her at a reasonable price, and he had reason to believe that he had her confidence, and that she relied upon his judgment as to the value of said land, and not her own; it was, therefore, his duty to deal, as to the price, fairly with her. They were not at arms' length, and gross inadequacy of price—always a badge of fraud—becomes an actual fraud when the parties do not deal with each other at arms' length. We are constrained to the conclusion that the chancellor was justified in his inference of actual fraud in this case."

There are other cases to the same import, the latest being Combs v. Davidson, 24 Ky. Law Rep., 2528.

Wherefore, the judgment is affirmed.

RIEDEL, SHERIFF v. COMMONWEALTH, FOR USE, &c.

(Filed November 3, 1904.)

1. Taxation—Omitted property—Penalty—Who entitled to—In a proceeding to collect back taxes on property not assessed the official who first files the statement in the county court required by Kentucky Statutes, section 4241, is entitled to the penalty allowed for the failure to list the property for taxation as against any other official or agent claiming same, and the fact that the first statement was not as full in describing the property as the subsequent one, will not deprive the first official of such penalty.

2. Taxes collectible—In a proceeding to collect taxes on omitted property the statute (section 4241, Kentucky Statutes) applies to all taxes for State, county and district purposes.

C. L. Raison, Jr., for appellant.

Jas. M Guthrie and J. C. Wright for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Nunn.

One John Cline, of Campbell county, died in the month of August, 1902, and left a large estate, consisting of lands and personal property. It appears that his personal property had never been listed nor assessed for taxation, nor had he paid any taxes thereon. On the 4th of September, 1902, appellee Guthrie filed a statement under section 4241, Kentucky Statutes, in the Campbell County Court against Oliver W. Root, curator of Cline's estate.

by which statement he sought to require the curator to list for taxation this personal property which he alleged had for the last nine years escaped taxation. On the filing of this statement a rule or summons was issued against Root, as curator, returnable on the 15th day of October, 1902, to show cause, if any he could, why the estate of his decedent should not be assessed for taxes, and the same, with the penalty thereon, collected. The curator was also directed to produce in court the bank and pass books of the decedent for the last ten years next prior to the death of Cline. This rule or summons was served on Root on the next day, September 5, by one of appellant's deputies. On the 10th day of September, 1902, appellant, Riedel, as sheriff, also filed a statement in the Campbell County Court against Root as such curator for the same purpose as appellee Guthrie, and caused a rule or summons to be served upon Root by the same deputy that served Guthrie's process. After this another revenue agent by the name of Gus Menninger instituted another proceeding in the same court against the same party, and for a like purpose.

It appears from the pleadings in this case that appellee Guthrie and the attorneys representing Cline's estate had agreed upon a settlement of the matter, and had prepared an order to be entered in the county court. When they presented it the court refused to enter it until the attorneys for Riedel and Menninger were called in, which was done. The court then refused to determine in which case the order should be entered and entered the order under the style of the three cases, to which appellee objected and excepted. Cline's curator, or administrator, paid the taxes assessed by this order to the master commissioner of the circuit court (the suit having been brought in that court to settle Cline's estate). The master commissioner paid this money to the appellant, as sheriff, together with the 20 per cent. penalty. The appellant then paid the State its part, and the county and taxing district their part, and retained the penalty, to wit, $835. Appellee brought this action against appellant to recover this sum, and the lower court allowed appellant 4 per cent. for collecting, and gave a judgment in favor of appellee for $801 against appellant and his surety, the Union Surety and Guaranty Co., which, as to the surety company, was void for want of process; and from this judgment Riedel only has appealed.

The appellant contends that he is entitled to this penalty for the reason, as claimed by him in his statement, he gave an itemized statement of the property that was liable to assessment and the banks in which the money of the decedent had been deposited, which appellee Guthrie, by his statement, failed to do. It is apparent that appellee's statement was filed before the appraisement of Cline's estate and appellant's after, and hence appellee's statement was not as explicit as that of appellant.

In the cases of Commonwealth v. Swelgert's Adm'r, and Commonwealth v. Longnecker, 21 Ky. Law Rep., 2147, this court held that the advantage of the insufficiency or indefiniteness of a statement filed by an auditor's agent could not be taken advantage of by demurrer, but should be corrected by motion to make more definite. It appears in this case that the attorney for the decedent's estate did not object to appellee's statement, nor did he require the statement to be made more definite, realizing that his decedent owed the taxes, agreed to the entry of the order.

This court has held in two cases that as between the auditor's agent and the sheriff, the one that files the first information or statement is entitled to receive the penalty. (Butler v. Watkins, 16 Ky. Law Rep., 309; Harrison v. Wilkerson, 26 Ky. Law Rep., 260.) The last case is almost identical with the case at bar, except that the contesting officers are reversed. In that case the sheriff filed the first information. The court held in that case that the county court should have assessed the property upon the information that was first filed, and should have dismissed the other information or statement, and the one filing the first information was entitled to the penalty. The case would have been different if the one filing the second statement had alleged and proved that collusion existed between the one filing the first statement and those representing the decedent's estate, for the purpose of aiding the estate in avoiding taxation on any part of its property.

Appellant also contends that appellee, in any event, is not entitled to the penalty on that portion of the taxes due the county and the taxing district. We can not agree with appellant in this. The only statute authorizing the assessment of omitted property is section 4241, Kentucky Statutes, and in our opinion this does not apply to State taxes alone. If it does, there is no statute authorizing back assessments for county and district purposes, and consequently appellant would be now holding penalties collected on county and district taxes without authority of law, and which should be returned to the estate of Cline. In our opinion, this section applies to all taxes for State, county and district purposes assessed from the list of taxable property returned by the county assessor.

Wherefore, the judgment is affirmed.

COLEMAN, &c. v. ILLINOIS LIFE INS. CO.

(Filed November 3, 1904—Not to be reported.)

1. Deeds—Breach of warranty—Action for damages for—Evidence—In this action by appellants to recover damages for breach of warranty contained in deed, the amount of damages claimed being taxes paid by them upon property exchanged them by appellee, while the evidence as to the tax liens was conflicting, the burden of proof was upon the appellee whose contention is not supported by the weight of the evidence.

2. Same—Reformation of deed—The answer and counterclaim of appellee recognizing the necessity for mutuality of mistake, pleads that the mistake in the deed upon which it relies to relieve it of the tax claim was mutual, but as the burden was upon it to establish that fact, and failing by satisfactory evidence to do so, the reformation should be refused. As to the amount of evidence required, the mistake must be clearly established by the proof, and an alteration in a duly executed contract will not be made unless the proof is full, clear and decisive. Mere preponderance of evidence is not sufficient.

Bodley, Baskin & Flexner for appellants.

DuRelle & McHenry and Henry W. Price for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Settle.

The appellants, Mary A. Coleman and Isabel C. Walker, owned a parcel of real estate in Chicago, Ill., known as the "Oriental Building," which they exchanged for a lot and building in Louisville, Ky., owned by the appellee, Illinois Life Insurance Co.

The Chicago property was valued at $470,000, the Louisville property at $200,000, and the difference between these amounts, $370,000, was paid appellants by appellee. Deeds of conveyance passed betwen the parties, each containing a covenant of general warranty. Negotiations for the exchange, mainly by correspondence, were for some time in progress between brokers representing the parties, which finally resulted in an agreement December 31, 1902. At that time a meeting took place at the office of Geo. W. Cobb & Co., real estate brokers, who represented appellants in the negotiations, which was attended by the brokers representing appellee, by appellant, Isabel C. Walker, Scott, the attorney in fact of appellant, Mary A. Coleman, then a resident of California, Judge Otis, appellants' counsel, C. S. Ennis, who also assisted in effecting the exchange of property, and Boyles, a friend of appellants.

At this meeting a paper intended to evidence the contract was drawn up and signed by the appellants. This paper, in the record called 'Stevens exhibit, No. 1," was taken by appellee's agent, Trainor, to Stevens, its president, and was by him signed, but it was never returned to appellants, or delivered to Geo. W. Cobb & Co., who, according to its provisions, were to hold it.

Mr. Long, the chief counsel for appellee, at the instance of its president, Stevens, drew up another contract, which bears date January 2, 1893, and is referred to in the evidence as the "Onderdonk contract." On the day it was written appellant, Isabel C. Walker, Scott, the agent of appellant, Mary A. Coleman, Judge Otis, the counsel of appellants, and Trainor, appellee's agent, met in the office of Cobb & Co. The "Onderdonk contract" was then signed by appellant Walker, and Scott, attorney in fact for the appellant, Coleman. The paper was taken by Trainor to Stevens, who signed it for appellee, after which it was returned to Cobb & Co., to be held by them until the deeds were executed according to its terms. The deeds, though delivered January 16, 1903, were dated as of December 31, 1902. At that time there were liens upon the Louisville property for taxes for the year 1893, which were assessed in September, 1902. These taxes, $2,186.69, due the city of Louisville, and $767.38, due the county of Jefferson and State of Kentucky, amounting in the aggregate to $2,954.70, appellants were later compelled to pay because of the refusal of appellee to discharge them.

Appellants thereafter instituted this action against appellee for the breach of the warranty contained in the deed, laying their damages at the amount of the taxes paid by them, with interest from the time of payment. The nonresidency of appellee and the fact of its owning property in this State furnished grounds for the attachment issued in the action. The answer and counterclaim of appellee denied the breach of the warranty complained of, and averred a mistake in the deed, in that it failed to require, first, that appellants should take the property thereby conveyed, subject to outstanding leases; second, that appellants should accept the property subject to all

taxes; third, subject to all unpaid special taxes and assessments; and, fourth, subject to the right of appellee to occupy certain rooms in the building as offices for its local agents. The prayer of the answer and counterclaim asks that the deed be reformed so as to supply the alleged omissions. The affirmative averments of the answer and counterclaim were denied by reply. After the taking of proof and upon submission of the case judgment was rendered by the chancellor dismissing the petition and granting the reformation of the deed as prayed by appellee, and of that judgment appellants complain.

It is disclosed by the record that upon the delivery of the deed the leases that existed upon the property were assigned to appellants, and that they are performing in good faith the first requirement alleged to have been omitted from the deed. The third omission complained of is unimportant, as there were no unpaid special taxes or assessments against the property, and the fourth omission is equally unimportant, as the answer admits the prompt execution by appellants of the lease of the office rooms to appellee, and that its officers are now occupying them. It is manifest, therefore, that no cause is shown for reforming the deed upon the first, third and fourth grounds. The second alleged omission, that appellants should have been required to assume the taxes for 1903, and that the deed should have so recited, presents the only real ground of controversy between the parties. In other words, the points of controversy are, first, did the real contract between the parties require appellants to accept the Louisville property subject to the taxes for 1903, and was that requirement omitted from the deed by mistake? second, if there was a mistake, was it mutual? These questions will be more fully considered further on in the opinion.

The demurrer filed to the petition raises the contention that it fails to state a cause of action, in that its averments do not show an eviction. It has been repeatedly decided by this court, and such is the weight of authority in other States, that a vendee in possession of land under a deed containing a covenant of general warranty of title, may resist the payment of the purchase money where there has been an eviction by a superior adverse title, or the vendor has been guilty of fraud in the sale or conveyance, because insolvent, or removed from the State. (Laevison v. Baird, 91 Ky., 206; Butt v. Riffe, 78 Ky., 354; English v. Thomason, 82 Ky., 282; Merifield v. Tyler, 8 Ky. Law Rep., 422.)

The doctrine announced permits the vendee to rely upon a breach of warranty by way of set off, as well as in an original action. It also applies in an action to recover the amount of an encumbrance paid by the vendee, whether it be a tax or other lien, if such encumbrance existed upon the property conveyed when the deed was made. (Walker v. Bartlett, 4 Ky. Law Rep., 867; Mackenzie v. Miller, 7 Ky. Law Rep., 831.)

It is conceded by appellee that the taxes paid by appellants constituted a valid lien upon the Louisville property, and that it was in force at the time the contract of exchange was made and when appellants received their deed.

"A mutual mistake" is "a mistake reciprocal and common to both parties, where each alike labored under the same misconception in respect to the terms of the written instrument." (Batsford v. McLean, 45 Barb., 478.)

"Equity will not reform a written contract unless the mistake is proved to be a mistake of both parties; but may rescind and cancel a contract upon the ground of mistake of facts material to the contract by one party only." (Pritchett v. Frisbie, 23 Ky. Law Rep., 434; Bush v. Starks, 23 Ky. Law Rep., 1560; Reeder v. Lewis, 7 Ky. Law Rep., 373; Tandy v. Hatcher, 9 Ky. Law Rep., 151; Stackoff v. Brannin, 14 Ky. Law Rep., 717.)

The answer and counterclaim of appellee recognizing the necessity for mutuality of mistake, pleads that the alleged mistake in the deed of appellants was mutual, and as the burden was upon it to establish that fact, unless it has done so by satisfactory evidence the reformation of the deed should be refused.

As to the nature and amount of evidence required, we find the rule thus stated in Royer Wheel Co. v. Miller, 14 Ky. Law Rep., 831: "The mistake must be clearly established by the proofs; * * * indeed in no case will a court decree an alteration in the terms of a duly executed contract unless the proofs are full, clear and decisive; mere preponderance of evidence is not enough; the mistake must appear beyond reasonable controversy." (Mattingly v. Speak, 4 Bush, 316; Stackhoff v. Brannin, 14 Ky. Law Rep., 717.)

Accepting the foregoing as the correct rule, it necessarily follows that a direct conflict of testimony is conclusive against the reformation of a deed.

We can not undertake to discuss the evidence in detail. Though conflicting, we think the weight of it established these facts: First, that the letters between Southard and Trainor, appellee's brokers, and C. S. Ennis, of Geo. W. Cobb & Co., appellants' brokers, looking to the exchange of the Chicago property for that in Louisville, shows that the Louisville property was to be "free and clear of all encumbrance;" second, that the matter was so understood by appellants and their counsel, which understanding was confirmed in the several interviews and consultations that took place between the parties and their representatives; third, that the contract, as first written, did give appellants the Louisville property free from all encumbrance, but it was later changed by an interlineation made by Ennis without appellants' consent; fourth, that on January 2, 1903, the contract was rewritten by Mr. Long, appellee's general counsel, for the ostensible purpose of providing more rooms in the Louisville building to be occupied as offices by appellee, at which time he added to it certain words not in the first writing, which made it the duty of appellants to accept the property subject to "all taxes which are now or hereafter become a lien;" fifth, that when the substituted contract was signed it was stated by appellee's representatives, and so understood by appellants, their lawyer, Judge Otis, and others assisting them in the trade, that it made no change in the contract as originally agreed upon, except as to the provision for more rooms in the Louisville building for appellee's offices; sixth, that the deed was accepted by appellants with knowledge upon their part, and advice from their counsel, Judge Otis, that it conveyed them the Louisville property free of tax liens or other encumbrance, and with the understanding that its provisions were in conformity to the contract previously made betwen the parties.

The testimony of appellee's witnesses is in most respects contradictory of that of appellants, as it was to the effect that appellants took the Louisville property subject to the tax liens. But in view of the fact that the burden

of proof was upon appellee, we are of the opinion that its contention is not supported by the weight of the evidence It follows, therefore, that the conclusion reached by the chancellor was unauthorized.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with the opinion.

SIEVERS, &c. v. MARTIN & WOOLFOLK.

(Filed November 3, 1904—Not to be reported.)

Fraudulent conveyance—Pleading—Proof—In a proceeding to set aside a fraudulent conveyance alleged to have been made to defraud creditors, where the answer filed denies fraud and alleges that the contract was made in good faith, and the defendants in their depositions subsequently taken testify that the transaction had been rescinded before their answer was filed, the lower court properly adjudged the conveyance to be fraudulent and subjected the property to the payment of plaintiffs' debt.

O. H. Waddle for appellants.

Brown & Brown and Benton & Robinson for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Nunn.

Appellant, L. B. Sievers, became indebted to appellees in sum of about $80. A judgment was obtained on this claim by appellees in the Pulaski Quarterly Court, in the spring of the year 1900. They caused an execution to be issued upon this judgment, which was returned by the sheriff, endorsed no property found.

The appellees brought this action in the month of August, 1902, against appellant, L. B. Sievers, Nathaniel Hicks and his wife, Sarah Hicks. By amended petition appellant, Martha E. Sievers, wife of appellant, L. B. Sievers, and one W. W. Wilson were made parties defendant to the action. The purpose of the action was to set aside a conveyance of a small piece of real estate made by Nathaniel Hicks and wife, dated November 10, 1900, for the recited consideration of $165; $10 cash and the balance, $155, payable on the 15th of January, 1901. Appellees alleged that this conveyance was made without any consideration and for the purpose of cheating and defrauding the creditors of appellant, L. B. Sievers.

Hicks and wife answered, stating that they had bought the property in good faith, and the deed recited the true consideration, and they still owed the note of $155, which they at date of deed executed to appellant, Martha E. Hicks, except they were entitled to a credit of about $49 for rent of the property, the same having been possessed and used by Sievers and wife; that if Sievers and wife made the sale to them for the purpose of cheating and defrauding appellees or any other creditor, they were not at the time aware of the fact. Appellants answered, and denied that the sale and conveyance was without consideration, but averred that the sale was made in good faith and for a valuable consideration, to wit, $165, and that the note for $155 was made payable to appellant, Martha E. Sievers, in part payment of what her husband owed her, and without any purpose to cheat or defraud appellees, or any one.

The issues were completed, the proof taken by deposition, and upon the trial the court adjudged that the deed was fraudulent and void as to appellees, and adjudged them a lien upon the property by virtue of their attachment which they obtained in their action. The court, by a subsequent order, directed that Hicks and wife might be permitted to pay appellees' debt, interest and costs, to-wit, $105, and pay the balance to appellant, Martha E. Sievers, and retain the property under their purchase. From these judgments appellants appeal. It appears that the legal title to this property was in the defendant, W. W. Wilson, who had sold and received the purchase price, but had never conveyed it. He gave his deposition, and stated that he had long since received the purchase price, and on several occasions had proposed to convey the property, but appellant, L. B. Sievers, on each occasion would defer the matter, stating in substance he was not ready for the deed, but would attend to it later. It also appears that at the date of the deed from appellants to Hicks and wife appellant, L. B. Sievers, and the Hicks were insolvent. Hicks took the benefit of the bankrupt law soon thereafter; no mention of this property was made in his schedule; the deed was not recorded until after Hicks obtained his discharge in bankruptcy.

It further appears that this note of $155 was never delivered to the recited payee, Martha E. Sievers. She stated that her husband held it as her agent, but it appears that her alleged agent, without her knowledge or consent, transferred and deposited this note with one Chris. Tartar as collateral. As before stated, appellants alleged in their answer that the sale of this property to Hicks and wife was made in good faith and for a valuable consideration, and without any purpose to cheat or defraud any person; and the note for the purchase price was made payable to Martha E. Sievers, and she accepted same in part satisfaction of what her husband owed her for borrowed money. Appellants, without objection, gave their depositions, which in substance sustained their answer; but also stated that within a few months after the deed was made, and before it was recorded, all parties to it agreed to and did rescind the trade, and the deed was returned by Hicks to appellants, and Mrs. Hicks was to take and hold the land as her property in place of the note, and stated that Hicks, after this, by fraudulent means, again obtained the deed and had it recorded without their knowledge or consent. Appellants contend that in view of this evidence the lower court erred in adjudging this property to Hicks, subject to appellees' attachment lien.

This evidence was in conflict with their answer. They certainly should not be permitted to disprove or contradict what they admitted and stated in their answer. The appellants and Hicks stated in their pleadings that the trade was in good faith and that the Hicks were the owners of the property, and denied any intent to cheat and defraud. And appellants also stated that the note of $155 was the property of Martha E. Hicks, and that she was entitled to collect from Hicks this note. These pleadings were filed long after appellants in their testimony stated the trade had been rescinded. If what appellants alleged in their pleadings was a mistake, and their statements in their depositions true, then they should have corrected their pleadings by an amendment, and as they did not do so, they have no reason to

complain at the action of the lower court. We are of the opinion, upon consideration of all the facts and circumstances proven, that this sale and conveyance by appellants to Hicks and wife was fraudulent, and the court did not err in sustaining appellees' attachment, and enforcing their lien on the property.

Whereupon the judgment of the lower court is affirmed.

BOYD COUNTY v. ARTHUR, &c.

(Filed November 4, 1904.)

1. Fiscal courts—Separate orders on same day—Appeal—Motion to elect—An order made by the fiscal court appropriating money for the repair of the public roads of the county, and a separate order made on the same day allowing the four magistrates of the county $3 per day each, not exceeding fifty days, for supervising and directing the expenditure of certain-named parts of the appropriation in their respective districts in such work, are to be considered as one order for the purposes of an appeal therefrom by the county to the circuit court, and it was error in the circuit court to require the county to elect from which order it would prosecute the appeal.

2. Road supervision—Ineligibility of member of fiscal court—Under Kentucky Statutes, sections 4313, 4315, 4335, fiscal courts are authorized to appoint a road supervisor for the county whose duties are to be exercised under its supervision, but these statutes do not contemplate that any member of the court should be supervisor for the county or for any district thereof, and so much of the order of the fiscal court as directed any part of the appropriation to be expended according to the directions of each of the four magistrates, and allowing them compensation therefor, is void.

3. Final orders—Injunction—An order by the fiscal court appropriating money to construct and repair the public roads of the county, and authorizing the magistrates of the several districts to have the work done and allowing them $3 per day for supervising the work, is a final order, which the county had the right to enjoin, and also to prosecute an appeal to vacate.

J. F. Stuart, Wm. Poage, John W. Woods and R. L. Greene for appellant.

Thos. R. Brown and Geo. B. Morten for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Hobson.

The fiscal court of Boyd county at a special term held on June 12, 1903, made the following orders:

"On motion of Mr. Kirk, it is ordered that the following appropriations be made and spent according to the directions of each magistrate:

District No. 1	$300
District No. 2	500
District No. 3	300
District No. 4	400

"Esquires Arthur, Kirk, Handley and Buckley voting for the adoption of the above order and Judge William Poage voting against same, and orders that an appeal be taken to the Boyd Circuit Court to test the legality of same.

"On motion of J. L. Kirk, J. P., and seconded by F. M. Buckley, J. P., it is ordered that each of the five justices of the peace of Boyd county, Kentucky, shall be allowed $3 a day for each day's work done by them in supervising and directing the work in their respective districts, in constructing and maintaining the county roads therein, not exceeding fifty days for the year 1903, and each year thereafter in lieu of this amount heretofore drawn by them.

"The foregoing order is excepted and objected to by William Poage, judge of the Boyd County Court, and ex-officio member and presiding judge of the Boyd Fiscal Court. It is, therefore, ordered that an appeal be taken from said order, or that such other legal proceedings be instituted as may appear necessary to test the legality and validity of said order.

"John W. Woods, a regular practicing attorney at law of Boyd county, is hereby employed and appointed for and on behalf of Boyd county to take and prosecute said appeal, or such other necessary legal proceedings as may appear for the best interests of Boyd county in and to and through any court to which said cause may be carried. For which legal service so rendered he shall be paid by Boyd county a reasonable compensation."

An appeal was taken to the circuit court as provided in the orders, and in that court a petition and an amended petition were filed setting out the proceedings in the fiscal court, alleging that the money was about to be drawn out under the above orders; that these orders were void and beyond the power of the fiscal court, and an injunction was obtained restraining the county treasurer from paying out any money under the orders. After this had been done the defendants to the appeal moved the court to require the appellant to elect whether it would prosecute its appeal from the first order or the second. The court sustained the motion, and the appellant refusing to elect, the court thereupon dismissed the appeal on account of appellant's refusing to elect, and also because the appeals were prematurely taken. He also discharged the injunction. From this judgment appellant has appealed to this court.

There was no misjoinder of causes of action. The first order appropriated a certain sum of money to be spent according to the directions of each magistrate, and the second order allowed each magistrate $3 a day for each day's work done by him in supervising and directing the work in his respective district, in constructing and maintaining the county roads. The two orders so entered separately on the order book were made on the same day, and are part of the same plan. The money is to be spent by the magistrates under one order, and their compensation for spending the money and the way they are to spend it are determined by the other order. It would be impossible to carry out the second order without the first, and the first would be meaningless without the second; for without the second it can not be told in what way the money was to be spent which was appropriated by the first order. There was, therefore, no misjoinder in taking one appeal from the two orders. Nor can it be maintained that the orders are not final. They appropriate money and direct how it shall be paid out. They are, in substance, contracts by the fiscal court with each of the magistrates by which they are employed to supervise and direct the work in their respective districts, in constructing and maintaining the county roads, at $3 a day for

not exceeding fifty days for the year 1903, and each year thereafter." If this was not a contract which the fiscal court could properly make, then appellant had a right to enjoin any payment of money under the orders, and had also a right to prosecute an appeal from the orders to have them vacated. In Daviess County v. Goodwin, 25 Ky. Law Rep., 1081, it was held that the fiscal court is without authority to appoint the county judge the county supervisor of roads, and that, being a court of limited jurisdiction, its action in doing so is void. In Pulaski County v. Sears, 25 Ky. Law Rep., 1381, the magistrates had entered an order as a fiscal court investing the county judge with the general supervision of the roads of the county and making the magistrate in each magisterial district his assistant. This was held unwarranted and void. These cases control the one before us.

Section 4313, Kentucky Statutes, authorizes the fiscal court to appoint a supervisor of roads in and for the county. By section 4315 the fiscal court is to see over the supervisor, and by section 4335 he is to report to the county judge or some magistrate. The duties required of the supervisor are to be exercised under the supervision of the fiscal court. The statute does not contemplate that a member of the fiscal court should be supervisor, much less that the county should have as many supervisors as there are magistrates, each being supervisor in his own district. By section 1844, Kentucky Statutes, no member of the fiscal court shall be interested, directly or indirectly, or be concerned in any contract for work to be done, or material to be furnished for the county, or any district thereof, nor purchase nor be interested in any claim against the county or the State. The members of the fiscal court are the representatives of the county charged with the duty of protecting its interest. They are allowed to appoint a supervisor, and are required to see that the supervisor lives up to the law. The interests of the county might seriously suffer if the person who is by law required to protect its interests, as between it and the supervisor, was himself the supervisor. There is no principle better settled than that a trustee will not be allowed to occupy a dual position, and that where he is charged with the protection of his cestui que trust, he can not place himself in a position where his personal interests may be antagonistic to the interests of the cestui que trust. If he does this, it is a breach of his trust. The statutes we have referred to have the same end in view when they forbid the members of the fiscal court being interested in any contract or work, and in providing that they may appoint one supervisor for the whole county and exercise supervision over him.

So much of the orders appealed from as appropriate $1,400 is unobjectionable, but in so far as they direct that this money is to be spent according to the directions of each magistrate, they are void. In so far as the orders allow each magistrate $3 a day for each day's work done by him in supervising and directing the work in his district in constructing and maintaining the county roads therein, the order is beyond the authority of the fiscal court. By section 1845, Kentucky Statutes, the members of the fiscal court are entitled to $3 a day for each day they are engaged in holding fiscal court, and in counties where a system of free turnpikes is maintained, there is an extra allowance for attendance at the meetings of the committees of the court. The fiscal court has no authority to allow its members any other compensation than that fixed by law.

In Jefferson County v. Waters, 23 Ky. Law Rep., 669, it was held that an appeal from an order of the fiscal court by the county attorney would not be dismissed although the fiscal court had made an order directing that it should be dismissed. The county attorney in the case before us declining to prosecute the appeal, the county court made an order directing another attorney to act. As will be seen from the orders copied above, an appeal was ordered to be taken, and in the latter order John W. Woods is employed on behalf of the county to prosecute the appeal. But at the December term, 1903, the fiscal court set aside this part of the orders, on the ground that the court had not in fact so ordered. Whether the latter orders were properly made or not we deem it unnecessary to determine. (Section 127, Kentucky Statutes, defining the duty of the county attorney, provides: "He shall attend to the prosecution of all cases in his county in which the Commonwealth or the county is interested; and when so directed by the county or fiscal court institute or defend and conduct actions, motions and proceedings of every description before any of the courts of this Commonwealth in which the county is interested, and shall in no instance take a fee, or act as counsel in any case in opposition to the interests of the county."

It was the duty of the county attorney to prosecute the appeal when directed to do so by the county court. When he declined to discharge his duty the county judge himself, in the name of the county, prosecuted the appeal. The county judge is a member of the fiscal court, and is given authority to direct actions to be brought on behalf of the county. When the county attorney refused to obey his order, he was not required to sit by and see the interests of the county suffer, but might himself prosecute the appeal. Whether he could employ counsel for this purpose, or charge the county therewith, are questions which do not arise here.

Judgment reversed and cause remanded for further proceedings consistent herewith.

TIPTON, &c. v. HARRIS.

(Filed November 4, 1904—Not to be reported.)

Jurisdiction—Sale of mortgaged property—In this action where mortgaged property was sold by order of the court below, because it appeared to be perishable, the sale bonds having been taken by the commissioner, a reversal is sought on the ground that the court could not order the sale in an action to enforce the mortgage debt until there had been a judgment therefor, but this question can not be adjudicated here as this court has no jurisdiction, there having been no final judgment in the action.

Chas. W. & Robert R. Friend and J. B. White for appellants.

L. A. West and Hugh Riddle for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Harris, instituted this action against the appellants on a promissory note for $500 secured by chattel mortgage on a portable sawmill and two mules. The defense was that the debt had been discharged by cer-

tain small payments and by a delivery of the mill to the appellee. The appellee filed an affidavit tending to show that the mill was perishable and was liable to explode or be destroyed by fire, and he asked the court to sell it and hold the proceeds to await a judgment in the action. The court did this, and directed the sale bonds to be taken to the master commissioner. No judgment has been given for appellee's demand, and the issues remain undisposed of. There has been no final judgment in the case.

A reversal is sought upon the grounds that the court could not order mortgaged property sold in an action to enforce the mortgage debt until there has been a judgment therefor, and in support of that position, the case of Wilson v. Aultman & Taylor Co., 12 L. R., 881 Ky., 91, is cited.

This court can not adjudicate that question on this appeal, as it has no jurisdiction because there has been no final judgment in the case. This court only has jurisdiction to review any final judgments or orders, except in special instances unnecessary to be enumerated here. A final judgment is one which puts an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy for which he sues. (3 Blackstone Com., 316.)

For the above reason the appeal is dismissed.

COMMONWEALTH v. HIGGINS' TRUSTEE.

(Filed November 4, 1904—Not to be reported.)

1. Taxation—Action by auditor's agent—Presumption that officer in making assessment did his duty in the absence of proof to the contrary—Where the face value of bonds sought to be taxed in an action by the auditor's agent is in excess of the value fixed by the owner, there being no proof as to their actual value, it must be presumed that the assessor in making the assessment did his duty, and the burden is upon the state to show that there was an omission of property from taxation.

2. Practice in Court of Appeals—Where an original answer was lost out of the record in the circuit court before the trial, and it is shown from the record that the case was tried upon pleadings filed in that court, on appeal from the judgment there the case must be tried in the Court of Appeals as it was in the circuit court, and the absence of the original answer having been waived there, can not be relied on here.

L. J. Moore for appellant.

J. D. & G. R. Hunt for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hobson.

In the year 1897 the auditor's agent for Fayette county filed in the clerk's office of the Fayette County Court this action, under section 4241, Kentucky Statutes, against appellee, seeking to have assessed, as omitted property, certain bonds, notes and cash for the years 1889-1897, inclusive. After some preliminary motions were overruled the defendant filed answer, and upon hearing in the county court judgment was rendered as sought by the auditor's agent. The defendant appealed to the Fayette Circuit Court. The

circuit court sustained a demurrer to the first paragraph of the answer filed in the county court and also to the statement filed by the auditor's agent, giving leave to the parties to amend. An amended petition and statement was thereupon filed; a demurrer to it and a motion to make it more specific were overruled, and then the defendant filed an amended answer in which the allegations of the former answer were adopted. Afterwards, it appearing that the original answer filed in the county court had been misplaced, the court allowed a second amended answer to be filed, which appears to have been intended to set up the matter which was not contained in the original answer that was then lost. The case was then submitted on the pleadings and proof and the court dismissed the proceedings.

It is insisted that the judgment must be affirmed because the original answer filed in the county court is not contained in the transcript. It is also insisted for the appellant that the judgment must be reversed because the answer filed in the circuit court, which is the only one now in the record, does not sufficiently controvert the allegations of the amended statement or petition. As the original answer was lost out of the record before the trial in the circuit court, and as it is shown by the record that the case was tried in the circuit court on the pleadings filed in that court, on appeal from the judgment there rendered the case must be tried here as it was tried there; and absence of the original answer having been waived in that court, it can not be relied on here. There was no demurrer to the answer of the trustee filed in the circuit court. The case was tried on the evidence without objection being made as to the sufficiency of the pleading, so far as the record shows, and it would seem that the denials of the answer are as broad as the allegations of the statement and sufficiently specific to put in issue all the facts alleged therein. The answer is at least good after judgment, for the rule is that formal defects in pleadings are cured by verdict and judgment, or by the judgment alone where the law and facts are tried by the court.

This brings us to the merits of the controversy as heard in the circuit court. The proof on the trial shows that the trustees for each of the years referred to had in his hands, in substance, the following property: Twenty L., C. & L. bonds of the face value $20,000; notes aggregating $6,000 or $7,000, and cash ranging from $100 to $200. It also is shown that for each year the trustee gave in to the assessor $18,000 and paid the taxes thereon. While the proof shows that the face value of the twenty L., C. & L. bonds was $20,000, and the face value of the notes was $6,000 or $7,000, there is no proof as to what the actual cash value of the bonds and notes was. On these facts the circuit court held that it must be presumed that the assessor did his duty, and that the burden is upon the State to show that there was an omission of property from taxation. We concur in this conclusion. For all that appears some of the notes may have been insolvent or worth much less than the face value, and the same may be true of the twenty L., C. & L. bonds. We can not say that any part of the property was omitted from taxation on the proof before us.

Judgment affirmed.

BERENDS v. THE BELLEVUE WATER AND FUEL GAS LIGHT CO.

(Filed November 11, 1904—Not to be reported.)

Gray & Hall for appellant.

Matt Herold for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge O'Rear.

The transcript in this case not having been filed in this court within two years from the rendition of the judgment the appeal is dismissed.

BERENDS v. THE BELLEVUE WATER AND FUEL GAS LIGHT CO.

(Filed November 11, 1904.)

Water rates—Separate tenements under one roof—Appellant owns a building composing six tenements under one roof, but without any internal communication between the several apartments, each being separated from those adjoining by solid walls and each occupied by separate tenants. Appellee, at appellant's instance, connected these several apartments with its water main by separate connections. Held—That appellant is not entitled to the rates allowed by the rules of the water company to "large consumers," by offering to guarantee payment for all his tenants, as though the building was all one house, but must pay the established rates charged by appellee for each apartment as though it were a separate building.

Gray & Hall for appellant.

Matt Herold for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge O'Rear.

The city of Bellevue, by ordinance, contracted with the assignor of appellee to install a water and gas service within the city, for the use of the municipality and its citizens. For the public service agreed prices were fixed. For the private service it was stipulated that it should not exceed 25 per cent. advance upon the then existing rates for similar service fixed by the city of Newport, Ky. Under the ordinance appellee did install the service, and is yet maintaining it. Appellant owns a lot in the city of Bellevue, on which he has erected a building 35 feet by 100 feet, comprising six tenements. The whole building is under one roof, but there is no way of internal communication between the several apartments, each being separated from those adjoining by solid walls. They are rented to tenants, a family occupying each of them, except one, which is partly a store and part residence, occupied by appellant. At the instance of appellant appellee connected these several apartments with its water main, by separate connections, and charged and collected the established rates from each apartment as if it were a separate building.

The Newport water tariff rate, upon which the Bellevue rate is based, as above indicated, is as follows:

"For families occupying a house containing:

1 or 2 rooms	$4 00 per annum.
3 or 4 rooms	5 00 per annum.
5 or 6 rooms	6 00 per annum.
7 or 8 rooms	8 00 per annum.
8 or 10 rooms	10 00 per annum.
11 or 12 rooms	11 00 per annum.
13 or 14 rooms	13 00 per anunm.
15 or 16 rooms	14 00 per annum.

"Houses containing more than sixteen rooms to be charged at the rate of 50 cents for each additional room. Houses occupied by more than one family to be charged at the above rates for one family, and $2.50 for each additional family. * * * All manufacturers and large consumers to be estimated according to size of establishment, and for every fifty hands employed an additional charge of $5 per annum, or the amount shall be determined by meter, at 10 cents per thousand gallons."

The 11th section of the rules and regulations further provides:

"Extensions and alterations—For any extension or alteration in any of the water fixtures of any consumer, written permits from the superintendent must invariably be obtained by the authorized plumber engaged to do the work before any extensions or alterations can be made. Any consumer desiring an extension for the purpose of supplying neighboring premises with water will receive permission to do so on condition that he will become responsible for the payment of the water rent for all premises so supplied, so long as the extensions are available for supplying anybody with water."

Section 23 reads: "Water consumers can have meters attached to their service pipe whenever it may be desirable; or the board of trustees (of the water company) may attach meters whenever they deem it proper to do so. When meters are attached the consumers shall bear all expenses attending the attaching and use of the same."

Appellant wanted to discontinue the separate service as installed for his several tenements and to have substituted one meter, for which he offered to pay, and offered also to pay for all the water consumed by himself and all his tenants at the company's established meter rates. This suit involves the construction of the contract with the city, and particularly the sections quoted above. It is appellant's contention, which was rejected by the circuit court, that his building was one house only; that he was a "large consumer," within the meaning of the contract quoted, and was entitled to have the service for his entire building by guaranteeing and paying the fixed meter rate. The contrary contention is that appellant's building is in fact, and in the contemplation of the contract, six houses, for each of which appellee is entitled to charge the schedule fixed by the ordinance and contract for houses of the number of rooms which these respectively contain. The "large consumer" meant to be provided for by the contract does not mean persons taking the water for ordinary family use; that is fully covered by the schedule based upon houses having a certain number of rooms, and whether occupied by one or more families. From the place it occupies in the contract, its connection with other characters of service enumerated

we think it means concerns like manufactories, and different more or less from those instances specifically provided for. Nor can section 11, providing for extensions, be held to alter the basis of charges expressly stipulated for; that means only that when the company has not laid its conduits or mains, and has not provided for the service of a given locality, it agrees to do so upon the assurance of the owner of the property to be served that he will pay or guarantee the payment of such water rents as may accrue by reason of the extension. It does not at all attempt to alter the rates already, and elsewhere in the contract, fixed for the service. The amount to be paid, and, therefore, guaranteed, will depend upon the character and use of the buildings to be supplied by the extension.

This narrows the case down to a determination of what is "a house," within the meaning of the contract. Bouvier says: "If a house, originally entire, be divided into several apartments, with an outer door to each apartment, and no communication with each other subsists, in such case the several apartments are considered as distinct houses." (Tracy v. Talbott, 6 Md., 214; Henrette v. Booth, 15 C. B., N. S., 500; Richards v. Swansea I. & T. Co., 9 Chan. Div., 425, Q. B.; Dyson v. Sheley, 11 Mich., 527; Tiernan v. His Creditors, 62 Cal., 286; Yorkshire F., &c., Ins. Co. v. Clayton, 8 Q. B. D., 421; Chapman v. Royal Bank of Scotland, 7 Q. B. D., 136.)

The test generally applied in the case is whether the structure is capable of habitation by man, and has independent occupation and actual severance. A case quite similar to the one at bar arose in the Circuit Court of the United States for the District of Nebraska in 1889, decided by Brewer, J. (United States v. American Water Works Co., 37 Fed. Rep., 747.) The contention was that the United States government owning and maintaining a military reservation of fort and barracks in the city of Omaha, was entitled, under the terms of an ordinance like the one in this case, to have all the buildings and houses on the military reservation furnished with water at rates available to one customer. The court held that the unit of charge was not that of proprietorship, but of separate occupancy and character of the property, and that such was deducible from the tariff rates.

Whether the structures severally occupied by different families be under one roof or not could not have entered into the contemplation of the parties as a controlling feature in the making of this contract. It was the quantity of water that would probably be consumed. The size of the house and the character of its use were made the unit of charge, not the ownership

The judgment of the circuit court having been in conformity with these views, is affirmed.

BOHLSEN, &c. v. BARBER ASPHALT PAVING CO.

BOHLSEN, SR., &c. v. SAME.

(Filed November 10, 1904—Not to be reported.)

Parties to actions—Liens—In this action which is a preceding in rem, and between appellee and Mary Bohlsen, executrix, after the termination of the litigation appellee discovered that appellants held an interest in the property and were necessary parties and were not before the court, and it was

not improper to file a supplemental petition and bring the other necessary parties before the court. An original action might have been brought, but by bringing them into this action the same result was reached, and no substantial right of appellants was prejudiced.

D. Moxley, J. D. Reed, Mat. O'Doherty and Lane & Harrison for appellants.

Wm. Furlong and Benjamin F. Washer for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Hobson.

Appellee made a contract with the city of Louisville to construct Chestnut street, from 31st street west to Shawnee Park, and filed this suit against the property owners to enforce a lien on their property for the cost of the improvement. The circuit court entered a judgment holding a part of the property liable, and dismissing the petition as to the remainder of the property. On appeal to this court it was held that all the property was liable for the costs of the improvement, and the case was remanded for a judgment in conformity to the opinion. (Barber Asphalt Co. v. Gaar, 24 Ky. Law Rep., 2327.) While the case was pending in this court some of the numerous parties had died, and on the return of the case amended petitions were filed, making the heirs at law of these persons defendants to the action. It was alleged that part of the property sought to be charged was the property of Mary Bohlsen, as executrix under the will of Theodore Bohlsen, deceased. On the return of the case to the circuit court appellee filed an amended petition, setting up the fact that appellants were claiming an interest in the land, which it was alleged in the original petition was the property of Mary Bohlsen as executrix under the will of Theodore Bohlsen, deceased, and praying that they be made parties defendant, and required to set up their claims in this action, and that judgment be entered subjecting the property to the lien claimed in the original petition. Summons was issued on this amended petition, which was served on appellants. They thereupon appeared in the action, and entered a motion to strike the amended petition from the files. The court overruled the motion. They then filed a demurrer to the amended petition which the court overruled, and they standing upon their motion and demurrer, the court entered a judgment subjecting the property to the lien as prayed for in the petition and amended petition, and from this judgment appellants prosecute the appeal before us.

The ground of the appeal is that the original action had been terminated by a final judgment, and that, therefore, it was too late for appellee to file an amended petition as there was nothing to amend. In support of this position we are referred to Houston v. Kidwell, 12 Ky. Law Rep., 887; Brown v. Van Cleave, 86 Ky., 388; Meadows v. Goff, 90 Ky., 542; Schmidt v. L. & N. R. R. Co., 99 Ky., 155; Craig v. Welsh, 25 Ky. Law Rep., 1853.) But none of these cases are in point. This is an equity action. The purpose of the action is to enforce a lien upon a given piece of land. It is a proceeding in rem. The original litigation was between appellee and Mary Bohlsen as executrix of Theodore Bohlsen. That litigation is ended. But when appellee was successful in the litigation with Mary Bohlsen, as executrix, it was discovered that appellants, who held an interest in the property

and were necessary parties to the action, in order to sell a good title to the land, were not before the court. In an equity action it is not uncommon after a judgment against the original defendant to file an amended or supplemental petition, bringing in some third person who it is discovered has an interest in the property sought to be subjected. Thus often encumbrancers who have not been made parties to the record are thus brought in after judgment in order that a perfect title may be sold, and in the same way where it is discovered that the defendants to the original action do not own the entire title, but that a part of the title is in some one else. The owner of this title may be brought in, else the purpose of the action would be defeated by the title turning out to be different from what it was understood by the plaintiff to be when he filed his action. When in the case before us the plaintiff discovered that appellants owned the interest in the property it might very clearly have brought an original action, and then had that action heard with this one. But by bringing them into this action by an amended petition the same result was reached, and no substantial right of appellants was prejudiced. The amended petition was substantially the beginning of a new action against them to subject their interest in the land of the plaintiff's claim. (Ency. of Plead. and Practice, 466-467; Newman on Pleading, 740.)

Judgment affirmed.

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COURT OF APPEALS OF KENTUCKY.

BRUMBACK v. CHOWNING, Sr.

(Filed November 10, 1904—Not to be reported.)

Deed to land—Consideration—Support of grantor—Suit to cancel—Where a father conveyed land to his son in consideration that the son would take care of and support him during life, and the son afterwards, with the consent and approval of his father, conveyed the land to his sister, the appellant, upon the same consideration, and in addition that she would pay off a mortgage thereon for $81. In an action by the father, alleging that his son had failed and refused to carry into effect the consideration, and had left the State and was insolvent, and asking that both the deed to his son and the deed by the son to his sister be cancelled, to which the sister, appellant, filed answer setting up her willingness and ability to carry out her contract, and the infirm condition of her father, his incapacity to take care of himself, and his presence and consent to the conveyance by his son to her, and also her discharge of the mortgage on the land and payment of taxes thereon, Held—That the facts set up in the answer constitute a valid defense to the petition, and the demurrer to the answer of appellant should have been overruled.

Victor F. Bradley for appellant.

L. F. Sinclair for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Barker.

Appellee, Sanford Chowning, Sr., conveyed a tract of land situated in Scott county, Kentucky, to his son, Sanford Chowning, Jr., upon the consideration that the latter was to support, maintain and care for him during his life, and to bury him and pay all funeral expenses at his death; also to permit one Walker Chowning to reside there until he reached the age of twenty-one years.

Afterwards Sanford Chowning, Jr., conveyed the land to his sister, Polly S. Brumback, upon the same consideration upon which he received it, and in addition that his grantee should pay off a mortgage of $81. The appel-

lee, who is an old man 70 years of age, instituted this action in the Scott Circuit Court, setting up the conveyance by himself to his son, Sanford, and the consideration therefor; also the sale by the latter to his sister, Polly S. Brumback, and alleging that his son had failed and refused to execute and carry into effect the consideration of the conveyance to him, and had wholly failed to support or to care for him; that after conveying the property to the appellant, his son then left the State, becoming a nonresident, and was insolvent; wherefore, he prayed for a cancellation of the deeds and a reconveyance to him.

Appellant filed her answer, admitting the conveyance as set out in the petition, and alleging in substance that the deed to her was made by Sanford Chowning, Jr., at the solicitation of their father, under an arrangement between her and him that the land was to be conveyed to her upon her agreement to maintain, support and take care of him as long as he lived, and to pay off the mortgage debt of $81; that she would not have undertaken the contract, or accepted the deed, but for his earnest plea that she do so; that in compliance with the agreement, on the 21st day of November, 1900, her codefendant, Sanford Chowning, Jr., executed and delivered to her a deed for the land in question upon the consideration mentioned; that the appellee was present when the deed was written, signed and acknowledged, he directing the draftsman how it should be drawn; that after the conveyance to her she and her husband took possession of the land, living in the house upon it at great inconvenience and annoyance to themselves, and have supported, maintained and cared for appellee ever since in a manner suitable to his condition and station in life; that in the fall of 1902 she paid off the mortgage, which at that time amounted to $95.58, and in addition thereto she paid off and discharged $6.10 back taxes which she was compelled to, and did, pay. The answer contains also the following statement: "This defendant represents to this honorable court that her father, the plaintiff in this case, is a very old man and is very feeble, both in mind and body; that she has tried faithfully to discharge towards him her duty as a daughter, and her husband has assisted in every way in doing so. She says that he is obstinate and very hard to get along with, but that in his condition he is utterly incapacitated to take care of himself. She says that she would gladly surrender the arduous task that she has undertaken if it were not for the fact that she knows that no one else would take care of him properly, acting as he does and in his present condition, and she says that she is ready, able and willing to carry out the balance of her part of the contract.

"She says that by reason of the facts stated herein, the plaintiff is estopped to deny that she is the owner of the land.

"Wherefore, she prays that the plaintiff's petition be dismissed, and if the court should set aside the deed, then she prays that she may be adjudged a lien upon said land for the sum of $95.58, with interest thereon at the rate of 6 per cent. per annum from the 25th day of October, 1902, until paid, and for the further sum of $8.10, with interest thereon at the rate of 6 per cent. per annum from the 6th day of November, 1901, until paid and her costs."

To this answer the appellee filed a general demurrer, which was sustained by the court, and appellant declining to plead further, a judgment

was rendered, cancelling the deeds to the land, and ordering it reconveyed to appellee. In this we are of the opinion the learned trial judge erred. The facts set up in the answer constitute a valid defense to the cause of action stated in the petition. The arrangement by which the appellant obtained a conveyance of the land was the agreement upon her part to satisfy the consideration for the original conveyance from appellee to his son. We can perceive no reason why appellee could not agree with his son that appellant should pay this consideration. There is no cogency in the suggestion that this was within the inhibition of the statute of frauds, it being entirely competent, by the terms of that statute, to prove the consideration of contracts within its purview by parol, or other evidence. Appellee was only interested in receiving the consideration of the conveyance by him to his son, and if he agreed to and did receive this at the hands of his daughter, instead of from his son, he can not complain of the son's default in the premises. There was no default. If the allegations of the answer are true (and for the purposes of the demurrer they are to be so taken), they constitute a bar to the cause of action stated in the petition.

Wherefore, the judgment is reversed, with directions to overrule the demurrer to the answer and for other proceedings consistent herewith.

AHRENS & OTT MFG. CO. v. RELLIHAN.

(Filed November 11, 1904—Not to be reported.)

1. Master and servant—Molten metal—Defective vessel—Duty of master—Where appellee was employed as a helper in handling molten metal, it is the duty of the master to use reasonable care to see that the vessels in which the hot liquid is carried are in a reasonably safe condition for such use.

2. Ignorance of servant—Knowledge of master—Liability—Where a servant employed as a helper to carry molten metal in a foundry, was burned by the escape of such molten metal from the vessel by reason of a defect in the vessel in which it was carried, without negligence on the part of the servant who did not know of such defect, but which was known to the master or to the foreman or could by ordinary care have been known by them, the master is liable for such injury.

3. Negligence of fellow servant—Joint negligence of master—In an action by a servant against the master for an injury by being burned by molten metal escaping from a defective vessel that the plaintiff and a fellow servant were carrying, an instruction that if the plaintiff was injured by the sole negligence of his fellow servants there could be no recovery, but if his injuries were caused by the negligence of his fellow servant and that of the master in furnishing a defective crucible in which to carry the molten metal, then plaintiff could recover, was improper.

Pirtle & Trabue, Doolan & Cox, Forcht & Field and R. C. Kinkead for appellant.

Kohn, Baird & Spindle, Bennett H. Young and J. J. Fitzgerald for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Settle.

Appellee recovered of appellant in the court below $1,000 in damages for injuries sustained in the burning of his foot by molten metal thrown from a crucible or pot, which he and a fellow workman were handling in appellant's foundry.

It is averred in the petition that appellant was grossly negligent in furnishing appellee for the handling of the molten metal the crucible mentioned, which was not reasonably safe for the use to which appellee was required to put it; that its defective and dangerous condition were known, or by the use of ordinary care could have been known, to appellant before and when appellee was injured, but were not then known, and could not by the use of such care have been known, to him. Appellant's answer, as amended, traversed the allegations of the petition, and averred that appellee's injuries were caused by his own negligence, or that of a fellow servant, in handling the molten metal.

There were three trials of the case in the court below. Upon the first trial appellee obtained a verdict and judgment for $500, which were set aside, and a new trial granted appellant. Upon the second trial the jury returned a verdict for appellant; this verdict and the judgment entered thereon were likewise set aside and a new trial granted appellee. Upon the third and last trial appellee recovered a verdict and judgment for $1,000. A new trial was refused appellant, and it now complains of the last judgment. The evidence of the appellee conduced to prove the following state of facts: That appellee was employed by appellant as an off-bearer of molten metal in its foundry. In the foundry a battery of furnaces for the melting of brass and other metals is used. The metal to be melted is put in jars or vessels made of a composition known as graphite. When filled with metal these vessels are loaded into the furnace from the top, the top covered and the blast turned on. From time to time as the metal melts the furnace tender fills into the vessels other metals, dropping them from the top of the furnace. When ready to be carried to the mold the vessels would be filled with liquid metal within two inches of the bottom of the lip, the lip being a place provided in the rim of the vessel to facilitate pouring off the metal. When the metal is ready to pour off, the molder fastens a pair of tongs over the top of the vessel and calls for the helpers, thereupon the helpers pull the vessel from the furnace with a swing, setting it down on top of the furnace, and then with another swing it is moved to a point a few feet distant, where it is set down for the scum to be scraped off; after the scraping it is carried by the helpers to the mold. In removing the pots from the furnace the helpers stand in a space of about two feet between the openings of the furnaces. The metal when brought out is at a white heat, and so intense is the heat over and about the furnaces that the men in removing the metal must do so very quickly, and even then they wet their clothing to keep it from burning.

It also appears to be necessary in filling a vessel to stop short of the bottom of the lip two inches, because there is more or less movement of the liquid metal within the vessel as it is swung and carried, and to give it a play of less than two inches would allow it to slosh out of the vessel and burn the helpers. While appellee and another helper, Schad, were swinging the vessel, a stream of the liquid ran through an opening at the top or in

the rim of the vessel onto appellee's shoe, whereby his foot was painfully and seriously burned. This opening or break, according to the testimony of the appellee's witnesses, was in the rim of the vessel, was of a crescent shape, and from two to two and a half inches in diameter, extending that distance below the rim of the vessel, thereby constituting a defect in the vessel which caused the metal to run out and burn appellee, as stated.

B. J. Judge, an employe of appellant, testified that he filled the jar that burned the appellee; that in filling it he saw the defect mentioned, and called the attention of the furnace boss, Urell, to it, advising him at the time that it was not fit for use. He further testified that Urell then looked at the pot, but after doing so ordered that it be put into the furnace. Gillem, another witness, testified that after appellee got burned, this pot was broken up by the witness and thrown into the dump, because it was worthless. It was thus made to appear that appellant's furnace boss was informed of the defective and dangerous condition of the crucible just before appellee received his injuries in removing it from the furnace. It is contended by counsel for appellant that the trial judge erred in refusing to give a peremptory instruction upon the last trial; also that he failed to properly instruct the jury; and, further, that these alleged errors authorize a reversal. We do not think a peremptory instruction would have been proper. As already indicated, the evidence of appellee conduced to prove that his injuries were caused by the defective condition of the furnace pot; that its defective condition was fully known by appellant's foreman before the injury to appellee, but was not known to appellee, or of such an obvious character as to be seen by casual observation on his part while using the vessel. Upon the other hand, appellant's evidence was directed to showing that the defect was caused by the heat of the furnace; that it was obvious, and of a nature common to the business, which was known, or ought to have been known, to appellee, and that his injury was but the result of a risk incident to the work in which he was engaged. It follows, therefore, that the case should have gone to the jury, and as we are unable to say that there was no evidence to support the verdict, we are without authority to disturb it.

We find no error in the instructions prejudicial to appellant. The first instruction told the jury that it was the duty of appellant, as master, to use ordinary care to have and maintain the crucible by which appellee claims to have been injured in a reasonably safe condition for his use, and that they could not find for appellee unless they believed from the evidence that the crucible was not reasonably safe, but was in a defective condition, which caused his injuries; that this condition was known, or by the use of ordinary care could have been known, to appellant before appellee was injured, and that appellee did not know its condition, or by the use of ordinary care could not have known it; and, further, that he himself was free from contributory negligence. The second instruction is the converse of the first. The third instruction submitted to the jury the question of the negligence of appellee's fellow servant, Schad, who assisted him in handling the crucible. By it the jury were in substance advised that if the appellee was injured by the sole negligence of Schad there could be no recovery, but if the injuries of appellee were caused by his, Shad's, negligence, and that of the master in furnishing a defective crucible, then the appellee could recover.

The other instructions are confined to the definition of terms and the measure of recovery.

It is unnecessary to decide whether or not instruction No. 3 was erroneous. Obviously it could not have been prejudicial to appellant, but might have proved so to appellee, as there was no evidence in the case tending to show negligence upon the part of appellee's fellow servant, Schad. The only thing in the way of evidence relied on by appellant as showing negligence on his part were the mere conclusions of several witnesses, that the metal could not have run out of the pot and fallen on appellee's foot if it had been properly swung by him and appellee. There was no proof tending to show that they did not swing the pot in the usual manner, or of any carelessness, undue haste, or unnecessary delay in removing it. Upon the contrary, the fact that appellee and Schad were experienced helpers, and that they handled the pot in the usual manner, would seem to show that if it had been in the usual, and a reasonably safe condition, the injury to appellee would not have resulted. In other words, the instruction in question was calculated to mislead the jury in so far as it affected the rights of appellee, because it presented for their consideration a false issue, but was not prejudicial to appellant, as there was no proof to support the theory that Schad was guilty of negligence.

It has been held by this court in several cases of comparatively recent date that when a master employs a servant to work for him he impliedly undertakes that the machinery and tools with which the servant is to work, as well as the place of work, are in a reasonably safe condition, and to keep them in such condition, and it is the duty of the servant to use ordinary care to avoid injury from the use of a defective tool or appliance, or from danger in the place of work, if the defect or danger is known to him, or so obvious that the performance of his duties would make it known to him, but no duty devolves upon him to make a critical examination of such tool, appliance, or place of work, and for injuries resulting from their dangerous or unsafe condition, of which he had no knowledge, he is entitled to recover against the master. (Clay City Lumber Co. v. Noe, 25 Ky. Law Rep., 668; Henderson Tobacco Extract Works v. Wheeler, 25 Ky. Law Rep., 495; L. & N. R. R. Co. v. Roberts, 24 Ky. Law Rep., 1160; Ohio Valley R. R. Co. v. McKinley, 17 Ky. Law Rep., 1208; Covington Sawmill and Mfg. Co. v. Clark, 25 Ky. Law Rep., 694.)

We are of opinion that the jury were authorized from the evidence in this case to find, as they did, that appellee's injury resulted from the negligent failure of the master to provide him with a vessel that was reasonably safe for use in the work he was required to perform in the master's service.

Wherefore, the judgment is affirmed.

SOUTH COVINGTON AND CINCINNATI STREET RAILWAY CO. v. WEBER, BY, &c.

(Filed November 11, 1904—Not to be reported.)

1. Jurors—Examination by counsel as to their competency—Control of court—The trial court has and may exercise a reasonable discretion in the matter of ascertaining the fitness of persons for jury service, and though

counsel for each party may examine those who are to constitute the jury, they must do so within reasonable limits, by pertinent questions, subject to the court's reasonable control.

2. Conflicting evidence—Province of jury—Where the evidence is conflicting as to the alleged negligence of the motorman in running his car over a four and one-half years old child playing upon the track, the jury have a right to believe plaintiff's witnesses and to disbelieve those of the defendant, and the court will not disturb a verdict because of such conflict, especially when two juries have found a verdict for the plaintiff.

3. Excessive damages—Where a child four and one-half years old was found by a jury to have been negligently run over by a street car, cutting off one of its hands and badly crippling the other, a verdict for $10,000 damages can not be said to be excessive.

4. Expert witness—A witness who had had several years' experience as a motorman over the same route on which the child was injured was properly allowed to testify as an expert as to the running of the car and how and in what distance it could have been stopped.

Ernst, Cassatt & McDougal for appellant.

B. F. Graziani and L. L. Manson for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted in the court below by the appellee, Marie Ellen Weber, an infant, through her father, Andrew Weber, as next friend, against the appellant, South Covington and Cincinnati Street Railway Co., to recover $50,000 damages for the loss of one hand and a part of the arm, and the maiming of the other arm and hand, caused by the alleged negligence of its conductor and motorman in running an electric street car over her in or near the city of Covington.

There were two trials. In the first, appellee was awarded $7,000 damages by a verdict of three-fourths of the jury. This verdict was set aside and a new trial granted appellant by the lower court, and upon the second and last trial appellee was, by a unanimous verdict of the jury, awarded $10,000 for the injuries complained of. Appellant complains of the last verdict and judgment and of the refusal of the trial court to grant it a new trial, hence this appeal. The errors assigned are, first, that the court erred in refusing to permit counsel for appellant to interrogate the jurors as to their connection, if any, with the attorneys for appellee; second, that the verdict was not supported by sufficient evidence, was contrary to the weight of the evidence, and should have been set aside because of the perjury alleged to have been committed by the appellee's witnesses in testifying; third, that the verdict was excessive and appears to have been given under the influence of passion or prejudice; fourth, that the court erred in admitting the "expert" testimony of Andrew Weber.

The questions which the court refused to permit appellant's counsel to ask each of the jurors were, in substance, whether they were personally acquainted with the counsel representing appellee, and whether they had ever had any business relations with them. The trial judge peremptorily excluded the questions as incompetent, and instructed the jurors not to answer them, in doing which he spoke with unnecessary sharpness, and in

effect repremanded counsel for asking them. It appears from the record, however, that counsel for both parties were permitted to ask, in substance, and each juror to answer, where he resided; whether he knew the appellee or her parents, or had ever sustained the relation of client to the counsel on either side; whether he had formed or expressed an opinion as to the merits of the case, or was biased in favor of or against either party, or knew of any reason why he could not fairly and impartially try the case. The answers returned to these questions were made after the jurors were sworn to answer them truthfully, and showed the entire eighteen from which the twelve composing the jury were selected, eligible and qualified to try the case.

The foregoing questions were also asked and answered before either party was required to exercise the right of peremptory challenge, and after the interrogation of the jurors by counsel had ended, the court addressed all of them as follows: "I want to ask all of the eighteen of you if you know of any reason, from any cause, whether, by acquaintance with any of the parties or relation with any of the attorneys of any kind, personal or otherwise, you think there is any reason, however slight, that might influence you one way or the other, or tend to prevent an absolutely fair and impartial trial of this case, it is your duty to let it be known now. If any of you feel that there is any reason at all that would interfere with you in this trial, you ought to let it be known now. I take your silence as indicating that there is no such reason."

We think the interrogation of jurors was carried as far as it was necessary to go in this case. Indeed we find that not less than thirty pages of the record are taken up in separately examining the eighteen jurors by counsel for both parties and the court, and it will be found that the examination was thorough enough to elicit all the information that either party needed to enable their counsel to act advisedly in exercising the right of peremptory challenge in selecting the jury. The trial court has, and may exercise, a broad discretion in the matter of ascertaining the fitness of persons for jury service, and though counsel for each party may examine those who are to constitute the jury, they must do so within reasonable limits and by pertinent questions, subject to the court's reasonable control.

In London and Lancashire Insurance Co. v. Rufer's Adm'r, 89 Ky., 525, this court said: "The examination of jurors for the purpose of acceptance by the one party or the other must necessarily be left to the judicial discretion of the judge; and while pertinent questions should be allowed to be asked by counsel, if the court should deny this right and interrogate the juror from the bench so as to show that the juror is honest and impartial as between the litigants, that fact appearing of record, there can be no reason for reversing the judgment when neither party has been prejudiced by the action of the court."

In Low's Adm'r v. Webster, 19 Ky. Law Rep., 1208, we find another statement from this court upon the subject under consideration. It appears that one of the errors assigned in that case was the refusal of the trial court to permit the appellant's counsel to ask the jurors whether or not they, or either of them, occupied the relation of client to plaintiff's attorneys. In passing upon this complaint of appellant, this court said: "In testing a juror many questions are pertinent to be asked to enable the party to deter-

mine whether, in their judgment, the jurors are in a condition to go upon the jury and give the party a fair and impartial trial. The object being in all jury trials to obtain a fair and impartial trial, and the litigant has, we think, the right to make the inquiry of the jury as to his relationship to the parties litigant or the attorneys engaged in the case. The answer of the juror to the question in the affirmative would not disqualify him to sit as a juror in the case, but would enable the party to exercise his right to excuse a juror from service. Jurors are frequently excused by a party on account of friendship for the party litigant, and on account of his being a neighbor to the party litigant, and we see no reason why the parties may not make the inquiry as to the relationship of client and attorney for the purpose of exercising his right to excuse from the jury a certain number of persons as the law permits. He ought to have the right to ascertain the residence, feelings and business relationship to the party or his attorney engaged in the case, of the persons called as jurors, so if possible the party may arrive at an intelligent opinion as to whether the juryman would give him a fair and impartial trial of the case. There is nothing in this record showing, or tending to show, that appellant was prejudiced by the refusal of the court to permit the juror to answer the question, nor is it claimed that appellant would have excused the jurors if answered in the affirmative. Nor do we think that the action of the court would be a reversible error, unless there was something to show that by reason of the relationship of client and attorney the verdict of the jury was influenced thereby." (State v. Brooks, 5 S. W., 264; Thompson and Merriam Jury Trials, section 258.)

It is not disclosed by the record in this case that appellant was prejudiced by the refusal of the court to permit its counsel to ask of the jurors the questions excluded by the court; it is not even made to appear from the affidavit filed what the answer to the questions would have been, or that the jurors would have been excused by appellant's counsel if they had been permitted to answer the questions. It would seem from the opinion in Low's Adm'r v. Webster, supra, that it was not error for the lower court to permit appellee's counsel to inquire of the jurors whether they did business with the German National Bank as the president of that bank is also the president of the appellant company, but if it were improper to do so, it is not made to appear that such answers were prejudicial to the appellant's rights.

In view of the evidence presented by the record in this case, a reversal upon the second ground urged by appellant's counsel would be unauthorized; that the evidence is conflicting and much of it contradictory must be conceded. The evidence introduced in behalf of appellee conduces to prove that as the car by which she was injured was on its way to the Latonia race track and running on Hamlin street at a high rate of speed, the motorman and conductor in charge thereof, instead of keeping a lookout ahead of them, were laughing and talking with each other, the motorman having his back turned in the direction in which the car was going, with his face toward the conductor, who was standing in the doorway of the car. The testimony further conduced to prove that for a distance of four or five squares from the place of the accident there was nothing to obstruct the view of the street railway track from those on the approaching car, and that appellee, a child of four and a half years of age, was playing on the track

in plain view of those on the car for that distance, and that she could have been seen and her imminent peril realized by the motorman and conductor in time for them to have stopped the car long before it reached her, if they had been looking ahead of the car; that after striking the child and running the car over her, the motorman and conductor, instead of trying to extricate her, without leaving the car backed it, and thereby added to her injuries. Indeed, according to the proof, it is questionable whether her right hand (the one remaining to her) would have been injured at all but for the backing of the car.

The defense interposed was that the appellee ran on the track just before she was struck by the car; that there was not time to stop the car to prevent it striking her, and that the car was backed after it struck her to release her hand from contact with one of the wheels, which was thrown upon it by the stopping of the car. The testimony introduced by appellant tended to sustain this defense, and much of it was directed to a contradiction of appellee's witnesses. As stated, the testimony was conflicting, but it was plainly the province of the jury to pass upon it, and the credibility of the witnesses as well. They had the right to believe appellee's witnesses and to disbelieve those of appellant. This court will not disturb the verdict of a jury because of a conflict of evidence. It will do so only when the verdict is unsupported by, or is flagrantly against, the evidence. (Green v. Anderson, 103 Ky., 216; Smithern v. Waddle, 19 Ky. Law Rep., 1418; Seibert's Ass'ee v. Ragsdale, 103 Ky., 206; L. & N. R. R. Co. v. Gray's Adm'r, 20 Ky. Law Rep., 79; Cassell v. Mercer Nat. Bank, 23 Ky. Law Rep., 1485.)

Notwithstanding the contradictory character of the testimony, two juries have returned verdicts in appellee's favor We do not think the verdict is so excessive as to indicate that it was superinduced by passion or prejudice. There can be no question but that appellee's suffering was great; that is shown by the nature of the injuries. The fact that she must go through life with the loss of one hand and a part of the arm, and the other arm and hand so maimed as to make them almost useless, demonstrates that her ability to earn money in the lines of employment usually followed by women, or otherwise, has been practically destroyed. The amount of the verdict is not greater than this court has more than once approved in similar cases.

In C. & O. R. R. Co. v. Davis, 22 Ky. Law Rep., 1166, a verdict of $ 0,000, in favor of the appellee, a boy nine years of age, for the loss of a foot and thelower part of the leg, was held not to be excessive.

In the case of L. & N. R. R Co. v. Papp, 96 Ky., 103, the appellee, an infant five years of age, received through the negligence of appellant's agents injuries which necessitated the amputation of his leg just above the knee; a jury awarded him $10,000 for this injury, and this court in deciding the appeal said: "The only case in which this court is authorized to reverse a judgment on account of excessive damages is where, as provided by the Civil Code, the verdict appears to have been rendered under the influence of passion or prejudice. In cases heretofore decided by this court, where the injuries were not greater than those received by appellee, verdict for as great amount have been sustained, and we see no reason for now departing from such precedents."

We can not see that the appellant was prejudiced by the ruling of the trial court in admitting the testimony of Andrew Weber as an expert. He was a motorman of appellant of several years' experience. He also ran for appellant the car by which appellee was injured over the same route where it is now used. The same power and appliance for operating the car were in use when he ran it that were used at the time of the injury to appellee, and his testimony as to the running of the car, how and within what distance it could be stopped, was competent. No objection is made to the instructions, and upon the whole case we find no reason for a reversal.

Wherefore, the judgment is affirmed.

STANDARD OIL CO. v. COMMONWEALTH.

(Filed November 11, 1904.)

Peddling—Retailing oil—Selling from wagon—License—Under act of March 29, 1902, now section 4224, Kentucky Statutes, requiring persons to procure a license and pay a tax thereon for selling petroleum or lubricating or other oils for each wagon used in transporting and selling same. Held—Where appellant conveyed such oils in wagons from place to place and sold and delivered it to customers from the wagons, in quantities of twenty-five gallons, without having a license as peddler, such sales were retailing in the meaning of the statute, although made to merchants to be resold by them; and appellant is subject to a fine as peddler for each wagon so employed.

Humphrey, Hines & Humphrey for appellant.

N. B. Hays for appellee.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge O'Rear.

By an act which became a law March 29, 1902 (Acts 1902, pages 281-392, section 4224, Kentucky Statutes), the general assembly re-enacted and substantially amended the revenue laws of the State. Among the subjects of taxation treated of in this comprehensive statute, was that of licenses exacted for various occupations, including peddling.

Sections 25 and 32 of article 10 of the act, concerning licenses, reads, in part: "Before engaging in any occupation, or selling any article named in this subdivision 3 of article 10 of this act, the person desiring to do so shall procure a license and pay the tax thereon as follows: * * * To selling by retail petroleum, lubricating or other oils, for each wagon used in transporting or retailing such oils, $5."

Appellant was indicted and convicted for a violation of this statute under the following state of facts: It is agreed that the Standard Oil Co. is a corporation; that it sells coal oil in Oldham county by transporting same in tank wagons which contain from three hundred gallons to six hundred gallons of oil; that within twelve months before the finding of this indictment defendant, by its agent or driver, sold coal oil to R. O. Duncan, R. B. Blakemore, Ballard Bros., and to Goldsborough & Co.; that each of these purchasers were at the time retail merchants in LaGrange, who dealt in coal oil; that the said oil so bought was resold by said purchasers to con-

sumers of oil in small quantities; that in no instance did defendant sell less than twenty-five gallons of coal oil to any one purchaser at any one time; that the driver of the wagon drove up to the store houses of the respective purchasers aforesaid and asked if any oil was needed or required, and he did furnish such quantity as was required or needed; that as to each of said witnesses or purchasers oil was purchased at the time in the quantity above named, and in some instances the cash was paid to the driver for the oil, and in some instances a receipt merely was taken, and the price was collected through the Louisville office.

It is agreed that defendant, by its said wagon, sold and delivered in a similar way coal oil to other retail merchants in Oldham county, Kentucky, but not in less quantity, at any one time, than twenty-five gallons, and the defendant had no license for said selling and transporting said oil. There was no agreement between the driver and merchant that he was to deliver and sell twenty-five gallons of oil, or any other quantity, more or less. This appeal bringing in question the conviction on the above facts, presents the section of the statute quoted above for construction.

It is conceded that the legislature had the right to tax occupations, including that of selling oils, whether by retail or wholesale; also that it had the power to exact a license tax of peddlers. Appellant contends that under certain state of facts, as where it sells oil in small quantities from its itinerant wagons direct to consumers, not merchants, for their own use, it may be a peddler. (Standard Oil Co. v. Commonwealth, 26 Ky. Law Rep., 142.) This it argues is selling by retail, and is the only selling of oil by retail covered by any statute; that, therefore, the act of 1902 must be held to repeal the peddler's statute wherein they conflict, that is, in the matter of selling oils, or it can not be presumed that the legislature intended to tax twice the same occupation by the same person. It is true that this court has held that selling oil by retail by appellant's wagons traveling from house to house or point to point, where the sale is not to a merchant for resale, is peddling within the terms of the statute on the subject, which reads: "All itinerant persons vending lightning rods, patent rights, goods, wares, merchandise, clocks, watches, jewelry, gold, silver or plated ware, spectacles, drugs, nostrums, perfumery, and any other thing not hereinafter specially exempt, shall be deemed peddlers."

The license tax required of peddlers by this same statute is $50 for one person with two-horse wagon; for one person with one-horse wagon, $40; one person on horseback, $30, and for one person on foot, $20. For one county alone, one-fourth the tax just named is exacted. If the purpose of the legislature was to raise revenue, and it was, mainly, it could not have meant that peddlers of oils were allowed to follow that vocation for $5 for each wagon used anywhere in the State, when for peddling every other article subject to the statute $50, or at least $40, was charged. If the purpose was in any part the police regulation of itinerants, the nature of whose business and character of whose goods afforded them opportunities for preying on the public by palming off inferior articles, and evading an accounting where the transaction occurred by their constant moving from place to place, then there could have been no reason for the discrimination in favor

of oil peddlers. The section first quoted is a new one in the statute. The peddler's statute is an old one. Both appearing in the re-enacted law, we must conclude that the legislature meant that the one should supplement the other, should cover some case not embraced by the other.

Appellant contends, however the argument just noticed may be disposed of, that it was not guilty under this statute because the agreed facts show that the sales complained of were not retail, but were wholesale transactions. Lexicographers are cited to the effect that retail means "to sell in small quantities or at second hand; to deal out or dispose of in small quantities;" while "wholesale" is defined as "sales of goods in large quantities to retailers; sale in the gross." The definitions given are undoubtedly correct as applied to current transactions. Were we left to the mere words of the section infringed, it might be difficult, if not impossible, to give the word "retail" another meaning. But we have just seen that that section is only one of a very comprehensive scheme of taxation; that under the same head, licenses, other provisions are found so out of accord with the interpretation urged by appellant that we can not believe the legislature had the intention of enacting in the same statute such repugnancies of purpose and principle. While it is true that in construing words of common use they are to be given their popular meaning, yet that is not the only rule of interpretation. The first and most indispensable rule is to find the subject of the statute, to understand what was intended by it. In the Eureka case, 4 Sawyer, 302, Mr. Justice Field said: "Instances without number exist where the meaning of words in a statute have been enlarged or restricted and qualified to carry out the intention of the legislature."

Reading all the provisions together as must be done, and as it is the universal rule of interpretation in this country and England where there is doubt or apparent conflict, in order to arrive at the legislative intent, we conclude that it was not the purpose of the legislature to reduce the license tax to oil peddlers, but to bring into the license system a branch of business not hitherto embraced by the statute. Itinerant salesmen who carry their wares with them and deliver as they go, have been the subject of licenses since the earliest days of the Commonwealth. (5 Litt., 114; Statute Laws of Kentucky, 1259-1814.) The business of vending oils by delivering from tank wagons passing through the country at regular intervals is a modern method, having been employed in this State for but a few years past. The first case brought to the attention of the court is Standard Oil Co. v. Commonwealth, 107 Ky., 606, 21 Ky. Law Rep., 1339, decided in January, 1900; that case was followed by the case of Hays v. Commonwealth, 107 Ky., 655. In each of these cases appellant had been indicted for peddling without license. It was held that sales from appellant's wagons to merchants for resale was not peddling. In the later case of Standard Oil Co. v. Commonwealth, 26 Ky. Law Rep., 142, it was held that sales from similar wagons to consumers, not merchants for resale, was peddling. The law then stood that itinerant vendors of oils to merchants for resale were not required to take out a license, while all other itinerant vendors of other articles (save a few specially exempt), and even itinerant vendors of oils to others than to merchants for resale, were required to obtain licenses before plying their vocations. The statute under consideration should be read in the light of

these conditions, for it was passed after the last cited case was reported. As the selling of oils to merchants is not different from the danger originally thought to warrant licensing peddlers generally, except in the degree, as they had the same protection of the laws of the Commonwealth, and the same use of her public highways, kept up by taxation of citizens and their property, it is easy to believe that the legislature intended to include such persons in the list of those from whom license taxes were to be collected. It must have been known to the legislature that the custom had grown up lately and extensively of supplying retail merchants with oils for resale by delivery from wagons going about from place to place at intervals. The language of the section indicates that they must have had such knowledge in mind, for it deals directly with the subject of transporting oils by wagons. The unit of taxation is the wagon used in the business of transporting oil for sale. The section says by retail. As there was already in force an ample statute, re-enacted by this same act, covering such sales to consumers, it must be that the sales not embraced by the old statute were intended; those were the sales to merchants for resale.

The Century Dictionary defines the expression "at retail" as being "in small quantities; a little at a time." As this is an accepted and popular meaning of the expression, as well as the one of selling at second hand, we are warranted, in view of the context of the act, in holding that the former definition was the sense in which the legislature employed the term; and that sales to merchants, though commercially wholesome transactions, were in contemplation of this statute, retailing.

The judgment of the circuit court in conformity herewith is affirmed.

Whole court sitting.

YATES, COUNTY CLERK v. COLLINS.

(Filed November 11, 1904.)

Registration—Discretion of legislature—Special legislation—Under Constitution, section 147, providing that "the general assembly shall provide by law for the registration of all persons entitled to vote in cities and towns having a population of 5,000 or more, and may provide by general law for the registration of other voters in the State," it was not required that if other registration was deemed expedient by the legislature all other voters should be registered. "Registration of other voters in the State" was allowed, but it was left to the general assembly to classify them by general laws. It is in no sense class or special legislation to classify voters in cities or towns separately from those residing in the country.

Turner & Jackson, Lewis McQuown and E. H. Brown, Jr., for appellant.

Fairleigh, Straus & Fairleigh and Burton Vance for appellee.

Appeal from Kenton Circuit Court.

Judge O'Rear delivered the following response to petition for rehearing:

In a petition for rehearing another ground has been presented by appellee, upon which it is urged that the act discussed in the original opinion is void, as being violative to the Constitution.

Section 147 is relied on. That section reads: "The general assembly shall

provide by law for the registration of all persons entitled to vote in cities and towns having a population of 5,000 or more; and may provide by general law for the registration of other voters in the State."

It is argued that the section divides all voters of the State into two classes, viz., those residing in cities and towns having a population of 5,000 or more, into one, and all other voters into the other; that as to the former, the legislature was compelled to provide a system of registration, but as to the latter it was permitted to do so or not; but that if it did, then all must be required to be registered, or none could be.

Before the present Constitution registration in this State was not required at all by any general law; that instrument made it compulsory that all voters residing in cities and towns of 5,000 population or greater should be registered. Beyond that the legislature was left a free hand, except that it was compelled to provide for any additional registration by general laws only. It was not required that if other registration was deemed expedient by the legislature, all other voters should be registered. "Registration of other voters in the State" was allowed, but it was left to the general assembly to classify them by general laws. It is in no sense class or special legislation to classify voters resident in cities or towns separately from those resident in the country.

Petition overruled.

THE HUMBOLDT BUILDING ASSOCIATION CO. OF CINCINNATI v. DUCKER'S ADM'R, &c.

(Filed November 11, 1904—Not to be reported.)

1. Instructions—Where the evidence makes out a prima facie case, supporting the allegations of the petition, a peremptory instruction is erroneous.

2. Construction of statute—Where an act of the general assembly is amendatory of another act, the amendment applying to only two counties, the title clearly covering the subject-matter of the act, it is constitutional.

W. W. Helm and Sam C. Bailey for appellant.

James C. Wright and Sam E. Anderson for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge O'Rear.

On the former appeal of this case (Humboldt v. Ducker, 23 Ky. Law Rep., 1071) it was held that the facts set out in the petition stated a cause of action against John S. Ducker's estate, and against the sureties on his bond to the building association. On the return of the case an issue was joined and a trial was had before a jury. At the close of plaintiff's evidence the court peremptorily directed a verdict for the defendants, and the plaintiff has again appealed.

The evidence introduced by appellant tended to support the allegations of the petition, and, therefore, constituted a prima facie case. The peremptory instruction was erroneous. The trial judge did not write an opinion, and we are, therefore, at a loss to know upon what ground he based his ruling.

It is argued by counsel for appellee, however, that the circuit judge was

of opinion that the duties of the attorney, John S. Ducker, in the matter of examining titles and perfecting mortgage liens on behalf of his client, the appellant association, extended only to the examination of the public records of the county where the property was situated; that as the lien which was afterward adjudged against the property to be superior to that of appellant's mortgage lien was one not of record, the attorney was not bound to look for it. Such, however, was not our construction of the attorney's undertaking when the case was here before, nor is it now. We then said that the bond executed by the attorney to the association in nowise altered his undertaking to it. It merely assured its faithful performance. The association in voting the loan left it to its attorney to learn the facts and to advise it whether there were other liens upon the title of the property to be mortgaged to secure the loan, as well as learn whether the title was a perfect fee simple. When the attorney reported that there was but one lien against the title, and that it would be waived in favor of appellant's mortgage, appellant furnished the money to the attorney to pay to the mortgagor upon the completion of the lien. After the examination upon which the attorney reported, and before he had paid the money, other liens had attached to the property, that of materialmen and mechanics doing work in building a house upon the property. It is shown that the attorney knew that the house was being built. He consequently knew that somebody was furnishing the material and that somebody was doing the work. Under the circumstances, so far as now appears, it was his duty before he delivered the money to the mortgagor to learn whether the liens created by statute for this material and these services were discharged, or at least were waived, so far as his client's mortgage was concerned. His failure to do this was a breach of his undertaking to his client, and, therefore, was a breach of the covenant of the bond as held in the former opinion.

Counsel for appellee argue that the mechanics' lien statute under which the liens asserted, and which were held superior to the mortgage of appellant, was unconstitutional because its subject is not expressed in its title. The title is as follows: "An act to amend section 5 of chapter 70 of the General Statutes." The act is chapter 1385, Acts of 1889-1890, volume 1, page 130. Chapter 70, section 5, General Statutes, then in force, related to mechanics' and materialmen's liens. The subject of the act amendatory of the section and chapter supra was the granting and perfecting of liens to mechanics and materialmen for labor done and material furnished in the erection of buildings and other improvements. The act, however, was restricted in its operation to the counties of Kenton and Campbell. Appellee argues that it was, therefore, not an amendment to the chapter of the statutes indicated. He cites Pennington v. Woolfolk, 79 Ky., 13, as in point. In Pennington v. Woolfolk the act was held bad, not on the ground that it was local in its application, but because the subject was not germane to the title, that is, in that case the title referred to was that of "attorneys," while the subject-matter of the act pertained to revenue and taxation, and had particular reference to the mode of assessment of delinquents' property. The act attacked in this case was an amendment to the General Statutes so far as they applied to the two counties named, and the title clearly covered the subject matter of the act.

Wherefore, the judgment is reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

THE NEWPORT, LICKING AND ALEXANDRIA TURNPIKE CO. v. PIRMANN.

(Filed November 15, 1904—Not to be reported.)

Damages—Evidence—The evidence in this action showing that appellee's injuries were serious and painful and his loss of time and medical bill considerable, it can not be said that the verdict was excessive, it being for $800. The court did not err in permitting proof of appellee's suffering after the commencement of the action, because in this class of cases a recovery may be had not only for suffering endured prior to the commencement of the action, but for damages resulting continuously up to the trial, or for which he may suffer from in the future.

Otto Wolff and Sam C. Bailey for appellant.

Ahlering & Caldwell and C. L. Raisen, Jr., for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal of this case, the opinion on the former appeal being in 24 Ky. Law Rep., 1341.

On the return of the cause to the lower court another trial was had in conformity with the principles stated in that opinion, and appellee obtained a verdict for $800. The appellant's contention is that the judgment should be reversed for three reasons: First, for the reason that the court failed to give an instruction on contributory neglect; second, that the court erred in permitting appellee to prove any pain or suffering as a result of the injuries after the time of filing his petition, or any loss of time by reason of his injuries after that date; third, because the verdict of the jury is excessive. As to the last objection it is sufficient to say that the proof conduced to show that the appellee's injuries were serious and painful and his loss of time and medical bill considerable, and we can not say, in view of all the facts and circumstances, that the verdict was excessive.

We are also of the opinion that the court did not err in permitting proof of appellee's suffering after the commencement of his action. In this class of cases a person injured may recover damages not only for the suffering which he has endured prior to the commencement of the action, but also all the damages resulting continuously from the injury up to the trial, or which it is reasonably certain he will suffer in the future. The appellant's contention as to the failure of the court to give an instruction on contributory negligence is likewise not well founded for the reason that appellant did not plead that appellee was guilty of contributory neglect. It only alleged that his injury occurred from "his own carelessness and negligence." The issue on this plea was provided for in the court's first instruction. The court in effect told the jury that they could not find for appellee if his injuries were received by his own carelessness or want of ordinary care on his part. The plea of contributory negligence is a defense that confesses and avoids, and the issue is whether the damage was entirely caused by the defendant's negligence or whether the person injured so far contributed to the injury by his own negligence that but for which the injury would not have occurred. (79 Ky., 160; 89 Ky., 99.)

Wherefore, the judgment is affirmed.

LOUISVILLE, HENDERSON & ST. LOUIS RY. CO. v. COVETTS.

(Filed November 15, 1904—Not to be reported.)

Railroads—Damages—Evidence—There being no serious objections to the action of the lower court in its admission or rejection of testimony, nor to its instructions to the jury, while the verdict is rather large for the injury received, it can not be said to be so excessive as to indicate passion or prejudice, and will not be disturbed.

Helm, Bruce & Helm for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Nunn.

Appellee, Jennie Covetts, who was an infant under twenty-one years of age, brought this suit by her brother, as next friend, to recover damages from appellant for having wrongfully and without right put her off at a station in the night time before she arrived at her destination, and on the trial recovered a judgment for $500, from which appellant has appealed.

There is no serious objection to the action of the lower court in its admission or rejection of evidence nor to its instruction to the jury. It is contended that the verdict was excessive to such an extent as to show passion or prejudice in the minds of the jurors. This makes it necessary for us to give a short statement of the facts as shown by the proof. It appears that on the 28th of September, 1902, the appellee purchased a ticket from appellant, whereby it agreed to carry her from the city of Louisville to Powers Station in Daviess county, Ky. She took passage on appellant's train at Louisville at about 10 p. m. o'clock on that day. She was accompanied by a young man friend of hers. When they arrived at Waitman, a station upon appellant's line of road, about five miles before they reached Powers Station, the servants in charge of the train announced that they had arrived at Powers Station, and she, with her friend, assisted by the brakeman in carrying off her bundles, alighted from the train. The train immediately moved on when they discovered that they were not at Powers Station. Her proof showed that this station, Waitman, was a small station in the woods, without a depot, and that there was no place where they could remain all night. Appellant's proof contradicted this. The proof showed that she did not know any one living at Waitman, nor did she or her friend know anything about the roadway leading from Waitman to Powers' Station, and consequently they were compelled to walk down the railroad track. The night was very dark, most of the way through the woods, cuts and over long trestles to Powers Station, where they arrived about daybreak. She stated that she was very much mortified, frightened and fatigued.

If her evidence was true, which the jury evidently believed, those in charge of appellant's train were very careless and negligent with reference to the rights and interests of the appellee, and caused her considerable annoyance, discomfort and mental suffering and anxiety. And while we are of the opinion that the verdict is rather large for the injury received, yet we can not say that it is so excessive as to indicate passion or prejudice in the minds of the jury.

Wherefore, the judgment of the lower court is affirmed.

DUFF v. CORNETT, &c.

(Filed November 15, 1904—Not to be reported.)

Pleading—Upon the trial of this action appellant offered to file a reply to the amended answer of appellees, in which he denied that the parties had entered into an agreement that the trial of one case (there being two) should determine the result in the other, which reply the court would not permit to be filed. It appears that the defendants in the two actions were different, and one of them claiming to be the sole owner in fee simple of the land upon which the timber was alleged to have been cut, and it is not shown that this land is within the boundary covered by the patent claimed by appellant. From the record, this court being unable to say the judgment in a former action settled this one, the lower court erred in refusing to allow the reply of appellant to be filed.

J. J. C. Bach and W. H. Miller for appellant.

E. E Hogg for appellees.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Nunn.

On the 3d day of July, 1895, the appellant instituted an action against Manning Cornett for damages for cutting timber from a tract of land alleged to be owned by appellant. Manning Cornett answered in that action, denying that he had cut this timber from appellant's land, but alleged that he had cut it from the land of one W. E. Cornett, which was covered by an 800-acre patent issued in the name of Roger Cornett in the year 1844. The appellant claimed under a patent of 2,000 acres issued in the name of Robert S. Brashears, dated in 1851.

W. E. Cornett filed his petition in this action, asking to be made a party defendant, alleging that he was the owner of the Roger Cornett patent, which covered and included the land upon which Manning Cornett cut this timber, and also alleged that Cornett and Brashears, the original patentees, prior to the year 1850, met and agreed upon a line, giving the corners, courses and distances between the two patents, and that the true line of the patents and this agreed line included this timber within the Cornett survey. The issues were formed in that case and on the trial the Cornetts were successful. The case was appealed to this court, and affirmed. (28 Ky. Law Rep., 297.)

The petition in the case at bar was filed by the appellant against A. A. and Henry Cornett on the 22d of March, 1895, also for damages for the cutting of timber on land alleged to be owned by appellant. A. A. Cornett answered, traversing the allegations of the petition, and alleged that he was the owner in his own right of the lands from which this timber was taken. He also pleaded this agreed line made by the original patentees, Cornett and Brashears, and that the timber cut was on his side of this agreed line. The appellant in 1896 filed an amended petition setting up a boundary of 250 acres of land patented to R. S. Brashears in 1838, and alleged that the timber cut by A. A. and Henry Cornett, appellees, was within the boundary of the 250-acre patent, and that he was the owner thereof. This case remained on the docket, after the issues had been completed, until after the case first above mentioned was decided by this court. After the filing of the man-

date in that case appellees filed an amended answer, pleading the judgment in that case as a settlement and in bar to the further prosecution of this action, stating that the same land in controversy in that action is the land in controversy in this action, and as the court in that action had adjudged the land to belong to the appellees, Cornett, the question was res adjudicata.

They also alleged that the parties to both actions, prior to the trial of the first one in the lower court, recognized the fact that the land in controversy in both cases was identical, and they agreed that the trial of the one case should determine the result of the other, and in pursuance of this parol agreement this action was continued from time to time, awaiting the determination of the other case, and asked that this agreement be upheld, and judgment in this case entered accordingly.

The appellant offered to file a reply to this amended answer, in which he denied any such agreement, and also denied that the land upon which the trespass was committed, sued for in the other action, was the same sued for in this action, but alleged that the trespass sued for in this action was committed upon land embraced in the 250-acre patent which was prior in date to the Cornett patent, and that it was not committed upon the $2,000 acre Brashears patent, the line bounding which was settled or adjudicated in the former action. The court refused to allow this reply to be filed, but made it a part of the record by order of court. The only question to be determined on this appeal is whether the lower court erred in refusing to allow this reply to be filed. Upon an inspection of both records we find that the defendants in the former action were only Manning and W. E. Cornett. In this action A. A. and Henry C. Cornett were the only defendants. It appears, however, that when this amendment was filed on the return of the mandate in the former case, pleading res adjudicata and the agreement referred to, the amendment starts without naming the parties, using the words "the defendants amend their answer, etc.," but is signed and sworn to by W. E. Cornett. It does not appear that he was ever made a defendant or a party to the action in any way.

It appears from the answer of the defendants in this action that the appellee, A. A. Cornett, claimed to be the sole owner of the fee-simple title to the land from which they cut the timber for which they are sued in this action. It appears also from the pleadings of the appellees in the other action that, in giving the boundary of the land of W. E. Cornett, he recognized the fact that A. A. Cornett was the owner of this land from which he cut the timber, by calling for his lines and corners. Nor is it shown that the land from which the appellee, A. A. Cornett, cut the timber is within the 2,000-acre Brashears patent or the 800-acre Cornett patent. From the record before us we can not say that the judgment in the other action settled and determined the matter in litigation in this action. We are of the opinion that the lower court erred in refusing to allow the reply to be filed. It may be that the agreed line made between the original patentees, referred to in the other action, extended between the lands of the parties to this action, but there is nothing in this record showing it.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

THE KENTUCKY LUMBER CO. v. SMITH.

(Filed November 15, 1904—Not to be reported.)

Damages—Former appeal—Instructions—All of the questions discussed in appellant's brief have been passed upon in a former appeal except the instructions. It is an action for damages alleged to have been sustained by reason of the action of a servant of appellant superior to appellee, and appellant complains of the following instruction: "If you shall believe from the evidence that the position of the plaintiff at the tree was reasonably safe, if the tree cut by Collier had not fallen against the tree being cut by plaintiff, and that the danger to plaintiff which resulted in his injury was caused by the negligence of Collier alone in felling the tree against the tree being cut by plaintiff, and was not caused by the gross negligence of Richard Taylor, you will find for defendant." It appears that Collier cut the tree as directed. It is not necessary to pass upon the criticism of this instruction, that it contains the word "alone" after Collier's name. The evidence shows no negligence on his part, and the verdict will not be disturbed.

O. H. Waddle for appellant.

Denton & Robinson and W. A. Morrow for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal of this case, the former opinon being in 25 Ky. Law Rep., 1386. In this opinion all the questions discussed in appellant's brief were directly passed upon except those as to the instructions given to the jury. We do not, therefore, deem it necessary to enter into a discussion of the facts as presented in this record or to respond to the contentions of appellant's counsel on the question of the sufficiency of the evidence or upon the point that a peremptory instruction should have been given or upon the question of the contributory negligence of appellee. The opinion referred to settles these propositions. The only question to be determined is whether the court gave proper instructions to the jury.

The instructions as a whole were very favorable to appellant, but it makes serious objection to the last one, which is as follows: "If you shall believe from the evidence that the position of the plaintiff at the tree was reasonably safe, if the tree cut by Collier had not fallen against the tree being cut by plaintiff, and that the danger to plaintiff which resulted in his injury was caused by the negligence of Collier alone in felling his tree against the tree being cut by plaintiff, and was not caused by the gross negligence of Richard Taylor, you will find for defendant."

This instruction was offered by appellant and it was given by the court after insertion of the word "alone" after Collier's name, but to the insertion of this word the appellant complains. It is unnecessary to pass upon, and we do not pass upon, the question as to whether or not this was error on the part of the court for the reason that the evidence does not show even the slightest negligent act on the part of Collier in the cutting and felling of his tree. He cut the tree as directed, by cutting it from the under side and opposite the drift, and it fell against the tree which appellee was cutting; it was by reason of a breeze, the shape of the tree or from some other cause peculiar to the felling of trees, in that they frequently fall at some other

than the desired place, of which peculiarity the foreman was presumed to have known at the time he ordered appellee to perform the labor at the place where he was hurt.

Wherefore, the judgment of the lower court is affirmed.

POLSGROVE, &c. v. WALKER.

(Filed November 15, 1904—Not to be reported.)

Official stenographer—Claim of for reporting testimony and making transcript of same—Allowance of claim by circuit court—Notice to fiscal court—Where appellee was, by order of the circuit court, appointed official stenographer, and for his services an allowance was made and ordered to be certified to the fiscal court for payment, the fiscal court will not be permitted to say that the county had no notice of any motion or proceeding requiring it to pay the account where it had actual notice and a hearing of the motion to set aside the allowance; and, moreover, sections 4637 to 4645, Kentucky Statutes, do not require notice. Where the Commonwealth's attorney and county attorney were both present at the trial and availed themselves of the transcript, it is no objection to such claim that the records fail to show that they requested the services of appellee as reporter.

J. T. Buford, J. H. Polsgrove and J. W. Rodman for appellants.

T. L. Edelen for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Burnam.

Upon the trial of James B. Howard for murder in the Franklin Circuit Court the appellee, Clarence Walker, was, by order of court, appointed official stenographer to take down the testimony. The trial occupied fifteen days, and appellee took a stenographic report of all the testimony introduced and subsequently made a typewritten transcript and carbon copy thereof, which made up a record of 1800 pages. He thereupon presented to the Franklin Circuit Court the following itemized claim for services:

For services in case of Commonwealth v. Jas. B. Howard (third trial), in Franklin Circuit Court, fifteen days' attendance, at $5....	$75 00
Transcript, 1,800 pages, at 25 cents	450 00
Carbon copy, 1,800 pages, at 5 cents.....	90 00
	$615 00

Which was allowed and ordered to be certified to the fiscal court of Franklin county for payment. At the same term of the circuit court the county judge of Franklin county, acting for and on behalf of the fiscal court, appeared in the circuit court and moved to set aside the order allowing appellee's claim, which was overruled. At a subsequnt term of the circuit court appellee filed his affidavit, in which he recited that he had presented the order of the circuit court allowing his claim to the fiscal court, and demanded that it should be allowed and its payment provided for out of the levy for the ensuing year; but that the fiscal court had refused to pay same or make any provision for its payment, and asked that a rule should issue against

the fiscal court requiring them to comply with the order of the circuit court. Thereupon the fiscal court responded that it had refused to make provision for the payment of appellee's claim, first, because the county of Franklin had no notice of any motion or proceeding requiring it to pay the account. In response to this contention it may be said that the act of July 13, 1893, found in the Kentucky Statutes between sections 4637 and 4645, inclusive, does not require notice to the fiscal court, and even if this were required, the county had actual notice and a hearing on its motion to set aside the allowance; second, it is objected that appellee's account is incorrect, in that it charges for the transcript at the rate of 25 cents a page, instead of 15 cents per hundred words, as required by the statute. But there is no claim that the amount allowed appellee was more than the transcript would have come to if he had charged in the manner pointed out by the statute. It is not, therefore, apparent how appellant was not prejudiced by this error; third, it is complained that the records of the circuit court fail to show that either the Commonwealth's attorney or the accused, through his attorneys, requested the services of appellee as reporter; and that in the absence of this affirmative fact appearing from the record, the presiding judge of the circuit court was without jurisdiction to make the order under which the services were rendered, and that it was, therefore, void. As both the attorney for the Commonwealth and county actively engaged in the prosecution of the defendant and presumably availed themselves of appellant's transcript, it seems to us that it is too late for the county to raise this question, and the presumption is that the trial court did not act without authority in the premises. It is also complained that appellee was not the regular official stenographer of the court; and that if this claim is paid by the county court the allowance for stenographic work might exceed the maximum sum of $1,200 permitted by the statute to be paid to the official stenographer. In the absence of complaint on this score by the regular official stenographer of the court, we are unable to perceive how appellee can be prejudiced in the premises. An amended response was offered by appellant to the effect that appellee had been paid the amount due him from the fiscal court for his services in the case by the "Goebel Reward Commission," which the trial court refused to permit to be filed. This amended response was not verified, and was not made a part of the record by order or bill of exceptions, and can not, therefore, be considered by this court. But in any event it was immaterial, as the statute expressly provides that such fees shall be paid by the county in which the allowance is made is situated. Whilst the allowance to appellee appears to be large, the services were properly rendered, and the amount allowed is within the limitations of the statute.

Judgment affirmed.

TYE, &c. v. TYE, &c.

(Filed November 15, 1904—Not to be reported.)

Former appeal—The former opinion in this case settled all of the matters in controversy between the parties, and no judgment could have been rendered other than the one appealed from, and this being true, the appellants were not prejudiced by any bias of the special judge, if biased, nor by the refusal of a continuance.

John T. Hays for appellants.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal of this case, the opinion on the first appeal being in 24 Ky. Law Rep., 637. On the return of the case to the lower court a special judge could not be agreed upon by the parties, and this fact was certified to the governor and he appointed and commissioned a special judge to try the case. One of the appellants, George W. Tye, made and filed an affidavit to the effect that he believed they could not have a fair and impartial trial before this special judge, and set forth the facts upon which he founded his belief, which, in the opinion of this court, was sufficient to disqualify and cause the special judge to vacate the bench. Appellant also filed an affidavit and moved the court to grant them a continuance for the reasons stated therein, which continuance the court refused. The reasons stated in the affidavit were amply sufficient to authorize a continuance of the case. Notwithstanding these errors, the question to be determined is whether or not the judgment appealed from should be reversed. The latter part of section 134 of the Civil Code provides: "The court must in every stage of an action disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

In our judgment the former opinion in this case settled all the matters in controversy between the parties, and no judgment could have been rendered other than the one appealed from. Prior to the former appeal the commissioner had made and filed his report showing the advancements made by George Tye, Sr., to each of his children. The parties filed their exceptions to this report, and this court said in the former opinion that the trial court erred in not overruling the exceptions filed thereto, and the various children and devisees should be equalized as far as practicable out of the proceeds arising from the sale of the dower land. As to the other lands, which were divided between the children soon after their father's death, in an action instituted for that purpose, they are barred from seeking to sell any part of same for the purpose of equalization among themselves as the children were all parties thereto, and are bound by the judgment therein. It appears that the judgment appealed from conforms strictly to the principles settled in the former opinion, and the appellants were not prejudiced by the bias of the special judge, if biased, nor by the refusal of the continuance of the case.

Wherefore, the judgment of the lower court is affirmed.

K. F. & C. B. DANIEL v. DAY BROS'. LUMBER CO.

(Filed November 15, 1904—Not to be reported.)

1. Contract—Delivery of saw logs—In a contract by which appellants agreed to deliver appellee a certain number of saw logs of stipulated dimensions, in Willard's creek, a tributary of the north fork of Kentucky river, by July 1, 1894, and such as were not to be delivered by such time were to be scaled 10 per cent. for sap rot, and all not delivered in floating water by July 1, 1895, to be forfeited, evidence considered, and Held—that appellants

had delivered logs of the value of over $6,000, from which deducting their debits, leaves a balance due them of $78.65, for which they are entitled to judgment.

2. Counterclaim—Forfeiture—Forfeitures are not favored by the law, and so much of appellees' counterclaim, under that part of the contract providing for a forfeiture of all logs not delivered in floating water by July 1, 1895, is disallowed as wholly unjustifiable.

B. P. Wooten, Jesse Morgan and R. L. Greene for appellants.

J. J. C. Bach for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge O'Rear.

By a contract dated November 27, 1893, appellants undertook to cut a certain number of saw logs for appellee of stipulated dimensions, to be delivered in the north fork of the Kentucky river, or in Willard's creek, a tributary of the north fork of Kentucky river, at the price of $7.50 a thousand feet for first-class logs, and $5 a thousand for second class. All the logs were to be cut and delivered for measurement by the 1st day of March, 1894. They were to be delivered on or before the 1st day of July, 1894. Such as were not delivered then were to be scaled 10 per cent. for sap rot. The contract provided that all that were not delivered at the point designated in floating water by the 1st of July, 1895, were to be forfeited to the vendee. Appellants brought this suit claiming a considerable balance on account of the logs which they allege they had delivered, as follows: One thousand nine hundred and sixty-five first-class logs, measuring 754,437 feet, and 582 second-class logs, measuring 122,050 feet. They also claimed the 50 per cent. payment, that is the sum that is to be paid when the logs were measured in Willard creek, on about 300,000 feet additional.

The petition alleged that the total price of the logs delivered under this contract amounted to $5,154.52, and claimed that only $3,134.25 had been paid. Consequently there is a prayer for $2,020.27. The answer admitted the delivery of 1,620 of the first-class logs, measuring 595,716 feet, and 531 second-class, measuring 108,590 feet. In the answer appellee claimed that it had paid appellants in full for all the logs delivered within the life of the contract, which had expired some time before the suit was brought. It claimed also that it had overpaid appellants by several hundred dollars, and prayed judgment on its counterclaim.

There is very little discrepancy in the facts. Floyd Day, president of the appellee company, an experienced lumberman, testifies that appellants delivered 1,640 first-class logs, measuring 600,946 feet, and delivered 530 second class logs, measuring 120,564 feet, at the contract prices, which produced $5,109.91. There is no evidence in the record that any other logs were delivered to appellee or received by it under this contract than those given out by Mr. Day in his testimony, and as shown by his books. We, therefore, adopt his statements as to these matters as the basis of the settlement. The apparent discrepancy between the figures of appellants and those of appellee may thus be accounted for: Appellee received and credited only the logs that had been delivered in floating water in Willard creek, or Kentucky river, while appellants claim that all logs had been measured and accepted.

Appellee admits that it measured precisely the number of logs aggregating about the number of feet claimed by appellant, but it says that a certain quantity of these logs that were measured on Little Willard creek and Pole road branch, each being small, unnavigable streams, not capable of floating saw logs out, were never delivered; but that this was done as an accommodation to appellants, and with the express understanding that the logs were not to be accounted for, or paid for unless and until they were delivered in floating water in Willard creek, as provided for in the contract; that as a matter of fact 377 of these logs, being 325 good logs, measuring 153,491 feet, 52 culls, measuring 14,086 feet, were never delivered at all, but were left upon these small streams and in the woods. As appellants did not deliver this timber to appellee within the life of the contract, and do not seriously claim to have done so, when it comes to the proof the apparent discrepancy between the claims of the parties in their pleadings disappears.

On a former appeal of this case (Day Bros'. Lumber Co. v. Daniel, 23 Ky. Law Rep., 285) it was held that under the contract and pleadings the alleged acceptance and delivery of the logs upon Pole road and Little Willard branches was not a compliance with the contract. Upon the return of the case to the circuit court the pleadings were not amended, nor was the proof different on this point than on the first trial.

The next question arises on the payments. It is clearly shown that appellee paid to appellants in cash and merchandise on this contract $4,231.55. This sum includes 10 per cent. discount on the quantity of the logs delivered between the 1st day of July, 1894, and the 1st of July, 1895, claimed in the answer and admitted in the reply to be $343.73. In addition to all this appellants had agreed to buy from appellee $1,000 of the capital stock in a boom company, which was to be paid for out of the logs to be delivered under the foregoing contract. This would make the total debits $5,231.55. Later, however, appellee and appellants agreed that appellee should sell this stock for appellants to a party at Clay City, which was done for $1,000, and the proceeds were applied, first, to the payment of a note owing by appellants to the Clay City National Bank for $666.66. Therefore, the accounts of the parties would have to be extended so as to add to the debit of appellants' account the note above named, bringing it up to $5,888.21. At the same time there would have to be added to the credit of appellants' account $1,000 for the stock sold, bringing it up to $6,109.81.

The contract provided that if appellants did not prosecute the delivery of the logs with diligence, that appellee might, at the appellants' expense, assume the execution of the contract. Appellee charges, and we think it is sustained, that appellants abandoned the delivery of these logs, leaving many of them in the small creeks named, but accessible to wagons. Appellee at an expense of $142.95 brought out a quantity of these logs, which are included in the credit above given to appellants. Therefore, appellants should be charged with this $142.95, which brings the debit aside of their account up to $6,031.16. Deducting the debit from the credit leaves a balance owning to appellants of $78.65, with interest from the date of the filing of the petition, to wit, September 18, 1896.

Appellee's claim asserted against appellants as a counterclaim, and much of the misunderstanding, it may be gathered from the record, arose from

the attempted application of that part of the contract providing for a forfeiture of all logs not delivered into Kentucky river by the 1st day of July, 1895. Such forfeitures are not favored in law, and will not be enforced. The actual damages sustained by the party aggrieved for the breach of said contract may of course be recovered. But to say that because a quantity of saw logs were not delivered at a given point, at a given time, that the logs should be forfeited to the buyer on that day and on that account, is wholly unjustifiable. The result might be to give to the buyer a sum greatly in excess of the damages he has actually sustained by reason of the breach of his contract. The law does not favor the infliction of arbitrary penalties, without regard to the damage sustained for the breach of the contract of sale and delivery of personal property. There is no evidence in this record tending to show that appellee sustained any damage beyond 10 per cent. allowed to it for sap rot on these logs which were not delivered between the first day of July, 1894, and the 1st day of July, 1895. As to the logs which were measured on Pole road and Little Willard, and which were never delivered, appellee was entitled to nothing under the contract. In the first place, it did not pay anything upon them, and they not being delivered, remained the property of appellants. In the next place, appellee had got the maximum quantity of logs called for in the contract, not including these.

But for the reasons indicated the judgment must be reversed and this cause is remanded, with directions to the circuit court to render judgment in favor of appellants against appellee for $78.65, with interest from the 18th of September, 1896.

SAMUELS, &c. v. BRAND.

(Filed November 15, 1904.)

County clerk—Deed—Forged endorsement by deputy—Genuineness certified by clerk—Liability of clerk—Where the clerk of a county court certified that a deed was acknowledged before his deputy "as appears from the endorsement made on the back of the deed by such deputy," when in fact the endorsement was a forgery, the clerk is liable on his official bond to one who was thereby induced to accept said deed and pay the price of the lot named therein to the pretended owner; and the fact that the clerk at the time believed the endorsement to be genuine will not excuse him.

Bullock & Smith for appellants.

Bennett, Robbins & Thomas for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted in the Hickman Circuit Court by the appellee against E. B. Samuels and his sureties on his official bond, as county court clerk, for damages occasioned by the appellant giving an erroneous certificate of the acknowledgment of Lula M. Carrico to a deed purporting to have been executed by her and her husband, R. F. Carrico, to appellee.

The material facts in this case, which are admitted, and which are necessary to be considered for a correct determination of the question in issue, are briefly these: Lula M. Carrico was the owner of a small house and lot

in the city of Mayfield, Ky., worth about $300, and on or about the 15th of February, 1903, the appellee entered into an oral agreement with Lula M. Carrico's husband, R. F. Carrico, for the purchase of this lot at an agreed price of $300 in cash; and on the 17th of March, 1903, R. F. Carrico presented to appellee, in the city of Mayfield, Ky., a general warranty deed to this lot from himself and his wife, Lula M. Carrico, in which the receipt of the purchase money was acknowledged, and the deed purported to have been signed and acknowledged by Lula M. Carrico and her husband. The deed was delivered to the appellee and he paid R. F. Carrico $300 in cash therefor. Subsequently Lula M. Carrico instituted suit in the Graves Circuit Court against the appellee to recover the property, and she assailed this deed as a forgery, and denied ever having signed or acknowledged the same. In this suit she was successful and recovered the lot. The deed was in fact acknowledged by R. F. Carrico before W. W. Craig, deputy of the appellant, and on the back of the deed was also this endorsement:

"Acknowledged before me in my county by Lula M. Carrico to be her act and deed this the 10th day of March, 1903.

"E. B. SAMUELS, Clerk Hickman County Court,
"By W. W. CRAIG, D. C."

But as a matter of fact this endorsement was a forgery, and it had not been made by W. W. Craig or E. B. Samuels. However, on the 12th day of March, 1903, and before the deed had ever been presented to the appellee, the appellant, Samuels, in Hickman county, in his own handwriting, endorsed on the deed the following certificate:

"State of Kentucky,
"Hickman County. } ss.

"I, E. B. Samuels, clerk of the Hickman County Court, in the State of Kentucky, do certify that this deed from Lula M. Carrico and R. F. Carrico to A. L. Brand was on the 9th day of March, 1903, acknowledged before W. W. Craig, my authorized deputy in my county, by R. F. Carrico, and on the 10th day of March, 1903, by Lula M. Carrico, his wife, to be their act and deed, as appears from an endorsement thereon in these words: 'Acknowledged before me in my county by R. F. Carrico to be his act and deed this the 9th day of March, 1903. E. B. Samuels, C. H. C. C., by W. W. Craig, D. C.' 'Acknowledged before me in my county by Lula M. Carrico to be her act and deed this the 10th day of March, 1903. E. B. Samuels, C. H. C. C., by W. W. Craig, D. C.' All of which is hereby certified to the clerk of the Graves county court for record. Given under my hand this the 12th day of March, 1903.

"E. B. SAMUELS, Clerk."

This certificate was on the deed when it was presented to the appellee for acceptance and when he paid the money to R. F. Carrico.

It is admitted by the appellant that his certificate was incorrect, but he says that he was deceived by the clever forgery of his deputy, Craig's, certificate, with reference to the acknowledgment by Lula M. Carrico; that this endorsement was very similar to the true endorsement made by his deputy as to R. F. Carrico's acknowledgment; that in this he faithfully performed his duty; that he exercised due care with reference thereto, but was imposed upon and deceived, and, therefore, he ought not to be held liable therefor.

He also says that appellee did not use any care to protect himself, for the reason that he knew that Carrico and his wife were then separated, and that Carrico did not have any special directions or order from his wife to Brand authorizing him to pay this money to Carrico.

We are of the opinion that the possession of this deed by R. F. Carrico, with the acknowledgment of the payment of the purchase price recited therein, was a sufficient authority to Brand to pay this money. While appellant alleged that appellee knew of the separation of Carrico and wife at the time he paid the purchase money, yet he (appellant) did not allege that he did not know of this separation at the time he made the certificate, and even if he had made this allegation, it would not avail him, for the reason that the possession by R. F. Carrico of this deed, properly signed and acknowledged, was sufficient to take appellee off his guard, and he could properly have supposed that everything was all right. We are of the opinion that the appellee had the right to rely upon the certificate of appellant. How may the public know that a deed has been acknowledged unless the truthfulness of the clerk's certificate can be relied upon? Shall a purchaser of real estate be compelled to go and ascertain for himself whether or not the grantors in a deed have in fact signed it. When a county court clerk's certificate, written by himself in his own handwriting and signed by him, is endorsed on the deed, can not the purchaser of real estate rely with absolute confidence on such certificate and buy without fear of losing his property? We think so. Of course if the certificate of appellant had been a forgery he would not have been liable, but in this case his certificate is genuine, and, not only that, he certifies that the certificate of W. W. Craig is genuine. The genuineness of Craig's signature is the meaning of his certificate, and he must be presumed to have known the signature of his deputy. We are of the opinion that appellant, by giving this certificate which he admits was incorrect, became responsible to appellee in the amount which the lower court adjudged.

Wherefore, the judgment is affirmed.

Whole court sitting.

WILLIAMS v. MAYSVILLE TELEPHONE CO.

(Filed November 15, 1904.)

Telephone company—Discrimination in supplying service—Mandamus—A petition for a mandamus, or a mandatory injunction against a telephone company to compel it to put a telephone in plaintiff's residence, is not sufficient which alleges that the company has been tendered $3 to pay for three months' service, which it is alleged is the customary charge paid by other customers of the company on the same square with plaintiff, and refuses to make such connection unless plaintiff will agree to keep the telephone for twelve months at the same rate, but which fails to allege that the sum tendered is a reasonable charge for making the connection, or that his neighbors were being served under the same or like conditions and circumstances that he was offering to the company, and a demurrer to the petition was properly sustained.

A. D. Cole for appellant.

Thos. R. Phister for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Nunn.

Appellant instituted this action against appellee and alleged in substance that it was a corporation organized and existing under the laws of the State of Kentucky for the purpose of owning, constructing, using and maintaining electric telephone wires and exchange within the city of Maysville; that it was authorized to transact and perform this work and service by an ordinance passed by the city council, and that prior to the institution of this action, and at that time, appellee was engaged in the business, having established an exchange from which connections were made to telephone instruments in offices, places of business and residences of its subscribers, and then continued as follows: "That whenever a person desires a telephone, it is placed in the office, residence or place of business of the applicant, at the expense of defendant, with authority to the subscriber to use the same, upon certain rates and terms, for the purpose of telephonic communication with others; that on or about the —— day of March, 1904, he sent to defendant a demand in writing for a telephone to be placed in his residence on Forrest avenue, in said city of Maysville, together with telephonic communications with defendant's exchange and other subscribers, and accompanied said demand with the payment of good and lawful money of the sum, to wit, three dollars, required by the defendant for the use of said telephone and telephonic connections during the period of time which he desired its use, to wit, three months, which sum defendant accepted, but refused to comply with plaintiff's said demand unless he would agree to sign a contract to keep said telephone and pay for the use thereof for a period of twelve months; that other of defendant's subscribers whose residences were then and are now on the same and other streets of said city, indeed were on the same square as the residence of the plaintiff, were and are supplied with telephones by defendant under agreements which contain no such stipulation; that said telephone and telephonic communication is necessary to the use and convenience of his said residence as well as to answer emergency calls in his profession; that he is now living in rented property and does not know how long he will remain there, for which reason he avers and charges that defendant's said stipulation, which is made a condition precedent to compliance with his said demand for said telephone and telephonic communications, is an unreasonable, unjust and oppressive discrimination, and also a violation of the duties owing by it to the public as a common carrier. Wherefore, plaintiff prays for a writ of mandamus requiring defendant to place a telephone in his residence in the city of Maysville, and to connect it properly with defendant's exchange and its subscribers, and to do all the acts necessary to afford the plaintiff the like service and telephonic communication afforded to its other subscribers."

A demurrer was sustained to this petition, and appellant amended as follows: "The plaintiff, G. M. Williams, comes before answer filed and amends his petition herein, and for amendment states that the rates and terms which defendant was at said time, and is accustomed to charge its subscribers for a telephone and telephonic communications in their residences in said city, were $3 per quarter, or three months, in advance, or at the rate of

$12 per annum; that most, if not all, of its subscribers in said city, including those residing on the same street as this plaintiff, were furnished with telephones and telephonic communications as aforesaid by defendant according to said rates and terms, but no stipulation was or is exacted of them, or at least the great majority of them, as that exacted of plaintiff aforesaid; but, on the contrary, they claim and exercise the right to discontinue the service of defendant's telephones and telephonic communications at the expiration of any quarter or period of three months; that unless said writ of mandamus be granted he is without remedy."

A demurrer was sustained to the pleading as amended, and the action was dismissed. From this order appellant has appealed. It is conceded by appellee's counsel that appellee is a common carrier, a public service corporation, and, as such, is subject to the laws governing and controlling such corporations. It is self-evident that a corporation engaged in a business affected by a public interest may prescribe reasonable rules and charges for conducting its business. And when the charges are not fixed by legislative enactment (as in the case at bar) the charges may be fixed by the corporation, and the only limitations are that the charges must be reasonable and be the same to all persons under the same or like circumstances and conditions. There must not be, in the service or charges, any discrimination or partiality. Tested by these principles, we are of the opinion that the petition did not state a cause of action. Especially it did not authorize the court to grant a mandamus to compel appellee to place a telephone in appellant's residence.

Mandamus was not the proper remedy. This writ is defined by section 477 of the Code as follows: "The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law; and it is granted on the motion of the party aggrieved, or of the Commonwealth when the public interest is affected."

The agents and servants in charge of appellee's telephone business were and are not "executive or ministerial officers" in the sense and meaning of this section of the Code.

If appellant's petition had been otherwise sufficient under his prayer "for all proper and general relief," the court should have granted him a mandatory injunction as provided in section 271 of the Code, which provides: "When a mandatory injunction shall be granted, the order or judgment may affirmatively direct the party enjoined to do the act or thing required to be done." This, however, is a harsh and extreme remedy, and should never be resorted to or granted except it be made to appear clearly that the party demanding the remedy has the legal right to have the act done, and that he has no other adequate remedy at law to obtain redress. The substance and effect of the alleged wrongs perpetrated by the appellee were, first, that it would not give him telephonic communications for the sum of $3 for three months unless he would sign a contract to pay at that rate for twelve months; that other of its subscribers whose residences were on the same square with him were and are supplied with telephones by appellee under agreements which contained no such stipulations, and averred that

appellee's act in requiring him to sign such a contract was unreasonable, unjust and oppressive discrimination.

It is not stated in the petition that $3 for three months' service and extending the line to his residence and putting in the telephone was a reasonable charge. It is possible and probable that extending the line to his residence, placing the phone and making the connections, would have cost as much or more than $3, but appellant says that appellee discriminated against him, for it furnished others on his square with telephone connections for the price of $3 for three months' service, but he did not allege that these other parties had received the connections and were being served under the same or like circumstances and conditions that he was offering to appellee. The service to his neighbors may have been at the price of $3 for three months, and they did not sign any contract for twelve months, yet the conditions and circumstances may have been very different; they may have all been upon one line, a party line, and the expense to appellee to make the connection and furnish them with the service may have been small as compared with what appellant required. The petition should have stated facts from which the court could have determined, not inferred, that the price offered by appellant was reasonable, and that he was being unjustly discriminated against by appellee.

For these reasons the judgment of the lower court is affirmed.

CALDWELL v. McVEAN, &c.

(Filed November 15, 1904.)

1. Traverse bond—Action thereon—Defense—Title in traverser—In an action by the traversee on a traverse bond executed under section 464, Civil Code, for the rental value of the land illegally detained, Held—That the traverser can not avoid a recovery by showing that he was the legal owner of the land and entitled to its use during all the time it was detained.

2. Damages recoverable—In an action on a traverse bond the general rule is that such damages as are the natural and proximate result of the forcible entry and detainer may be recovered from the traverser, and that the reasonable value of the rents and profits of the land, so illegally detained, is an element which should be taken into consideration in estimating such damages.

M. R. Lockhart for appellant.

Wright & Wright for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Edwin Caldwell, brought this action against the appellee, S. D. McVean, upon a traverse bond executed pursuant to section 464 of the Civil Code for the rental value of the land of which he had been illegally deprived by the forcible entry and detainer of appellee. The answer was in two paragraphs; the first denied all damages, and the second plead affirmatively that the defendant held the legal title to the land in controversy and was entitled to the beneficial use thereof during all the time sued for. A general demurrer was interposed to the second paragraph of the answer,

which was overruled. Appellant thereupon in his reply denied that appellee was the owner of the land. Upon the issues thus formed appellee introduced as proof his title papers, which conduced to support his claim of ownership. No testimony was introduced by either party upon the defense relied on in the first paragraph of the answer, and the action being submitted to the court for trial without the intervention of a jury, it was adjudged by the trial court that as McVean was the legal title holder of the land during all the time of the controversy betwen him and appellant, out of which the suit arose, no recovery could be had by appellant, and his petition was dismissed. Motion and ground for a new trial having been overruled he has appealed. It is not controverted by counsel for appellee that a forcible entry and detainer proceeding under subsection 3 of section 452 of the Civil Code does not in anywise involve the title to the land in dispute, but simply whether the entry was without the consent of the person having actual possession It is insisted that a different rule prevails when an action had been instituted upon a traverse bond; that in this class of actions title in the plaintiff is essential to the recovery of rents or damages for deprivation of the land by reason of the forcible entry and detainer. It may be admitted that in some jurisdictions no damages are recoverable in actions of this character, but we think the general rule is that such damages as are the natural and proximate result of the forcible entry and detainer may be recovered from the traverser, and that the reasonable value of the rents and profits of the land so illegally detained is an element which should be taken into consideration in estimating such damages. (13 A. & E. En. of Law, 2d edition, 773, and authorities cited.) But the question is hardly an open one in this State as section 464 of the Civil Code expressly authorizes the recovery of damages for withholding the possession during the pendency of the traverse in either the circuit court or Court of Appeals in addition to the reasonable expenses of the traversee in defending the traverse. We are, therefore, of the opinion that the trial court should have sustained the demurrer to the second paragraph of appellee's answer, but as the claim for damages is only for $100 and cost, this court has no jurisdiction to grant relief.

The appeal is, therefore, dismissed.

REYNOLDS v. COMMONWEALTH.

(Filed November 15, 1904—Not to be reported.)

Criminal law—Instructions—Upon the trial of this case in the lower court the court took occasion to define the meaning of the word "affray," and told the jury that it was a mutual combat, voluntarily engaged in by two or more persons in a public place. While the definition is technically accurate, it was more misleading than helpful to the jury, because it may have appeared to them that both parties in this instance willingly engaged in combat. If appellant was assaulted in a public place he had the right to defend himself, and was not guilty within the meaning of the instruction unless he began it.

Tye & Denham and T. Z. Morrow for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge O'Rear.

The petition for rehearing in this case is granted. The former opinion, filed September 28, 1904, is withdrawn.

Appellant was convicted and sentenced for the crime of manslaughter. A number of witnesses testified in behalf of the prosecution. About an equal number for the defense. Those for the prosecution who professed to have seen the fight in which appellant took the life of Steel, do not claim that they saw the beginning of it, nor does any one of them so claim. On the contrary, uniformly they say that when their attention was first attracted the parties were engaged in a scuffle or struggle. This was in the night time, at a public gathering, in the town of Corbin. In the course of the conflict the parties fell to the ground, grappling each other, when appellant fired twice, the last shot taking effect in Steel's head, killing him almost instantly. Steel was armed with a revolver, which he carried in a holster, swung from a strap across his shoulder. The holster was beneath his coat and vest, and possibly his outer shirt, but was discernible by any one looking at him. The strap could be seen through his open clothes. For some days before Steel had been threatening to kill appellant and another man, and had been carrying arms, he said, for that purpose. This was because appellant had been seen in company with a woman who had formerly been Steel's wife, but from whom he had been recently divorced. There was no evidence whatever to show the state of feeling of appellant toward Steel.

The witnesses for the defense claim and testify that appellant was sitting with a lady at the public gathering mentioned, when Steel came by and accosted appellant with some taunting and insulting remark, took hold of him roughly and struck him. Appellant grappled with Steel, when they fell to the ground, struggling. Appellant claims, and another of his witnesses testifies also, that appellant was struck over the head by Steel with his pistol before defendant grappled with him.

At the conclusion of the evidence the court instructed the jury that if they believed from the evidence that the defendant in sudden affray, or in sudden heat and passion, without previous malice and not in his necessary self-defense, shot and killed the deceased, the crime was that of manslaughter. The court took occasion also to define to the jury the meaning of the word affray, and told them that it was a mutual combat, voluntarily engaged in by two or more persons in a public place. We are of the opinion that the definition given is technically accurate. But we have come to the conclusion that the giving of the definition in this case, limited as the definition was, was more misleading than helpful to the jury. They may have construed the definition of a mutual combat, voluntarily engaged in, to be one in which both willingly took part. In an affray we understand, as the term is used in manslaughter instructions, that each of the parties engaged in it are equally guilty, or all guilty, to some extent. Nevertheless it is true that a man assaulted in a public place may defend himself there as well as elsewhere, and if the assault be of that violence and nature that indicates a purpose of the assailant to inflict death or great bodily harm upon the per-

son assaulted, the latter has a right then and there to defend himself, even to the death of his assailant.

It is laid down in 1 Hawkins, chapter 65, section 8: "If any number of persons met together at a fair or market, or any lawful or innocent occasion, happen on a sudden quarrel to fall together by their ears, they are not guilty of a riot, but of an affray only, of which none are guilty but those who actually began it."

If the court undertakes to give the jury a definition at all of the meaning of the word affray, he ought to add the qualification just outlined. Complaint is made as to the former instruction defining the right of self-defense, or more particularly because the court rejected appellant's instruction offered on this point. The one given is substantially in the form many times approved by this court. Its sense and proper construction is not at all different from the one offered by appellant.

But for the reasons indicated the judgment is reversd and cause remanded for a new trial under proceedings not inconsistent herewith.

KENTUCKY AND INDIANA BRIDGE AND R. R. CO. v. SYDNOR, ADM'R.

(Filed November 15, 1904.)

1. Railroads—Switching cars—Causing death of licensee—Negligence of decedent—Duty of defendant—Failure to keep lookout—Liability—In this action for causing the death of plaintiff's intestate it is shown by the proof that at the time of the accident appellant maintained a switchyard in the city of Louisville, which was used by it as well as its patrons, the connecting railroads, including the Southern Ry. Co. It was the custom of appellant to suffer these railway companies to repair their cars in this switchyard, the plan of protecting the workman, so engaged, being the placing of a blue flag or signal over or near the car being repaired, which indicated to the switching crews that they must not connect to or touch the car while the flag was up. The deceased and one McDowell were engaged in repairing a car in said yard for the Southern Ry. Co , and were required to do the work under the car. McDowell placed the blue flag (tied to an iron rod four feet high) in the middle of the track over 100 feet from the car they were repairing in the direction of the incoming train. Appellant's train was kicked into the yard without any one being on the outlook for the blue flag or signal, and coming in collision with the car under which deceased was at work, he was instantly killed. Held—That decedent was rightfully at the place where he was killed, and where his presence ought to have been anticipated by appellant's switching crews in view of the custom of allowing repairs to be constantly made at that point, and it was the duty of those in charge of the moving train to keep a lookout for the car repairers and their signals, and although decedent was negligent in not causing the signal to be placed further around the curve, yet if appellant's servants in charge of the train, by the exercise of ordinary care, could have discovered the signal, as it was in fact placed, in time to have averted the injury, and failed because of negligence to discover it, by which the injury was occasioned, appellant was liable.

2. Master and servant—Joint negligence—Whatever may have been the opinion of the circuit judge or counsel on the subject of the master's liabil-

ity to an injured servant, where the injury was caused by the joint negligence of the master and of a fellow servant of the injured person, that question does not arise in this case. We, therefore, do not decide it.

3. Joint tort feasors—Liability—While McDowell was a fellow servant of decedent in repairing the car, it does not follow from that fact that anybody in connection with McDowell could wrongfully injure or kill decedent in that work, and escape liability on the ground that the fellow servant, McDowell, by his negligence, aided in the wrongful act. Nothing is better settled than that where two or more, by their joint tort, damage another, they are jointly and severally liable to the injured person for the entire damage.

4. Fellow servants — Assumption of negligence — Personal contract — Stranger to contract—The assumption by a laborer of his fellow servant's negligence, or, to put it differently, the excusing of the master for the act of such, is the result of the contract between the master and the servant and is personal to them. A stranger to the contract is not entitled to its benefits, for he does not bear any of its obligations. As to him the fellow servant with whom he acts in doing the wrong is like any other joint tort feasor—they are both liable for the injury they have inflicted by their negligent acts.

5. Contributory negligence of fellow servant concurring with negligence of stranger—Applying these principles to the facts in this case, as decedent and McDowell were not servants of appellant, the appellant is not entitled to any benefit of the doctrine applicable as between a master and his servants. The third instruction given by the court seems to fairly submit this view of the case, which is as follows:

"3. If the jury shall believe from the evidence that the life of plaintiff's intestate, Renfro, was lost solely by reason of the negligence (if any) of his fellow workmen, or any of them, in the service of the Southern Ry. Co., or by his own negligence and the negligence of said fellow workmen, combined or concurring, then the law is for the defendant, and the jury shall so find. But although the jury may believe from the evidence that the fellow workmen of the decedent were negligent, and that such negligence on their part contributed to his injury and death, nevertheless if they shall further believe from the evidence that the defendant's agents and servants in the control and operation of its cars were also negligent, and that such negligence on their part, or on the part of any of them, concurred with the negligence of the decedent's fellow workmen in causing his death, then the law is for the plaintiff, and the jury should so find."

Humphrey, Burnett & Humphrey for appellant.

Bennett H. Young, L. R. Yeaman and Marion W. Ripy for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge O'Rear.

Appellee Sydnor, as administrator of Elijah T. Renfro, filed this suit against appellant to recover for the death of his intestate, which was charged to have occurred by reason of its gross negligence. The defendant traversed the allegations of the petition and pleaded contributory negligence on the part of Renfro, but for which he would not have been injured. It was also pleaded that Renfro was working with one of appellant's servants employed in the same grade of service and engaged in the same character of labor, neither being superior in authority to the other; and that the accident which caused the death of Renfro was due either wholly to the negligence of his fellow ser-

vant or to his negligence, together with the negligence of the fellow servant. The jury to whom the case was submitted found a verdict in favor of the plaintiff in the sum of $6,000, on which judgment was entered, and the defendant's motion for a new trial being overruled, it appeals.

The facts of the case are as follows: The plaintiff's intestate and John L. McDowell were car repairers in the service of the Southern Railway Co.; they were directed by their foreman, O. L. Harris, to make certain repairs to a freight car, which was at the time in the yard of the defendant, upon one of the tracks sometimes used as a repair track. To make the repairs it was necessary for them to get under the car. It was customary for workmen engaged in repairing a car to place a signal upon it or upon the track to indicate to the switching crews in the yard that men were working on the car, and that no engine or cars should be allowed to come in contact with it. The signal used for this purpose was a blue flag, and was well understood by the employes in the yard. McDowell was proceeding to put out his flag preparatory to going under the car when the defendant's yardmaster, George A. Zumer, told him not to put the flag up; McDowell told Zumer he would not until he was through switching. The engine went in and took out a coal car and took it into the Southern yard. McDowell then put up his flag and he and Renfro went under the car and proceeded to repair it. About a half hour afterwards, and just as they had finished the work, when McDowell had come from under the car and Renfro was about to come out, but had not gotten out, a train of cars under the control of the defendant was kicked upon the track, striking the car upon which Renfro had been at work just as he was in the act of coming from under it, and killing him instantly. No notice of the approach of the train was given, and no lookout maintained on the rear cars as they were kicked in. McDowell had first placed the flag upon a car in front of the one he was working on, but his attention being called to the fact that as the track was curved, the flag here would be obscured by a car standing on another track, he walked down the track about 100 feet and set up the flag in the center of the track, attaching it to an iron rod which he stuck down between the cross ties, the flag being about four feet above the ground. The engine which kicked the cars in was some distance from the flag, still further around the curve, there being sixteen cars in the train, and the engineer could not see the flag by reason of an office building which stood between him and the flag in consequence of the curve of the track. As there was no lookout on the cars, the flag was not seen, and was run over by the cars as they were kicked in. The flag was found after the accident between the rails. There was proof by the defendant that the flag was not securely set up and that it should have been placed further around the curve and down near the office so that the office would not have obstructed the view of it. It was something over a hundred feet from where the flag was set to the point indicated. The proof for the plaintiff was that the flag was securely set up, and was at the proper place. Two witnesses saw the flag standing between the tracks shortly before the cars were kicked in, and it appeared, from its position when found after the accident, to have been knocked down by the train. The verdict of the jury should be received as settling the disputed facts in appellee's favor. McDowell and Renfro were fellow servants, in the same grade of service,

working together in repairing cars. Before going under the car Renfro asked McDowell if he had put out the flag, and he was informed by him that he had done so. It was the duty of Renfro, no less than of McDowell, to put out the flag before going under the car. The cars were kicked in at a low rate of speed, and if an outlook had been kept on them the flag could have been seen and the collision avoided; but it was not customary to have a man on the rear end of a train of cars when kicked in on a track in the yard. The defendant moved the court to give the jury this instruction, which was refused by the court:

"12th. The court instructs the jury that if they believe from the evidence that Renfro and McDowell were associated in the work of repairing the car under which Renfro was killed, and that the said Renfro left to McDowell the task of giving the usual warning of their presence under said car, then the said Renfro was bound for the manner in which the said McDowell performed this task, and if the jury believe from the evidence that McDowell was guilty of negligence in the manner in which he gave the said warning, if he gave any warning, and that his negligence contributed to the accident in which Renfro lost his life, so that such accident would not have happened except for the negligence of the said McDowell contributing thereto, the law is for the defendan , and the jury shall so find."

The court then, of its own motion and over the objection of the defendant, gave to the jury the following instructions:

"1st. If the jury shall believe from the evidence that the agents or servants of the defendant, the Kentucky and Indiana Bridge and Railroad Co., by negligence on their part caused the cars of the defendant company, under their control, to be backed against the car under which the plaintiff's intestate was working, and that by reason of such negligence (if any there was) on the part of defendant's said agents or servants, the plaintiff's intestate lost his life, then the law is for the plaintiff and the jury shall so find, unless the jury shall believe from the evidence that said Renfro, by negligence on his part, so far contributed to his injury that but for said negligence (if any there was) on his part he would not have been injured.

"2d But unless the jury shall believe from the evidence that the plaintiff's intestate, E. T. Renfro, lost his life by reason of the negligence of the defendant's agents or servants, or some of them, in the operation and management of the cars which collided with that under which he is alleged to have been working when killed, the law is for the defendant, and the jury should so find. Or if the jury shall believe from the evidence that the said Renfro, by negligence on his part, so far contributed to his injury that but for such negligence he would not have been injured, the law is for the defendant, and the jury shall so find.

"3d. If the jury shall believe from the evidence that the life of plaintiff's intestate, Renfro, was lost solely by reason of the negligence (if any) of his fellow workmen, or any of them, in the service of the Southern Railway Co., or by his own negligence and the negligence of said fellow workmen, combined or concurring, then the law is for the defendant, and the jury shall so find But, although the jury may believe from the evidence that the fellow workmen of the decedent were negligent, and that such negligence on their part contributed to his injury and death, nevertheless if they shall

further believe from the evidence that the defendant's agents and servants in the control and operating of its cars were also negligent, and that such negligence on their part, or on the part of any of them, concurred with the negligence of the decedent's fellow workmen in causing his death, then the law is for the plaintiff, and the jury should so find."

In giving the third instruction the court apparently had in mind this allegation of the answer: "Defendant further states that the said accident and the death of said E. T. Renfro was caused either wholly by the negligence of Renfro's fellow servant or by the negligence of his said fellow servant, together with the negligence of Renfro himself, and it states that one or the other of said facts alleged alternatively is true, but defendant does not know which, and, therefore, pleads said facts in the alternative."

To have a correct understanding of the application of these instructions it must also be remembered that appellant was not the master of the two car repairers, Renfro and McDowell. They were employed, as stated, by the Southern Railway Co., and were in its service at the time. Appellant is a bridge and transfer company. In connection with the operation of trains across the bridge it maintains a switchyard in Louisville, which is used by it as well as by its patrons, the connecting railroads, including the Southern Railway Co. It was then the custom of appellant to suffer these railway companies to make repairs on their respective cars at any point in this switchyard, the plan of protecting the workmen so engaged being the placing of the blue flag or signal over or near the car being repaired, which indicated to appellant's switching crews that they must not connect to or touch the car while the flag was up.

Appellant complains of the instructions given, because, he argues, it incorporates into our law the doctrine of comparative negligence, a doctrine hitherto rejected by the Kentucky courts. We fail to so understand the effect of the instructions. The jury were not by them warranted in comparing the degrees of negligence of either decedent or his fellow servant and that of appellant further than has always been allowed in this State. That is, if the injury was inflicted by reason of the negligence of the deceased, or would not have occurred but for his negligence, then appellant is not liable, although it may have been also negligent. The instruction which tells the jury that if decedent and his fellow servant were both so negligent that the injury would not have happened but for it, notwithstanding appellant's negligence, the law was for the appellant, merely states in another and appropriate form the doctrine of contributory negligence, coupled with the idea that if another, not a servant of appellant, by his own act alone or in conjunction with the decedent brought about the injury, appellant is not liable. Whatever may have been the opinion of the circuit judge or counsel on the subject of the master's liability to an injured servant, where the injury was caused by the joint negligence of the master and of a fellow servant of the injured person, that question does not arise in this case. We, therefore, do not decide it.

In this case the decedent was at the place of injury as a matter of right, and where his presence ought to have been anticipated by appellant's switching crew in view of the custom of allowing repairs constantly to be made at that and similar points. It was, therefore, the duty of those in charge of

the engines and moving cars to keep a lookout for the car repairers and their signals. If the car repairer put out a signal it would manifestly be useless as a protection unless those operating the trains were required to look out for it, and govern their actions by it. The signal could have no effect on the moving trains unless it was seen. It could not be seen unless some person was so placed on the approaching cars that he could see it. Therefore, it was proper to tell the jury that although decedent was negligent in not causing the signal to be placed further around the curve, yet if appellant's servants in charge of the train, by the exercise of ordinary care on their part, could have discovered the signal as it was in fact placed in time to have averted the injury, and failed because of negligence to discover it, by which the injury was occasioned, appellant was liable. This is in line with the doctrine frequently announced by this court that where in a city or town, at street crossings and the like, where persons have the right to be, and may reasonably be expected, it is the duty of those operating trains there to keep a lookout to discover them, and a failure to do this is actionable notwithstanding the contributory negligence of the injured person, if by observing that duty the injury could have been averted notwithstanding the negligence of the injured person. While negligence of trespassers need not ordinarily be anticipated, nor that of employes or licensees, yet where the duty is to maintain a lookout for their presence the operator can not shut his eyes to their actual situation. The very reason that they are required to keep a lookout at street crossings and at other places where others may be expected, is because such persons may not always, and do not always, take proper care in protecting themselves; in other words, are themselves negligent. But knowing of their presence and peril, always imposes the duty upon the operator to refrain from injuring them, if possible, with the means at hand. (Thurman v. L. & N. R. R. Co., 17 Ky. Law Rep., 1343; Johnson v. L. & N. R. R. Co., 91 Ky., 651; L. & N. R. R. Co. v. Wolfe, 80 Ky., 82; 3 Ky. Law Rep., 576; Gunn v. Felton, Receiver, 108 Ky., 561; Railroad Co. v. McCoy, 81 Ky., 404; Flynn v. Lou. Ry. Co., 110 Ky., 662; L. & N. R. R. Co. v. Potts, 92 Ky., 30.) So if he has reason to believe they are in peril, by knowledge of the fact that they are apt to be at the point of peril, he is under like duty to look for them. His failure to look under such circumstances is equivalent to his failure to use proper precaution to avert the injury after he has discovered the jeopardy.

McDowell was a fellow servant of decedent Renfro in repairing the car, it is true, but it does not follow from that fact that anybody in connection with McDowell could wrongfully injure or kill Renfro in that work and escape liability on the ground that the fellow servant, McDowell, aided in the wrongful act. Nothing is better settled than that when two or more by their joint tort damage another, the joint tort feasors are jointly and severally liable to the injured person for his entire damage. The doctrine of nonliability of a master or employer to one of his servants for an injury inflicted by the negligence of a fellow servant is based upon the implied contract of the parties, which is, that each servant agrees to assume the risk of his fellow servant's negligence, the correlative undertaking of the master being that he will use reasonable diligence to engage none but competent fellow servants. If the master, notwithstanding, engages incompetent

workmen, from whose negligence damage is sustained by his fellows, the master is liable for the injury, because it was brought about by a breach of his implied undertaking. But this assumption by the laborer of his fellow servant's negligence, or, to put it differently, the excusing of the master for the act of such, is the result of the contract between the master and the servant, and is personal to them. A stranger to the contract is not entitled to its benefits, for he does not bear any of its obligations. As to him, the fellow servant with whom he acts in doing the wrong is like any other joint tort feasor; they are both liable for the injury they have inflicted by their negligent acts. (Pugh v. C. & O. Ry. Co., 101 Ky., 77; Farwell v. Boston & W. R. Corp., 4 Met., Mass., 49; 38 Am. Dec., 339; Johnson v. Lindsay, 65 L. T. N. S., 97; Smith v. N. Y., &c., R. R. Co., 19 N. Y., 132; Gray v. Phil., &c., R. R. Co., 24 Fed., 168.)

Applying these principles to the facts in this case, as Renfro and McDowell were not servants of appellant, Kentucky and Indiana R. R. and Bridge Co., the latter is not entitled to any benefit of the doctrine applicable as between a master and his servants. The third instruction seems to fairly submit this view of the case.

Perceiving no error prejudicial to appellant's substantial rights the judgment is affirmed, with damages.

The whole court sitting.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT v. COMMONWEALTH

(Filed November 15, 1904—Not to be reported.)

1. Taxation—Where the city of Frankfort sold its gas plant to a private corporation, receiving in consideration therefor forty bonds of the value of $1,000 each, bearing interest at the rate of 6 per cent. interest per annum, such property is subject to taxation, and not exempt by the provisions of section 170 of the Constitution and by section 4026 of the Kentucky Statutes because it is not "public property used for public purposes," which, by the provisions of the Constitution, is exempt from taxation.

2. Same—Property owned by a city, necessary to the exercise of those duties which are strictly governmental, is exempt from taxation, but not so of that property which is held and used by the municipality for the comfort and convenience of its citizens individually or collectively, or for money-making purposes merely.

T. H. Crockett and Ira Julian for appellant.

J. T. Buford and Guy H. Briggs for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Franklin Circuit Court adjudging that forty bonds of $1,000 each, belonging to the city of Frankfort, should be assessed and the taxes paid thereon by the city.

The city of Frankfort many years ago was the owner of and operated the gas plant, and it sold this plant to a private corporation known as the Capital Gas and Electric Light Co., and received in consideration therefor forty

bonds of the company of $1,000 each, bearing interest at the rate of 6 p cent. per annum, and the city has held and owned the bonds from the time of their issual to the present, and never has at any time listed them, or any part thereof, for taxation for State and county purposes. When these proceedings were commenced to cause these bonds to be listed and taxed the board of councilmen answered that this property was within the purview of section 170 of the Constitution, authorizing the legislature to exempt "public property used for public purposes" from taxation, and that the legislature had, by section 4026 of the Kentucky Statutes, exempted the same from taxation. Therefore, the only question presented for the decision of the court, is this property, this investment, owned by the city of Frankfort, "public property used for public purposes," in the purview of the Constitution, and exempted from taxation?

It is claimed by the city that the $2,400 interest received on these bonds is used exclusively in lighting the streets of the city, and it is strenuously argued that the lighting of the streets of the city of Frankfort is a "governmental function," and because the income derived from the bonds is expended by the city in lighting its streets, that these bonds are, therefore, exempt from taxation as "public property held and used for public purposes." This court, prior to the present Constitution, in the case of the city of Louisville v. Commonwealth, 1 Duv., 295, discussed the question as to the liability of a city to pay taxes on its property, and decided that the property owned and used by the city for public purposes of local government was not subject to taxation. "But so far as any of its property may be used not for that purpose, but only for the convenience or profit of its citizens individually or collectively, this it owns and uses as a private corporation, and, like the property of all such corporations not expressly exempted, it is a legal subject for assessment and taxation."

Measured by this test, it can not be claimed that the bonds in question are exempt from taxation. But appellant says that the new Constitution changed this rule; that if the framers of the Constitution had intended the construction enunciated in the Duvall case, supra, to continue, they would have used the expression "public property used for governmental purposes," instead of "used for public purposes." But this court in several cases has passed upon this question, and construed the words "used for public purposes" to mean the same as the words "used for governmental purposes." (Negley v. City of Henderson, 21 Ky. Law Rep., 1394; Negley, Sheriff v. City of Henderson, 23 Ky. Law Rep., 912; Newport v. Commonwealth, 21 Ky. Law Rep., 42; City of Covington v. Commonwealth, 19 Ky. Law Rep, 105.) In the last case cited the court said: "Assuming, as a beneficial rule of construction requires done, that the phrase 'for public purposes' was intended to be construed and understood according to previous judicial interpretation and usage, there can be no doubt of the proper meaning and application of it. For in the cases cited, and others, where the question of subjecting particular property of cities to taxation arose, the words 'for public purposes' had been held by this court to amend, in that connection, the same as the words 'for governmental purposes;' and so property used by a city for public or governmental purposes was held to be exempt, while that adapted and used for profit or convenience of the citizens individually or collectively, was held to be subject to taxation."

Our conclusion, from reason and the authorities, is that property owned by a city, necessary to the exercise of those duties which are strictly governmental, is exempt from taxation, but not so of that property which is held and used by the municipality for the comfort and convenience of its citizens individually or collectively, or for money making purposes merely. In our opinion the lighting of the streets of the city is peculiarly for the comfort and convenience of the citizens of the municipality, and not a governmental or public duty or purpose as used and meant in the Constitution. Appellant lays much stress upon the case of the City of Owensboro v. Commonwealth, 105 Ky., 344, in which a majority of the members of this court held a public park owned by the city of Owensboro not taxable. It is difficult to understand how any one after reading that opinion could come to the conclusion that the reasoning therein sustained the contention of appellant in this case. The difference between a public park from which absolutely no revenue is derived to the municipal corporation of Owensboro can not be compared to an investment of $40,000, which brings an annual income of $2,400 to the city of Frankfort.

For these reasons the judgment of the lower court is affirmed.

COULSON v. FERREE.

(Filed November 16, 1904—Not to be reported.)

New trial—Bankruptcy proceedings—The fact that appellee instituted proceedings in bankruptcy and became a bankrupt before the judgment was rendered in this action against appellant did not constitute fraud upon his part in obtaining the judgment, and appellant is not entitled to a new trial under the provisions of subsection 4 of section 518 of the Civil Code of Practice.

Mather & Creal for appellant.

Chas. Williams for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Barker.

This is an action for a new trial under susbection 4 of section 518 of the Civil Code of Practice. The appellant and appellee, and one James Leadley, were partners under the firm name and style of the Hodgenville Spoke and Lumber Co. Appellee instituted an action in equity to dissolve and wind up the affairs of this partnership, and set up in his petition a claim against his partners for $600 for services and labor performed by him for the firm under contract at $20 per month. Appellant was duly summoned to answer in the action. Afterwards, and before judgment, the appellee became a bankrupt, and was so adjudged in the District Court of the United States for the District of Kentucky, held at Louisville. The action instituted by appellee against his partners remained on the docket of the Larue Circuit Court until the January term, 1904, when, without any defense having been made, a judgment was rendered against the defendants by default for the sum claimed in the petition, and execution issued thereon.

Appellant seems to have assumed that, after appellee was adjudged a

bankrupt, as the chose in action passed under the bankruptcy law to the assignee, there was no necessity on his part to take further notice of the pending action; when, however, the execution was levied on property belonging to him, he instituted this equitable action in the Larue Circuit Court for a new trial on the ground of fraud, the petition stating, substantially, the foregoing facts, and praying that the judgment be set aside and held for naught because of the fraud of appellee in withholding from the court the fact of his bankruptcy, and that appellee be enjoined from further enforcement of the execution levied on his property. A general demurrer was filed by the appellee to the petition, and sustained by the court. Appellant declining to plead further, his petition was dismissed; to reverse which judgment this appeal is prosecuted.

The allegation that a given state of facts constitutes fraud, does not make it so. There is nothing in the petition which shows fraud on the part of appellee. He was under no obligation to look after appellant's side of the case. The fact that appellee's chose in action had passed to his assignee, and that the former had no right to further prosecute the action, was a matter of defense for appellant, and if he desired the court to act upon this fact, it was his duty to set it up by plea. It does not appear that the appellee did anything to induce appellant to believe that he would not further prosecute the action after his bankruptcy, and the fact that he failed thereafter to look after the litigation pending against him was his own negligence.

Every intendment is taken against the pleader. So far as this record shows to the contrary, appellee may have prosecuted his case to judgment for the benefit of his creditors by the direction of his assignee, or it may be that he fully paid off his creditors in the bankruptcy proceeding, and thereby became re-entitled to the chose in action, with the consequent right to prosecute it in his own name. The fact that the appellant did not owe the claim sued for by appellee will not avail him here; it was his duty to plead that as a defense. If, as is urged by his counsel, the court erred, for reasons appearing on the face of the petition, in giving the judgment complained of by appellant, that can be remedied by direct appeal from the erroneous judgment.

The facts stated in the petition do not constitute fraud on the part of appellee in obtaining the judgment sought to be vacated, and the court properly sustained the demurrer and dismissed the petition.

Wherefore, the judgment is affirmed.

EASTON, &c. v. COMMONWEALTH, USE, &c.

(Filed November 16, 1904—Not to be reported.)

1. Office and officer—Arrests—Disorderly conduct—By section 3497 of the Kentucky Statutes arrests may be made for drunkenness or disorderly conduct at any time without warrant, and where one in making an arrest acted in the line of his duty and in good faith and upon reasonable grounds, he is not liable on his bond.

2. Same—Where one was arrested on a Sunday and placed in jail and kept until Monday morning when a warrant was issued, as was the custom under

the rules to place persons in jail when arrested on Sunday and hold them until Monday, the jailer was warranted in receiving the prisoner without a mittimus as the statute authorizes persons arrested to be placed in the county jail until taken before the police court.

A. D. Cole for appellants.

Thos. R. Phister for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hobson.

On the afternoon of Sunday, February 1, 1903, a crowd assembled on Greenley's corner, on Wall street, in the city of Maysville, and were obstructing the street so that ladies could not pass. Appellant Easton, as a policeman of the city, dispersed the crowd. Soon after this he saw the appellee, Weaver, leaning against a telephone pole on the corner and arrested him on the ground that he was drunk. After taking him about one square he offered to let him loose if he would go home, but this appellee refused to do. He then took him to jail and turned him over to the turnkey. Later in the evening appellee gave bond and was released. He subsequently filed this suit to recover of appellant on his bond as policeman for a wrongful arrest, charging that he was arrested without cause. The proof on the trial on appellee's behalf tends to show that he was not a part of the disorderly crowd which the policeman had dispersed, but came up after that crowd was scattered. The proof by appellant is that he was a part of that crowd; that they all left but appellee, and that appellee refused to leave when ordered to do so by the policeman, and was thereupon arrested. The proof for appellee is that he was sober and not disorderly. The proof for appellant is that he was drunk. On this evidence the court instructed the jury that if they believed from the evidence that Easton, without a warrant therefor, and when a public offense had not been committed by the plaintiff in his presence, arrested the plaintiff and placed him in the county jail, they should find for the plaintiff such damages as he thereby sustained; also, that if the plaintiff was guilty of a public offense in the presence of the officer, then he had a right to arrest him without warrant, and it being Sunday, had a right to confine him in the county jail until the following morning. The jury found for the plaintiff and assessed the damages at $250.

By section 3495, Kentucky Statutes, governing fourth class cities, including Maysville, it is provided: "Arrests may be made for drunkenness or disorderly conduct at any time without warrant." By section 3497 every policeman, before he enters upon the duties of his office, shall give bond for the faithful performance of his duties, and for any unlawful arrest, or unnecessary or cruel beating or assault in making an arrest, he and his bondsmen shall be liable to the persons so injured. By section 3498 persons arrested for any bailable offense may be placed in the station house or county jail, if necessary, for safe keeping until taken before the police court.

Appellee's incarceration in jail grew out of his arrest. The officer arrested him without warrant and placed him in jail for safe keeping, as it was Sunday, and the custom was under the rules to place persons arrested on Sunday in jail and hold them in this way until Monday morning, when warrants were issued. The jailer, therefore, was warranted in receiving

the prisoner without a mittimus, as the statute authorizes persons arrested to be placed in the county jail until taken before the police court. But the instructions of the court place too great a responsibility upon the defendant. By the statute arrests may be made for drunkenness or disorderly conduct at any time without warrant. Appellant in making the arrest was, therefore, in line of his duty if he acted in good faith and upon reasonable grounds. If a private person had gone before a magistrate and sworn out a warrant against appellee, charging him with drunkenness or disorderly conduct, and he had brought an action for damages, the private person would not have been responsible if he acted in good faith and upon probable cause. It was the duty of the police officer to enforce the law. It was his duty to arrest without warrant persons whom he found guilty of drunkenness or disorderly conduct in his presence, or whom at the time he had reasonable grounds to believe guilty. If the grounds turned out to be unfounded, he is not liable on his bond where he acted in good faith and in the attempted discharge of his official duty. Were the rule otherwise, a policeman could rarely safely arrest offenders without warrant. The purpose of the statute in allowing arrests to be made at any time for drunkenness or disorderly conduct without warrant is to secure the peace and quiet of the community, and the policeman should not be held responsible under the statute for making an arrest where he acts in good faith, and upon reasonable grounds.

The instructions of the court correctly state the rule as to arrests for ordinary offenses, but drunkenness and disorderly conduct are placed by the statute on a peculiar ground. If appellant had procured from the police judge a warrant and had arrested appellee under it, he would only be responsible if he acted in bad faith and without probable cause in procuring the warrant. And when the statute authorizes the arrest to be made without warrant, he is under no greater liability for the arrest than he would be if he had procured a warrant to be issued and had made the arrest under it. To hold otherwise is to deny the statute proper effect. As the action is upon the bond, there can be no recovery for punitive damages. The recovery must be limited to compensatory damages, and on another trial the court will so instruct the jury.

Judgment reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

NEAL, &c. v. NEAL, &c.

(Filed November 16, 1904—Not to be reported.)

Parties to actions—The appellants, who are the descendants and heirs at law of John Neal, can not maintain the action seeking to cancel the conveyance because had he lived he could not have maintained it. The appellants stand in his shoes and have no rights which he did not have, and the chancellor properly sustained a demurrer to their petition.

Tye & Denham for appellants.

Sharpe & Siler for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Chief Justice Burnam.

Appellants filed in the circuit court their petition in equity against appellees, in which they alleged that John Neal died a resident of Whitley county in August, 1902, intestate; that the defendant, Vina Neal, is his widow, and that the plaintiffs and the other defendants are his descendants and heirs at law. The petition then proceeds in these words:

"The plaintiff further states that on the 9th day of August, 1898, said John Neal, now deceased, was indebted to the estate of John Wood in the sum of $340.18, with interest from May 24, 1893, for which and costs judgment had been rendered against him in the Whitley Circuit Court, at its May term, 1898, in an action then pending therein, wherein the administrators of John Wood, deceased, were plaintiffs, and the said John Neal was defendant; that said indebtedness to the estate of John Wood was on said 9th day of August, 1898, all unpaid and the said John Neal then had no personal property subject to execution out of which said indebtedness could have been made. Plaintiffs further state that by deed, dated August 9, 1898, the said John Neal and his wife, the defendant, Vina Neal, for the pretended consideration of $1,000, conveyed to the defendant, T. G. Neal, a tract of land lying on the waters of Marsh creek, in Whitley county, Kentucky, known as part of the John Neal farm, and bounded as follows, to wit. (Here follows boundary): "Said deed is recorded in the Whitley county clerk's office and a copy thereof is filed as part hereof, marked 'A.' Plaintiffs state that said conveyance was made without valuable consideration, and for the purpose of cheating, delaying, hindering and defrauding the estate of said John Wood, as his creditor, by preventing the collection of his indebtedness to said John Woods' estate, and for the purpose of cheating and defrauding these plaintiffs and the other of his heirs, except the defendant, T. G. Neal.

"The plaintiffs state that they and the defendants, except the defendant, T. G. Neal, have a united interest in the land hereinbefore described; that the plaintiffs have been unable to obtain the consent of the defendants to join with the plaintiffs in this action, and, for that reason, they have been made defendants herein.

"Wherefore, plaintiffs pray that said conveyance be cancelled, set aside and held for naught, and that they recover of the defendant, T. G. Neal, their cost herein expended.

"They pray for all proper relief."

The circuit court sustained a demurrer to the petition, and the plaintiffs standing by their petition and refusing to plead further, dismissed the action. If John Neal had lived he could not have maintained an action to set aside the deed which he had made to T. G. Neal on the ground that it was made without valuable consideration and for the purpose of defrauding the estate of John Wood. The plaintiffs, as his heirs at law, stand in his shoes, and have no rights which he did not have. When he died such rights as he then had, and no more, passed to them. The plaintiffs do not show that they have any interest in the land except such as they would have inherited from John Neal. It was not a fraud on them for John Neal to give the land to T. G. Neal. It was his land and he could do with it as he pleased. If he gave it away and did not own it when he died, nothing descended to them at his death, and they have no interest in the land, and no standing in court to complain of the conveyance to T. G. Neal.

Judgment affirmed.

PARKERSBURG MILL CO. v. FARMERS AND TRADERS NATIONAL BANK.

(Filed November 16, 1904—Not to be reported.)

Banks and banking—Deposit of check with bill of lading—Agreement to hold and collect—Liability of bank—On April 30, 1902, V. S. purchased a carload of lumber from appellant for export, and in payment therefor drew his check upon appellee bank for $486.39, and to meet this check he, by agreement with appellant, deposited with the bank for discount a draft on his consignee, with bill of lading attached, upon receipt of which the bank wrote appellant as follows:

"Received bill of lading from C. W. T., to be attached to draft left by V. S. to take up his check issued to your company for $486.39. We will not discount the draft as we have previously done, but will send same for collection with instructions to cable payment of same, and upon receipt of advice will credit proceeds to his account. Hold check subject to advice.

"B. BRANBRIDGE, Cashier."

In due course B. S's. draft on his customer was collected and money placed to his credit. The bank having failed to honor the check and remit the proceeds to appellant, it brought this suit to compel payment. Held—That upon this state of facts the bank is liable.

Ferber & Jackson for appellant.

S. D. Ruse and C. B. Thompson for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 30th of April, 1902, F. C. Van Stone purchased a carload of lumber for export from the Parkersburg Mill Co., a West Virginia corporation, and in payment therefor drew his check upon appellees, the Farmers and Traders National Bank of Covington, Ky., for $486.39, and to meet this check he, by agreement with appellant, deposited with the bank, for discount, a draft on his consignee, with the bill of lading attached. Upon the receipt of the check the bank addressed appellant the following communication:

"Covington, Ky., June 6, 1904.

"Parkersburg Mill Co.,

"Parkersburg, W. Va.:

"Gentlemen—Received bill of lading from O. W. Tomlinson, to be attached to draft left by F. C. Van Stone to take up his check issued to your company for $486.39. We will not discount draft as we have previously done, but will send same for collection, with instruction to cable payment of same, and upon receipt of advise of payment will credit proceeds to his account. Hold check subject to advice. Yours,

"B. BRANBRIDGE, Cashier."

In response to this communication appellant replied as follows:

"Parkersburg, W. Va., June 11, 1902.

"Farmers and Traders National Bank,

"Covington, Ky.:

"Gentlemen—We have yours of the 6th relative to the Van Stone check, and would say that our understanding with Mr. Van Stone was that he had arranged with you to discount his bills. Will you please advise us whether

there are any special conditions in this particular case why the account is not discounted, so that we may know whether there is a probability of a repetition of the same trouble on some future shipment. We thank you in advance for the information. Of course it will be all right for you to hold his check as against the draft referred to, if this is the best arrangement that can be made. We will expect remittance when you receive cable notification of the payment of the draft.

"Yours truly,

"E. L. DAVIDSON, Gen. Man."

In due course Van Stone's draft on his customer was collected and money placed to his credit. The bank having failed to honor the check and remit the proceeds to the lumber company, they brought this action, relying upon the facts recited above. A general demurrer was sustained to this petition, and the lumber company has appealed.

There can be no doubt that Van Stone's check drawn against his draft, with bill of lading attached, was an appropriation of a sufficient amount of the proceeds which might be realized from the collection of the draft to pay his check for purchase money. (German National Bank v. Grinstead, 21 Ky. Law Rep., 1670.) That this was the understanding of appellee is abundantly shown by their letter of June 6, in which they acknowledged that the draft, with bill of lading attached, had been delivered to them by Van Stone for the express purpose of taking up his check issued to the lumber company. It is true that they decline to discount the draft as they had previously done, but they assured appellant that the draft would be forwarded for collection; and that upon receipt of advice of its payment that the proceeds would be credited to his account for the manifest purpose of meeting the check. The words "will hold check subject to advice" were simply as to whether they should retain possession of the check or return it to appellant pending the collection of the draft. There can be no doubt that the bank intended that appellant should understand by this letter that when the draft was collected the check would be paid; and that appellant so understood it is abundantly shown by their response thereto on June 11.

For reasons indicated the judgment is reversed and cause remanded, with instruction to overrule the demurrer and for further proceedings consistent with this opinion.

MAGGARD v. ASHER, &c.

(Filed November 16, 1904.)

Attachments—Garnishment—Priority—Conveyance after levy—On February 9, 1904, appellees filed an action against B., who was a nonresident, and obtained a warning order and an attachment which was levied by the sheriff by posting a copy on the dwelling house on a tract of land which had been conveyed to B. by S. On March 7 thereafter appellant filed an intervening petition, alleging that in August, 1902, he filed an action against B. on a note due him for $500, and, at same time, sued out a general attachment against the property of B., and in the same proceeding garnished in the hands of S. any indebtedness owing by S. to B., and in June, 1903, obtained

a rule against S. to answer the garnishment, at which date S. owed B. $400, and after the service of the garnishment S., by collusion with B., conveyed the land to B. upon which appellees' attachment was levied, in consideration of his indebtedness to B. Held—That after the service of appellant's garnishment on S. he could not legally pay his indebtdeness to B. until appellant's claim had been satisfied, and his conveyance of the land to B. in payment of such indebtedness, and the subsequent levy by appellees of their attachment thereon, created no lien in their favor superior to the rights of appellant under his garnishment. Appellant having the oldest equity, was entitled to have his debt first paid out of the land.

J. M. Bicknell for appellant.

Lewis & Calvert for appellees.

Appeal from Leslie Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 6th day of February, 1904, the appellees, A. B. Asher and J. T. Sizemore, brought this action against G. A. Brewer for the collection of a note due by him to them for $415, and simultaneously with the institution of the suit sued out a general attachment against the property of the defendant, which was levied by the sheriff upon a tract of 150 acres of land lying on the schoolhouse branch of Cut Shin creek of the Middle Fork of the Kentucky river, to which the defendant held title by deed from one William Sizemore, by posting a copy of the attachment on the dwelling house on the land. The defendant was proceeded against as a nonresident by warning order. On the 7th day of March thereafter the appellant, Reuben Maggard, intervened in this proceeding by petition, in which he alleged that on the 18th day of August, 1902, long prior to the institution of appellee's suit, he had filed an action against Brewer on a note due to him by Brewer for $500; and that he had at the same time sued out a general attachment against the property of the defendant, Brewer, and had also in the same proceeding garnished in the hands of Wm. Sizemore any indebtedness due and owing by him to the defendant, Brewer; that he had realized a part of his debt by the sale of certain personal property belonging to Brewer, but that Wm. Sizemore failed to answer, and at the June term, 1903, a rule was awarded against him requiring him to answer the garnishment and disclose the amount of his indebtedness; that at the date of the garnishment Wm. Sizemore owed Brewer $400; that subsequently to the service of the garnishment upon him he conveyed to Brewer the tract of 150 acres of land upon which the attachment of Asher and Sizemore was levied in consideration of his indebtedness to Brewer; that this conveyance was collusive and fraudulent and was made for the purpose of defeating the garnishment in the hands of Sizemore, and further alleged that he was entitled to have the land itself, into which Sizemore's indebtedness to Brewer had been merged, first subjected to the payment of the balance of his demand. The answer of Asher and Sizemore to appellant's intervening petition was in substance a traverse. The deposition of William Sizemore was taken, and he testified that at the date of the service of the garnishment upon him he owed Brewer $400; and that subsequently thereto he had conveyed the land attached by appellee to Brewer for the sole consideration of this indebtedness.

After the service of appellant's garnishment upon Wm. Sizemore he could not legally pay off his indebtedness to Brewer until appellant's claim had been satisfied and his conveyance of the land to Brewer in extinguishment of such indebtedness, and the subsequent levy by appellees of their attachment thereon created no lien in their favor superior to the rights of appellant under his garnishment. Appellant, having the older equity, is entitled to have his debt first paid out of the land.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

HINES & CO., &c. v. HAYS, &c.

(Filed November 16, 1904—Not to be reported.)

Insolvency—Preference—Transaction with bank—F. H. applied to a bank to borrow money and offered his mother as surety. The bank declined to accept her as surety because she was a married woman, but agreed to let F. H. have the money if his mother would sign the note as principal, with F. H. and his brothers as sureties, which was done. Later F. H., in contemplation of insolvency, borrowed money and paid the bank note, and executed a mortgage on all his property to secure the mortgagee, and the following day made an assignment. Held—That as to the bank F. H. was principal on the note which he paid the bank, and having mortgaged all his property to pay this debt in preference to his other creditors the transaction was within the statute.

Samuel D. Hines and R. C. P. Thomas for appellants.

Wright & McElroy for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Barker.

Forrest L. Hays was a merchant doing a small retail business at Hydro, Ky. On the 21st day of February, 1898, he made a general assignment for the benefit of his creditors to James R. Kirby. Afterwards this action was instituted by his creditors for the purpose of attacking two transactions, which took place before the assignment, as fraudulent preferences under section 1910 of the Kentucky Statutes, commonly called the act of 1856. The first of these was a mortgage on certain real estate belonging to the bankrupt in favor of his mother, M. E. Hays, to secure an antecedent debt of $300 owed by him to her. The second was the payment of a note for $350 to the Warren Deposit Bank.

The pleadings in this case properly present the issues growing out of these transactions, and it remains, therefore, only to examine the merits of those here on appeal. Upon the trial the chancellor held that the first transaction, by which the bankrupt undertook to prefer his mother by the mortgage, was a fraudulent preference within the statute, and vacated the deed. As to the second, he held that the payment was not within the letter of the statute, and dismissed the petition as to the bank. From the latter part of this judgment this appeal is prosecuted.

The note held by the Warren Deposit Bank, and which evidenced its debt, was as follows:

"$850. Bowling Green, Ky., September 24, 1897.

"One hundred and twenty days after date we promise to pay to the order of the Warren Deposit Bank $850, value received, negotiable and payable at Warren Deposit Bank without defalcation.

(Signed) "MATTIE E. HAYS,
"F. L. HAYS,
"M. J. HAYS."

The facts as to the creation and payment of this debt are not disputed, and are as follows: Forrest L. Hays desired to borrow $550 from the bank, and offered his mother and his brother, M. J. Hays, as his sureties. The president of the bank knowing his mother to be a married woman, told the son that he could not take her as surety, because, under the statute, she could not bind herself in that capacity, but that he would make the note with the mother as principal, and the sons as sureties; and the matter was arranged in this way. The note was discounted, the proceeds placed to the credit of Mattie E. Hays, and she was required to go through the routine of giving Forrest L. Hays her check therefor. As a matter of fact, however, the bank did not know Mattie E. Hays in the transaction, and had no communication with her on the subject of the indebtedness; she lived some fourteen miles away, and the terms of the contract were arranged through the son, it being assumed that as her name was signed first on the note, therefore she was principal; in fact, however, the debt, really and technically, was that of Forrest L. Hays. After this note became due, and the bank commenced to urge its payment, Forrest L. Hays borrowed $300 from the Farmers Bank of Smith's Grove, executed and delivered simultaneously with the creation of this debt a mortgage on his stock of goods to secure his sureties on the note from loss by reason of their suretyship, and with the sum thus borrowed, together with $40 taken out of his business, he paid off and discharged the balance due on his note held by the Warren Deposit Bank. On the same day, February 21, 1898, he filed a general assignment of all his property in the county clerk's office of Warren county.

The evidence shows without doubt that the note to the Warren Deposit Bank was a debt of Forrest L. Hays, and was known to be so by the bank; the signing by the mother, M. E. Hays, of the note first, and placing the proceeds to her credit, was a mere technical arrangement to avoid the effect of the statute prohibiting married women binding themselves as sureties, and we have said, in the case of Crumbaugh v. Postell, 20 Ky. Law Rep., 1866, that "in transactions of this kind the courts must look to the substance; and whatsoever the parties themselves may designate or name the undertaking of the wife, if in fact it be an attempted assumption by her of the debt of another, she must be held not liable unless she binds herself in the statutory mode. Any other course will speedily result in a nullification of the statute."

In the case cited the wife undertook to bind herself as principal in identically the manner adopted in the case at bar. But we are not forced to rely upon the principle enunciated in the foregoing case. As to the bank, all of the parties, on the face of the note, were principals. It was a joint undertaking of all three to pay the debt. We need not examine the question as to who, among themselves, was principal and who was surety. As to For-

rest L. Hays, the debt was his, and he was legally bound to pay it. This being true, the bank was his creditor, and if he paid it the debt, knowing himself to be insolvent at the time, with the fraudulent intent to prefer it to the exclusion, in whole or in part, of his other creditors, then the transaction is within the denunciation of the statute. There can be no doubt that Forrest L. Hays was insolvent at the time he made the payment to the bank, and that he was well aware of that fact. This needs no further evidence than the fact that his assignment, and the payment in question, were made on the same day. Nor do we think that there can be any reasonable doubt that the payment to the bank was made for the fraudulent purpose of preferring it over his other creditors. By making this payment, he relieved his mother and his brother from liability, and, in order to make the payment necessary to afford them this relief, he mortgaged his stock of goods to obtain the money. The practical result of the whole transaction was this: The stock of goods which constituted all the property owned by the bankrupt, and to which his creditors could look for payment, was absorbed to pay the bank a debt which he owed jointly with his mother and brother. If this arrangement is allowed to stand, the other creditors will get nothing. We are of opinion that the transaction comes within the very letter, as well as the spirit, of the statute, and should have been so held by the chancellor.

Wherefore, the judgment is reversed for proceedings consistent herewith.

KOCH v. ROBINSON, &c.

(Filed November 16, 1904—Not to be reported.)

Deeds—Trustee—Reference to other deeds—Purpose—Effect—Where a deed is made by a trustee who is invested with the legal title to the property conveyed, such title is not affected by a reference therein to a former deed in which said property was not included, the purpose of the reference being to incorporate into the latter deed the language employed in the deed referred to creating the trust and providing how it should be executed, instead of rewriting such provisions in the deed then being prepared.

Peter & Newcomb for appellant.

Bodley, Baskin & Flexner for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Paynter.

This suit was instituted for specific performance. The appellee, as trustee, sold the appellant a lot in the city of Louisville for an agreed price. He was willing to take and pay for it, if the title was good. The question involves the interpretation of certain deeds. The lot is embraced in the deed which William Preston Johnston and others, on November 10, 1887, made to the appellee, Robinson, as trustee. A provision of that deed is as follows: "To have and to hold to the said Geo. A. Robinson, in fee simple forever, but for the uses and upon the trusts set forth, declared and created by and in a deed from Henrietta P. Johnston to Wm. Preston and Wm. Cornwall, dated May 30, 1866, * * * which said conveyance is hereby specially referred to and made part hereof as if the same were copied word

for word herein, and with all the rights and powers in relation to property herein conveyed, subject to the same limitations and trusts which govern, control or affect the property conveyed and settled in the deed of trust aforesaid from Henrietta P. Johnston to Wm. Preston and Wm. Cornwall, the said Geo. A. Robinson, party of the third part, being the successor to the said Wm. Preston and Wm. Cornwall, as evidenced by deed from said Preston and Cornwall to said Geo. A. Robinson, dated November 12, 1866; * * * and also by further deed between said same parties, dated January 30, 1867." * * *

The deed of May 30, 1866, which Henrietta F. Johnston executed to William Preston and William Cornwall contains the following provision: "That the said trustee shall hold the said property to the use of William Preston Johnson and the rents, issues and profits thereof to his use during the term of his natural life, but that the said William shall not have any right or power to assign, charge or appoint the same by way of anticipation, but that the same shall only be paid over by the trustees to the said William P. Johnston, after the same shall have accrued and been received, and that the receipt of the said William therefor after the same shall have been received shall be the only proper and sufficient acquittance therefor, and in like manner the said trustees shall hold the said property and the rents, issues and profits thereof, after the death of the said William P. Johnston, to the use and for the support and maintenance of his wife, Rosa Duncan Johnston, so long as she may remain a widow (or if she should again marry and afterwards become a widow); but she shall not have any right or power to assign, charge or appoint the same by way of anticipation, but shall only receive the said rents, issues and profits, after the same shall have accrued, and her receipt under her own proper hands shall be the only proper receipt and voucher to the trustees for so much as may be in their hands after the same shall have accrued; that the said trustees, the survivor or successor of them, shall hold the said property after the expiration of the life estates created to William and Rosa Johnston in the first trust mentioned to the use of such child or children or descendants of William Preston Johnston, living at the time of his death, in such manner, and in such portions and upon such limitations, conditions and provisos, as the said William P. Johnston may by deed made in his lifetime to appoint and create said estates, or by will, or writing, or appointment in the nature of a will, may direct, limit, declare or appoint, and in default of such deed or will by William P. Johnston, to appoint said uses, then upon trust that the trustees will hold the said property for the use of the heirs at law of William Preston Johnston, provided that if the said William should undertake to appoint said uses by deed in his lifetime, then that the consent and joinder of the trustees thereto, or of the survivor, shall be necessary to the said deed, and to make same valid and effectual; but no such consent shall be necessary to any appointment which may be made by will or writing in the nature of will, by the said William P. Johnston."

The lot sold the appellant is not embraced in the latter deed. As stated in the deed to the appellee, Robinson, he was the successor to the trustees, William Preston and William Cornwall, named as trustees in the deed of May 30, 1866. By a proceeding in the Jefferson Circuit Court the trust was

adjudged to be terminated, and which authorized a conveyance of the property to the five children of William Preston Johnston. On November 8, 1893, William Preston Johnston, his second wife, Henrietta P. Johnston, Geo. A. Robinson and the children of William Preston Johnston and the husbands of those who had married conveyed the property to the children of William Preston Johnston. On December 2, 1903, the children of William Preston Johnston conveyed the property, including the lot here in question, to John C. Doolan, and on January 26, 1904, he conveyed the property to Geo. A. Robinson in trust for Rosa Duncan Johnston, Margaret J. Sharp and others. This deed empowered Robinson, as trustee, to sell the land and provided that the purchaser was not required to look to the application of the purchase money.

It has been suggested that the conveyance of November 8, 1893, was not valid, because William Preston and William Cornwall, who were trustees under the deed of May 30, 1866, did not join in that conveyance. The lot sold appellant was not embraced in the conveyance to Preston and Cornwall as trustees. They were not designated as trustees in the deed which was made to Geo. A. Robinson, as trustee, on November 10, 1887, but on the contrary, it was recited therein that Robinson was their successor as trustee. The only purpose for referring to the deed by which they were made trustees was to incorporate into it the language there employed creating the trust and providing how it should be executed, and to fix the rights of William Preston Johnston and his children to the property conveyed. The draftsman seems to have thought that it was an easier way to define the powers of the trustee and fix the rights of the beneficiaries by referring to the other deed than to rewrite its provisions in the deed he was then preparing. It is perfectly manifest that it was not intended that William Preston and William Cornwall should be invested with a trust which was expressly conferred upon Geo. A. Robinson. William Preston Johnston and Geo. A. Robinson, as trustee, vested the children of William Preston Johnston with the title to the property. In doing this William Preston Johnston exercised the power of appointment by deed which had been vested in him. We are of the opinion that the appellant, Koch, gets a good title by the deed tendered.

The judgment is affirmed.

COSTIGAN, &c. v. TRUESDELL, &c.

COVINGTON, &c. v. SAME.

(Filed November 16, 1904.)

1. Judicial sale—Real estate—Inadequacy of price—This court has repeatedly held that a mere inadequacy of price is not sufficient to set aside a judicial sale.

2. Confirmation—Power of court—Except upon the grounds stated in section 518, Civil Code, this court is without power to set aside a sale after it has been confirmed.

3. Appraised value—Redemption—Limitation—Where land sold at public sale failed to bring two-thirds of its appraised value, and the equity of redemption was ordered to be sold, but the order was not executed, the fail-

ure to execute the order until after the expiration of a year from the sale did not prevent the termination of the statutory right to redeem.

4. Rights of owner—The owners of property sold at public sale are entitled to its use until the time of redemption expires, or until it is placed by the court in the hands of a receiver.

Louis Reuscher and C. L. Raisen, Jr., for appellant, M. J. Costigan.

Edward A. Bruton for appellant Covington.

Ramsey Washington and Geo. Washington for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Paynter.

This action was instituted to settle the estate of Anna W. Covington, and there being but little personal property, it was necessary to sell real estate. A building association held a mortgage on the real estate and there were some other creditors, including Costigan, who did not have a lien upon it. The court ordered it sold to satisfy the debts, and it was sold for that purpose on February 4, 1903, and it was purchased at the commissioner's sale by the appellee, Truesdell, at less than two-thirds of its appraised value. On February 14, 1903, the sale was confirmed. The proceeds of the sale only paid the mortgage creditor and costs of the suit, leaving the demands of the other creditors unsatisfied. On March 28, 1903, the court ordered the equity of redemption sold, but for some reason not appearing in the record that order was never executed. In November, 1903, W. G. Wagenlander filed a petition asking to be made a party to the action, claiming he had a debt of $30 against the estate secured by mortgage on the real estate. He seems to have abandoned his claim, as he took no further steps to enforce it, and he is not here complaining, so the questions here for review are not affected by the alleged claim of Wagenlander. On February 2, 1904, two days before the time for the redemption of the land expired, the appellant, Costigan, filed what is denominated as an answer and cross petition, by which he sought to set aside the sale to Truesdell, claiming the land had been sold for a grossly inadequate price. After the expiration of the time for redemption Costigan filed an amended answer and cross petition, in which he avers that if the property is resold he would pay $550 for it.

This court has repeatedly held that a mere inadequacy of price is not sufficient to set aside a sale. If it had been a good ground for setting aside the sale the question was raised too late, as the sale had been confirmed months before. Except upon the grounds stated in section 518, Civil Code of Practice, the court was without power to set aside the sale after it had been confirmed. (Thompson v. Brownlie, 25 Ky. Law Rep., 622; Carpenter v. Strother, 16 B. M., 295; Yocum v. Foreman, 14 Bush, 494; Megowan v. Pennebaker, &c., 3 Met., 502; Dawson v. Litsey, 10 Bush, 411; Kinkaid v. Tutt, 88 Ky., 392; Bean, &c. v. Haffendorfer, 84 Ky., 685.) The fact that Wagenlander was not made a party does not alter the case. (Thompson v. Brownlie.) Besides, he did not establish his claim; it may not have existed in law. After the sale to Truesdell the equity of redemption could have been sold and the court so ordered. It was not sold, and the failure to execute the order could not prevent the termination of the statutory right to

redeem. It only existed for one year after the sale, and during that time there was not even an offer to redeem. (Bethel v. Smith, 88 Ky., 84.) It is averred in the amended answer that Truesdell took possession of the property after his purchase, and that the value of the rents was $12 per month. If he did so before the expiration of the time for redemption, he is liable to the owners for the rents. That question can not be determined in this action, because the court did not place the property in the hands of its receiver and the owners were entitled to enjoy the use of the property until the court did so or until the time for redemption expired. The rents were not assets of the estate, but a claim in favor of husband and heirs at law of the decedent. The appellant, Costigan, slept on his rights and thus failed to collect his claim.

The judgment is affirmed.

HUNT v. HUNT.

(Filed November 16, 1904.)

Deed—Father to son—To take effect at grantor's death—Construction—On October 11, 1901, John Hunt and wife, by deed duly recorded, for love and affection conveyed to their son, F. M. Hunt, their home farm, in which deed was this clause: "This deed is not to take effect until the death of John Hunt and his wife, S. E. Hunt." John Hunt, upon the death of his wife, remarried, and brought suit against his son, claiming that said deed was testamentary and passed no present interest in the land. Held—That while the deed contains the words that it is not to take effect until the death of the grantors, it also contains these words: "Do hereby sell and convey," "to have and to hold" and "said party of the first part hereby covenants with the said party of the second part that he will warrant the title hereby conveyed." These words aptly convey a present estate, and as it is clear that as to S. E. Hunt only the enjoyment of the land was postponed until her death, we conclude that in giving effect to all parts of the deed the grantee takes a present estate, vesting at the time of the delivery of the deed, but taking effect in possession at the death of the father and mother.

F. W. Stowers and Roscoe Vanover for appellant.

York & York for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Hobson.

On October 11, 1901, John Hunt and wife, S. E. Hunt, signed and acknowledged a deed to their son, F. M. Hunt, for their home place on which they resided. The deed was duly recorded and after this the mother, S. E. Hunt, died, and the father married a second time. The son and his family then moved out of the home place to a tract of land which the son had bought, and the father and his second wife remained on the home place. The father was selling the timber off the place and the son set up claim to the timber. The father then brought this suit, alleging that the deed made on October 11, 1901, was testamentary in character, passing no present interest in the property to F. M. Hunt, and praying that it be adjudged a will, and that he be quieted in his title to the property. On final hearing the court dismissed the petition, and the father appeals.

The proof shows that the father has another son to whom he made a similar deed for another tract of land, and that he has not disturbed that son in his tract. It also shows that the father has two other tracts of land and some $5,000 in money, and that at the time the deed was made he contemplated turning over the place to the son. The son cleared some of the land after the deed was made, and cultivated it with the father's acquiescence. The father also then declared that it was the son's land. But as a matter of fact the father remained on the place all the time and his rights must be determined from the deed, which is in these words: "This deed of conveyance, made and entered into this 11th day of October, 1901, between John Hunt and S. E. Hunt, parties of the first part, and F. M. Hunt, party of the second part, Witnesseth: That the said parties of the first part, for and in consideration of the sum of love and affection, this deed is not to take effect until the death of the said John Hunt and S. E. Hunt, do hereby sell and convey to the party of the second part, his heirs and assigns, the following described property, to wit: A certain parcel or tract of land (here follows description), to have and to hold the same, together with all the appurtenances thereunto belonging unto the party of the second part, his heirs and assigns forever. And said party of the first part hereby covenants with the said party of the second part that he will warrant the title hereby conveyed unto the said party of the second part and to his heirs and assigns forever."

It is insisted for appellant that by reason of the words "this deed is not to take effect until the death of said John Hunt and S. E. Hunt," the paper, though in form a deed, is testamentary in character, and revocable by the father in his lifetime. It is insisted for the son that these words, when taken in connection with the other parts of the deed, merely retain a life estate in the father and mother. In other words, that the land is conveyed to the son, and some effect must be given to the other clauses of the deed. The question is one upon which there is an irreconcilable conflict of authority. Thus in Lauck v. Logan, 45 W. Va., 251, the deed contained these words: "This deed shall take and be in full force and effect immediately after the said William Logan shall depart this life, and not sooner." It was held a good deed, reserving a life estate in the grantor. So in Wilson v. Carrico, 140 Ind., 533, the words of the deed were: "To be of no effect until after death of grantor, and then to be in full force." The instrument was held valid as a deed. The same ruling was made in Shackleton v. Sebree, 86 Ill., 615, where the words were: "This deed not to take effect until after my decease—not to be recorded until after my decease;" so in Wyman v Brown, 50 Me., 139, where the words were: "Not to take effect during my lifetime, and to take effect and be in force after my death;" so in West v. Wright, 115 Ga., 277, where the words were: "This deed to take effect at my death;" so in Abney v. Moore, 106 Ala., 131, where the words were: "This conveyance is not to take effect until after my death, and, after my death, the title to the foregoing lands is to vest immediately in my said children;" so in Bunch v. Nicks, 50 Ark., 367, where the words were: "And the deed shall go into full force and effect at my death." (Latimer v. Latimer, 174 Ill., 418; Abbott v. Holloway, 72 Me., 298; Owen v. Williams, 114 nd., 179; Wynn v. Wynn, 112 Ga., 214; Brice v. Sheffield, 118 Ga., 128.) In

these States the rule followed rests on the ground that as the instrument contains words of present grant, covenant of warranty and the like, and is authenticated or acknowledged as a deed, some force must be given all the parts of the instrument, and such a construction must be given to it as will make the instrument effective, rather than one that would deny it any operation; and, therefore, the words that the instrument is not to take effect until the death of the grantor must be construed as a clumsy way of expressing that the deed is not to take effect in possession or in the enjoyment of the property until the grantor's death.

On the other hand, in Pinkham v. Pinkham, 55 Neb., 729, the deed contained these words: "This deed is to take effect and be in full force from nd after my death," and it was held that no present interest passed by the grant. The same ruling was made in Turner v. Scott, 51 Pa. St., 126, where the words were: "This conveyance is in no way to take effect until after the decease of the grantor;" so in Armstrong v. Armstrong, 4 Baxt. (Tenn.), 857, where the words were: "This conveyance to have effect from and after my death;" so in Leaver v. Gaus, 62 Ia., 814, where the words were: "To commence after the death of both the said grantors;" also the following: "It is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in the said premises as long as the said grantors, or either of them, shall live, and that after the death of both the said grantors the grantee shall have and hold the premises by fee-simple title;" so in Murphy v. Gabert, 166 Mo., 596, where the words were: "The intention of this instrument of writing is such that Mrs. Ann Ellison relinquishes her entire right at her death, then this deed is to immediately come into effect, but not until then." (Coulter v. Shelmadine, 204 Pa., 120; Horn v. Broyles, Tenn., 62 S. W., 297; Griffin v. McIntosh, Mo., 75 S. W., 676; Hazelton v. Reed, 46 Kan., 73; Bigley v. Souvey, 45 Mich., 285; Carlton v. Cameron, 54 Tex., 73.) There are in Alabama and Georgia some older cases following this rule, but they seem to have been disregarded by the courts in the later cases. In Reynolds v. McFarland, 10 Ky. Law Rep., 972, this court had before it a deed containing these words: "This deed is not to take effect until after the death of myself and the death of my wife, Cynthia Reynolds, and at her death then this deed is to be in effect." The grantor died, the grantee conveyed the land to William Reynolds, who made a mortgage on it; the mortgagee sued to foreclose his lien and Cynthia Reynolds claimed a life estate in the land. It was held that she was entitled to a life estate in the land and not to dower only. In Phillips v. Thomas Lumber Co., 94 Ky., 445, the deed which was made by Jesse Phillips and his wife, Vicey E. Phillips, contained this clause: "This land is deeded to Vicey E. Phillips during her life, and she is to live on and have control until her death, and at the time of her death it is to go to and belong to John Phillips, son of William Phillips, deceased, and his heirs forever. This deed is not to take effect until the death of Jesse Phillips, and Jesse Phillips is to have and keep full possession of said farm during his life and to have all proceeds of said farm until his death."

The court held the deed good as passing a present interest on the ground that, taking all the instrument together, it showed just what Jesse Phillips retained and was to have. Referring to the cases above cited, the court said:

"The language used must fix the interest of the grantee and determine whether the instrument is a deed or merely testamentary in its character. The fundamental rule in the construction of both wills and deeds is to give effect to the intention of the party executing the instrument, and this is to be arrived at by the language used as found in the entire writing."

The question was again presented in Rawlings v. McRoberts, 95 Ky., 346, where the deed contained in the first part of it this recital: "Whereas, * * * said Rawlings desires to make a distribution of his estate to take effect, however, and to go into effect, on and after death." It also contained in the concluding part of it these words: "This conveyance is put to record, but not to take effect so as to give possession until after my death, at which time they are to divide the same as they see fit and proper." It was held that some effect must be given to the form of the writing as showing the intention of the grantor to make an ordinary deed, and that, on the whole instrument, only possession was postponed until the death of the grantor. In the subsequent case of Ward v. Ward, 104 Ky., 857, a paper, which was offered for probate as a will, and was in the form of a will, was rejected because the estate vested for a valuable consideration during the maker's lifetime.

The rule is, that the court will, if possible, so construe an instrument as to give it effect, and that a construction of an instrument which would deprive it of any effect will not be adopted if it can reasonably be avoided. In the case before us the paper is authenticated as a deed. It is not authenticated as a will, and, therefore, can not be probated as a testamentary paper. An instrument to be good as a will must take effect at the maker's death. But this paper, if we construe it literally, does not take effect until the death of both John Hunt and his wife, S. E. Hunt. If John Hunt had died, the estate, under the literal reading of the words: "This deed is not to take effect until the death of said John Hunt and S. E. Hunt," would not vest in F. M. Hunt until the death of S. E. Hunt. The paper, therefore, if we enforce these words literally, can have no force as a deed because not taking effect in the lifetime of John Hunt, and no force as a testamentary paper because not taking effect at his death. The title to the property was in John Hunt. If John Hunt had died, under the case of Reynolds v. McFarland, above cited, S. E. Hunt would have been entitled to a life estate in the land. It was the home place of the old people, and as to S. E. Hunt plainly there was no purpose to vest in her a greater estate, but only to preserve to her use her old home as long as she lived. Only the enjoyment of the place by the grantee was postponed to her death. But the language of the deed as to her and her husband is exactly the same, and no greater effect can be adjudged the same words as to him than as to her. The object of all construction is to arrive at the intention of the maker of the instrument. In doing this, all parts of the instrument must be considered, and in a deed, in case of doubt, it must be resolved against the grantor, for he selects his own language. While the instrument in question contains the words that it is not to take effect until the death of the grantors, it also contains the words: "Do hereby sell and convey," "to have and to hold," and "said party of the first part hereby covenants with the said party of the second part that he will warrant the title hereby conveyed." These words aptly convey

a present estate, and it is not presumed that one part of the deed was intended to conflict with another. As it is clear that as to S. E. Hunt only the enjoyment of the property was postponed until her death, we conclude that, giving some effect to all parts of the deed, its proper construction is that the grantee takes a present estate vesting at the time of its delivery, but taking effect in possession at the death of the father and mother.

Judgment affirmed.

GALLOWAY v. BRADBURN.

(Filed November 16, 1904.)

1. Election contest—Filing appeal bond—Sufficiency—In an appeal to the Court of Appeals from a judgment of a circuit court in an election contest an appeal bond reciting that "appellant will pay to appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform said judgment should it be affirmed, and any judgment which the Court of Appeals may render, or order to be rendered, by the inferior court, not exceeding in amount or value the judgment aforesaid," is insufficient under the statute.

2. Filing amended bond—Acceptance—Under the statute requiring that a bond be executed within thirty days after final judgment in the circuit court, where a defective bond has been executed within thirty days from the final judgment, under sections 134, 682 and 742, Civil Code, allowing defects in transcripts to be amended, and the act of February 28, 1828, regulating appeals and appeal bonds, the appellant should be allowed to file an amended bond to conform to the statute, and such amended bond having been tendered in this court by appellant is accepted.

3. Ballots—Evidence—Competency—Upon the trial in the circuit court, when the ballots in precincts Nos. 22 and 25 of Warren county were opened in court, appellant offered evidence tending to show that they had been tampered with, which the court declined to hear on the ground that the time for taking evidence had passed. This was error. The ballots were evidence in the case themselves, and when the question was made that the evidence itself had been mutilated, the court had power, summarily, to determine the question. The ballots in a case of this character stand like any other part of the record, and if part of the record has been tampered with, this fact may be summarily determined, so that the court may know what the record before him really is.

4. Same—Inspection in appellate court—But while the lower court rejected the evidence offered by the appellant on this subject, the ballots themselves and the envelope in which they were put have been brought up to us, and from an examination of them we have no doubt that they have been mutilated since they were returned by the election officers.

5. Discrepancies — Incredible results — Fraud—Where two precincts are shown by the returns of the election officers to have given appellant, who was the Republican candidate, a majority of 40 votes, and by the rejection of the mutilated ballots this majority is changed to 280 for appellee, and the two precincts are known to be reliably Republican politically, and the vote for appellant therein by the official count was about the same given all the other candidates on the Republican ticket at the same election as well as in recent elections for a number of years, it is incredible that only 18 votes, out of 271 cast in one precinct, voted for appellant, and the discrepancy in the other precinct, while not so large, is also incredible. Such a discrep-

ancy in the count by the election officers and inspectors could not exist by mistake; it could only have come to pass by fraud on the part of said officers and inspectors, and there is nothing in the record to cast suspicion on the integrity of these officials.

6. Election officers—Certificate—Prima facie evidence—The rule is that the certificate of election officers is prima facie correct, and that the presumption of the proper discharge of official duty in counting the ballots is not overthrown where the ballots have been tampered with after they were deposited in the ballot box. As the ballots in this case have been tampered with, the certificate of the officers is the best evidence as to how the vote was cast, and as on this basis appellant was elected, it is unnecessary for us to determine any of the other matters discussed by counsel.

Sims & Grider, John E. DuBose, Fairleigh, Straus & Fairleigh and J. McKenzie Moss for appellant.

Lewis McQuown, John B. Rodes, W. S. Pryor, Samuel D. Hines, Wright & McElroy, B. F. Proctor, R. L. Greene, T. W. Thomas and W. B. Gaines for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hobson.

At the November election, 1903, appellant and appellee were candidates for circuit judge in the eighth circuit court district. By the official count, as made by the officers of the election, appellant received a majority of 270 votes in the district. Appellee filed a petition contesting the election, and on the hearing of that action in the circuit court it was adjudged that appellee had been elected by 342 votes. When the judgment was rendered in the circuit court in favor of appellee, appellant prayed an appeal, and immediately executed an appeal bond. Appellee has entered a motion to dismiss the appeal on the ground that the appeal bond is defective. Appellant denying that the appeal bond is defective which he executed before the clerk of the circuit court, tenders in this court a new bond with same sureties, conforming to the statute, and asks that it be filed as an amended bond. Whether the bond which appellant executed before the clerk of the circuit court is defective, and whether, if it is defective, it may be amended or a new bond given now, are the first questions to be determined on the appeal.

The bond executed by appellant, after reciting the judgment entered in the circuit court to the effect that appellee was duly elected and was entitled to the office on and after the first Monday in January, 1904, concludes with these words: "Now we, John M. Galloway, W. G. Morris and M. M. Ennis, his sureties, do hereby covenant to and with appellee, B. W. Bradburn, that the appellant will pay to appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform said judgment above stated in the event that it should be affirmed, and any judgment or order which the Court of Appeals may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid."

The statute regulating contested elections, so far as material here, is as follows: "Within twenty days after the service of summons upon him the contestee shall file his answer, which may consist of a denial of the averments of the petition and may also set up grounds of contest against the

contestant, and if grounds are so set up they shall be especially pointed out, and none other shall thereafter be relied upon by said party. A reply may be filed within ten days after the answer or answers are filed, but its affirmative allegations shall be treated as controverted, and no subsequent pleading allowed, and the action shall proceed as an equity action. The evidence in chief for the contestant shall be completed within thirty days after the issues are made up, and the evidence of the contestee completed within twenty days thereafter, and the evidence for contestant in rebuttal in fifteen days after the contestee has concluded. The action shall have precedence on the trial docket over all other cases. All ballots, poll-books, stubs and other papers concerning which there is any ground for contest may be removed to the court in which the action is pending. Either party may appeal from the judgment of the circuit court to the Court of Appeals by giving bond to the clerk of the circuit court, with good surety, conditioned for the payment of all costs and damages the other party may sustain by reason of the appeal and by filing the record in the clerk's office of the Court of Appeals within thirty days after final judgment in the circuit court. And in the Court of Appeals the case shall be heard and determined as speedily as possible, and shall have precedence over all other cases. * * * On the production of a copy of the final judgment the successful party shall be permitted to qualify or be commissioned, or a writ of new election shall be issued as the judgment may require. The unsuccessful party shall pay all costs in both courts." (Section 1596, subsection 12, Kentucky Statutes.)

The final judgment referred to in the statute is the judgment which ends the controversy, and, therefore, where an appeal is taken the appellee would not be permitted to qualify or be commissioned until the appeal is determined. Under the terms of the statute the supersedeas on the appeal stays the execution of the judgment. The statute, therefore, requires that the appellant shall give a bond conditioned for the payment of all costs and damages the other party may sustain by reason of the appeal. The damages which the appellee will sustain by reason of the appeal consist in his being kept out of his office during the pendency of the appeal. The bond which appellant executed covenants that the appellant will pay the damages that may be adjudged against him on the appeal. But the damages for keeping appellee out of the office can not be adjudged against appellant on the appeal. The bond also covenants that the appellant will satisfy and perform the judgment in the event it is affirmed, but a surety's obligation is limited to the letter of his covenant, and this would make him responsible for nothing more than that appellant would surrender the office to appellee in the event the judgment is affirmed. The bond as executed by appellant is not, therefore, conditioned for the payment of the damages which appellee may sustain by reason of the appeal, and is insufficient under the statute.

It remains to determine whether the bond may be amended or a new bond given. The statute requires the appellant to give the bond and file the record with the clerk of this court within thirty days after final judgment in the circuit court. In Patterson v. Davis, 24 Ky. Law Rep., 842, it was held that the execution of a bond within thirty days after final judgment is a condition precedent to the right of appeal, and that if the bond is not given the appeal must be dismissed; but in that case no bond was executed.

It will be observed that the statute requires the bond to be executed and the transcript to be filed in this court within thirty days after the judgment in the circuit court. If a transcript filed in time for some reason is defective, as by the statute the case proceeds as an equity action, this court, under section 134 and section 742 of the Civil Code of Practice, might allow the defect to be remedied by the correction of the transcript, although more than thirty days had elapsed. In other words, the jurisdiction of the court would attach by the giving of the bond and the filing of the transcript in this court, and the court having jurisdiction, under the sections of the Code referred to, could allow the record brought before it to be perfected. But it is insisted that the same rule can not be applied to a defective bond.

Previous to the year 1828 the rule was that if an appeal bond was defective the appeal must be dismissed. (Trenton v. Phillips, 7 T. B. Mon., 117; Hardin v. Owings, 1 Bibb., 214.) To remedy this the legislature enacted the following statute:

"An act further to regulate appeals and appeal bonds. Approved February 12, 1828.

"Section 1. Be it enacted by the general assembly of the Commonwealth of Kentucky, That from and after the passage of this act, no appeal bond, or bond executed upon granting an injunction or supersedeas, either in the county or circuit courts, general court, or Court of Appeals of this Commonwealth, shall be quashed or set aside for any technicality or other defect upon the face of the bond; but the court shall decide upon such defects and decide whether the same be a good statutory bond or not, and if not, then such court shall dismiss the appeal, or writ of error or other proceeding upon which a supersedeas may have been had, or dissolve the injunction, unless the party appellant, plaintiff or complainant, as the case may be, shall forthwith, upon the defect being announced by the court, and as soon as a bond shall have been prepared, together with good and sufficient security, to be approved of by such court, conditioned as the law in such cases directs, execute another bond, to be prepared by the clerk of such court, and the execution of such new bond shall not be a cause of continuance for either party, and the bond so declared defective may, notwithstanding, be sued upon as a bond at common law." (1 M. & B., 137.)

After this act was passed it was held that where a bond was defective the appeal would not be dismissed, but the appellant would be permitted to execute a good bond in lieu of the original which was defective. (Bates v. Courtney, 1 Dana, 145.) Thus matters stood until the Code of Practice was adopted. That contained this provision: "If a bond provided for by this Code be adjudged to be defective, a new and sufficient one may be executed in such reasonable time as the court may fix, with the same effect as if originally executed." (Section 682.)

Under this provision it has been uniformly held since the adoption of the Code that an appeal will not be dismissed on account of a defective appeal bond if a good bond is executed. (Adams v. Settles, 2 Duvall, 76; Anderson v. Trent, 79 Ky., 259.) But it is urged that the bond in this case is not provided for by the Code, but is a bond required to be given under the act further regulating elections. On the other hand, it is insisted that as by section 838, the Code regulates pleading and practice in all civil cases com-

menced after its adoption, and as by the statute this case must proceed a an equity action, therefore, any bond required in this proceeding is a bond provided for by the Code within the meaning of the statute. While there is some force in this position, the language of the statute is not to be extended by construction beyond its fair and natural meaning. There are a number of bonds provided for by the Code, such as appeal bonds in ordinary cases, bonds to obtain an order of arrest, bonds to obtain or discharge an attachment, bail bonds on an order of arrest, claim and delivery bonds, refunding bonds, forthcoming bonds, bonds of indemnity, bonds to infants on sale of real property, bonds in suits on lost writings, bonds to perform a judgment, and the like. When the Code in terms provides for so many bonds, the natural meaning of the words "a bond provided for by this Code" must be that they refer to the bonds which the Code authorizes. To hold otherwise is to deny to the carefully chosen language of the codifiers its natural and ordinary meaning. In addition to this, section 683 provides that an officer whose duty it is to take a surety "in any bond provided for by this Code" may require a person offered as surety to make affidavit of his qualification. Section 684 provides the qualifications of the surety "in every bond provided for by this Code." It is perfectly manifest that sections 682, 683 and 684, in using precisely the same expression, "bond provided for by this Code," referred to the same thing. Subsection 7, section 732, provides how the signature to a writing under the Code shall be made. It has been held that this provision only applies to writings that are required under the Code. (Meazels v. Martin, 93 Ky., 50.) It would seem that the same construction should be given sections 682-684. In other words, the legislature provided how the bonds required under the Code must be signed, and also provided who should be sufficient sureties, how this should be evidenced, and how the bonds may be amended. But in all of these provisions it had nothing more in mind than the bonds required by the Code. The same legislature which adopted the Code of Practice in 1851 had before it the Revised Statutes, which also provided for a number of bonds, and if the legislature had had in mind in framing the Code a general provision covering all bonds given in judicial proceedings, it is incredible that it would have used the language found in sections 682-684, and that this language should have been readopted without change in 1877. It has never been supposed that the provision of the Code as to the sufficiency of sureties in bonds provided by the Code was applicable to bonds given under the Revised or General Statutes. Thus in the numerous cases which have been brought against county judges for taking insufficient surety in a guardian's bond it has uniformly been held that his liability depends simply on whether he exercised ordinary care under the facts before him. It can not, therefore, now be held that section 682 applies to the bond in question.

As to all bonds provided by the Code, section 682 is in effect the same as the act of 1838, but as to bonds not provided by the Code a different question is presented. In Madison, &c., R. R. Co. v. Briscoe, 18 B. Mon , 570, this court had under consideration the question whether the act of 1798, giving damages upon the dismissal of an appeal, was repealed by the Code of

Practice. It was urged that the Code of Practice regulated appeals and expressly provided for damages upon affirmances, but failed to provide for damages upon dismissals, and, therefore, by implication repealed the act of 1798. The court, however, held otherwise, and held the act of 1798 in force. Under that opinion it is clear that the act of 1828, in so far as it applies to bonds not provided for by the Code of Practice, was not repealed by the Code of 1851. The Code of 1877, which is now in force, contains verbatim the same provision as the Code of 1851 on the subject of bonds. The rule is that the re-enactment of an old statute is construed as simply the continuance of the old rule. The Code of Practice provision contemplating only the bonds provided for by the Code, other bonds are not within the purview of its provision, and not being regulated thereby, are left to be governed by the law that was in force when the Code of Practice was adopted. The act of 1828 is, therefore, still in force as to bonds not provided for by the Code of Practice.

In addition to this, and aside from the act of 1828, section 134 of the Code provides: "The court may, at any time, in furtherance of justice, and on such terms as may be proper, cause or permit a pleading or proceeding to be amended, by adding or striking out the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, if the amendment do not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

This is a general provision. It includes not only pleadings, but every proceeding. Under it, as has been held, a bastardy warrant may be amended (Commonwealth v. Cantrell, 20 Ky. Law Rep., 24), or notice of a contested election under the former statute (Wilson v. Hines, 99 Ky., 221), or the issue on appeal from a justice's court to the circuit court (Willis v. McNeal, 8 Ky. Law Rep., 411). As the Code regulates proceedings in all actions, so this action allows an amendment of all proceedings in the process of an action. It was intended by it to provide in general for the amendment of anything that was found to be defective in the progress of an action, the purpose being to perfect rather than to destroy. It is not limited to mistakes in pleadings, but is intended to cover any kind of a mistake and to allow an amendment. At common law and before the passage of the modern statutes, very many mistakes or clerical errors were cause for the dismissal of an action or the defeating of justice. The act of 1828 is only one of several acts passed by the Kentucky legislature allowing amendments so that injustice should not be done. These acts were in force when the Code was adopted, and it was the clear purpose of the Code to continue the same principles in force and to allow amendments even more liberally than before. Under section 134 a bond required in the course of a judicial proceeding not provided for by the Code, aside from the act of 1828, may be amended just as any other proceeding in the case may be amended. Section 682 points out specifically how the bonds provided by the Code may be amended, but section 134, which applies to everything else, allows amendments in furtherance of justice and on such terms as the court may deem proper. In other words, having provided by section 682 how Code bonds may be amended if defective, the legislature, by section 134, made a general provision applicable to everything else that nothing might be omitted. The words, "a mistake in

any other respect," are very comprehensive, and, there being nothing in the statute to limit them, they must include mistakes in a bond as well as mistakes in any other part of the proceeding. A number of bonds are provided for in the Kentucky Statutes, such as bastardy bonds, bonds of persons bringing in a pauper, apprenticeship bonds, replevin bonds, bonds of vagrants, contractors' bonds, and the like. None of these bonds are provided for by the Code, and if they may not be amended under section 134, then we have the anomaly that while everything else in a judicial proceeding may be amended in case a mistake is made, there is no remedy for a mistake in a bond not provided by the Code. This we are not willing to hold in view of the broad language of the statute, when there is no reason why these bonds should be put on a different plane from everything else. To construe section 134 as allowing amendments of bonds not provided by the Code does not make section 682 meaningless. Section 682 applies to bonds provided for by the Code, and is a specific provision as to the mode of amending them. Bonds not provided for by the Code, not being within the purview of section 682, are provided for by section 134, which is a general provision for amending every mistake in a proceeding as to which there is not elsewhere a specific provision. The act of 1828 is not repealed by section 134 of the Code because that section is designed to effect the same thing, so far as appeal bonds go, as the act of 1828, the only difference being that section 134 is broader in its terms than the act of 1828. Still, as to appeal bonds, both have the same purpose. Implied repeals are not favored, and it can not be presumed that, in providing that any mistake might be corrected, the legislature had in mind repealing a specific provision for the giving of a good appeal bond in the place of one that was defective.

We, therefore, conclude that the amended bond tendered in this court should be accepted, and the motion to dismiss the appeal is overruled.

The circuit court threw out Huntsville precinct in Butler county and Bee Spring precinct in Edmonson county, but after these two precincts were thrown out appellant was still left with a majority, so we need not consider whether the Huntsville precinct and the Bee Spring precinct were properly thrown out. The court recounted the vote in precincts 25 and 22 of Warren county. The result in these two precincts on the official count and the recount was as follows:

No. 25.	Count.	Recount.
Bradburn	138	197
Galloway	195	145
No. 22.		
Bradburn	119	241
Galloway	152	18

It will thus be seen that while appellant received on the official count a large majority in these two precincts, the appellee, on the recount, received the majority. In other words, 192 ballots which were counted for the appelant on the official count, in precinct 22, were counted for appellee on the recount, and 59 ballots in precinct 25 that were counted for appellant on the original count were counted for appellee on the recount. When the ballots were opened in court appellant offered evidence tending to

show that the ballots had been tampered with since they left the hands of the election officers. The circuit court declined to receive the evidence on the ground that the time for taking evidence had passed. In this he erred. The ballots were evidence in the case themselves, and when the question was made that the evidence itself had been mutilated the court had power summarily to determine the question. For example, if it had appeared that a deposition had been mutilated after it was taken, the court might have heard evidence to show what the deposition really was. The same is true as to the ballots or any other exhibit when offered. The evidence may be heard by the court summarily in open court in order for the court to determine what the writing, which the law makes evidence, in fact is. Otherwise, the court might be required to base its judgment upon a forgery. The ballots in a case of this character stand like any other part of the record, and if any part of the record has been tampered with, this fact may be summarily determined, so that the court may know what the record before him really is. But while the court rejected the evidence offered by the appellant on this subject, the ballots themselves and the envelope in which they were put have been brought up to us, and from an examination of them we have no doubt but that the ballots have been mutilated since they were returned by the election officers. The ballots referred to were all stamped under the Republican device, and when opened in court they were also stamped in the small square opposite appellee's name and opposite Speed Guffy's name, which were under the Democratic device in the other column on the ballot. Every ballot that was thus marked for appellee was also marked for Guffy, and these marks are in plainly a different ink and made with a different stencil from the mark under the Republican device which the voter put there. The envelope containing the ballots in one of the precincts also discloses the fraud because it has on it two colors of sealing wax, the lighter shade being on top of the darker shade and the folding of the envelope when it was stamped the last time covered part of the name of one of the officers of the election written across the envelope when it was first sealed. In the other precinct the ballots were not put in the envelope at all. These two precincts were reliable Republican precincts. The majority which appellant got in the two precincts by the official count was about the same they gave all the other officers running on the Republican ticket at the same election, and about the same that they have given in recent elections for a number of years. When the candidates for governor, attorney general, mayor and judge of this court all received about the vote which was given appellant on the official count, it is incredible that only thirteen voters in precinct 22 voted for him, and the discrepancy, in the other precinct, while not so large, is also incredible. The testimony of the election officers is that the ballots in these two precincts were counted without any dispute or question. There were inspectors present for both parties. The ballots were taken out of the boxes and placed in three piles; the straight Republican ballots in one pile, the straight Democratic ballots in another pile, and the crossed ballots in a third pile. If there had been in either of these precincts such a number of crossed ballots as now appears, it would have astonished every man present at the count. Such a great discrepancy in the count could not exist by mistake; it could have only come to pass by

fraud on the part of the election officers and the inspectors. The testimony of the officers is that the count went off smoothly, and there is nothing in the record to cast suspicion on the integrity of the officials. When we look at the ballots it is not difficult from the difference of the ink and the marking to tell what ballots were voted or counted for appellee by them and what ballots were voted or counted for appellant.

The rule is that the certificate of the officers of the election is prima facie correct, and that the presumption of the proper discharge of official duty in counting the ballots is not overthrown where the ballots have been tampered with after they were deposited in the ballot box. As the ballots in the case before us have been tampered with, the certificate of the election officers is the best evidence as to how the vote was cast, and as on this basis appellant was elected, it is unnecessary for us to determine any of the other matters discussed by counsel. (Bailey v. Hurst, 24 Ky. Law Rep., 504; Hamilton v. Young, 26 Ky. Law Rep., 447.)

Judgment reversed and cause remanded for judgment as herein indicated.

Whole court sitting.

STANDARD OIL CO. v. COMMONWEALTH.

(Filed November 17, 1904.)

1. Taxation—Oil depots—Constitutional provisions—Under Constitution, section 171, requiring that taxes shall be uniform on all property subject to taxation, and section 172, that property shall be assessed at its fair cash value, and section 174, that all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, the imposition of an arbitrary sum of $10 as tax upon each oil depot in this State, without regard to their values, would be a most palpable violation of these sections of the Constitution.

2. Construction of statute—In construing that part of Kentucky Statutes, section 4224, which reads as follows: "To each oil depot in this State, wherein petroleum, lubricating or other oils are stored in bulk or tank, $10," the words "in bulk or tank" imply that all places where oil was stored exclusively was not intended to be covered by the statute, because if it had been intended to include all places used exclusively for storing oils, no qualification would have been necessary or proper.

3. Double taxation—License tax—The imposition of a license tax upon an oil depot, where the oil and the building in which it is stored are both already taxed, ad valorem, equal with all other property in the State, would be double taxation, which is not only repugnant to the general rule of construction, but violates the provisions of the Constitution, requiring uniformity of taxation.

Humphrey, Hines & Humphrey for appellant.

N. B. Hays, Loraine Mix and D. J. Woods for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was convicted for a violation of section 4224, Kentucky Statutes, which requires licenses for certain occupations, including the storing of oil in bulk or tanks in oil depots in this State.

The facts are that appellant maintained a warehouse at Hodgenville, in which it kept oil stored in barrels in about car lots. As a result of the indictment a fine of $400 was imposed. This appeal involves the constitutionality of the statute and its construction. The first thing to be determined is, what is meant to be taxed by the statute? The provision is found in section 4224, which section comprises the whole of subdivision 4 of article 10 of the chapter of Kentucky Statutes relating to revenue and taxation. The title of this subdivision is "amount of license tax." The subjects particularly treated of by the section are tavern and hotel licenses; liquor dealers' licenses; licenses to sell pistols, playing cards and deadly weapons; license of pawn brokers and trading stamp companies; bowling alleys; circuses and exhibitions; tobacco and cigarette manufacturers; operation of slaughter and packing houses, wherein animals are slaughtered; breeding live stock licenses; peddlers' licenses; licensing of foreign railroad companies, operating terminals in this State; tax brokers; and oil depots, and the selling of oil by retail by transporting in wagons. It will be observed that the subjects are in keeping with the title.

The Constitution requires that taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax (section 171), and that all property not exempted from taxation by the Constitution shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. (Section 172.) "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value unless exempted by the Constitution." (Section 174.) The imposition of an arbitrary sum of $10 as a tax upon each oil depot in this State, without regard to their values, would be a most palpable violation of these sections of the Constitution. It is altogether improbable that every oil depot in the State is of exactly the same value. Or, if they were, when taxed as property they could not be taxed either a greater or less per cent. of that value than other property subject to taxation is made to bear. So, from the context and title of the section, we have no hesitancy in declaring that the tax sought to be imposed on oil depots is not a property tax.

The only other taxes authorized by the Constitution are income, license and franchise taxes. The legislature has not yet authorized the collection of an income tax. Franchise taxes are collected, but they are imposed only on the intangible property of those corporations classed as public service corporations, or such as enjoy special or exclusive privileges not allowed by law to natural persons. (Section 4077, Kentucky Statutes.) Mere trading corporations are not included. (Louisville Tobacco Warehouse Co. v. Commonwealth, 106 Ky., 165.)

Is it then a valid license tax? Cooley declares that license fees of taxes may be imposed for the following purposes: First, for regulation; second, for revenue; third, to give monopolies; fourth, for prohibition. That the third is inadmissible in any free government will not be gainsaid. While of the fourth, it is admissible only in cases of those pursuits or indulgences which in their general effect are believed to be more harmful than beneficial to society, and which consequently the public interest requires should be put an end to. If the exaction of the license in the case at bar is said to be

for the purpose of revenue, it is met with the argument that the property, viz., the oil and the building where it is stored, are both already taxed equally ad valorem with all other property in the State for that purpose; that to tax the same property again for the same purpose would be double taxation, which is not only repugnant to the general rule of construction, but violates the provisions of the Constitution requiring uniformity of taxation.

Livingston v. Paducah, 80 Ky., 656, is relied on by appellant. In that case license taxes were imposed under a statute upon owners of private vehicles, not used for hire. The court said: "A statute which makes any kind of property the subject of taxation, and, discriminating, imposes upon it a double burden for a single object, makes even approximate equity and uniformity impossible, because it is an impossible and radical departure from both."

The license tax was in that case held invalid. The popular understanding of the word license undoubtedly is a permission to do something which, without the license, would not be allowable. The object of the license is to confer a right that does not exist without the license. (Chilvers v. People, 11 Mich., 43.) The right to own a house in which oil might be stored is not prohibited by any law. Consequently the granting of a license for that purpose gives no right. The right of acquiring property and protecting it, found in the Bill of Rights, is even above the right of taxation, for the exercise of the former can not be denied until a license to exercise it has first been obtained from the State. The right to own oil depots in this State is not dependent upon a privilege to be first obtained in the form of a license granted by the State.

The authority of Livingston v. Paducah, supra, aside from the reasons already advanced, would force us to say that the tax in this case was also invalid, although imposed as a license and not a property tax, if the subject of it is the oil depot or building. In construing statutes the courts will never adopt a construction that makes them violate the Constitution, if any other is susceptible from their words. We, therefore, reject the construction that makes this statute impose either a property tax, or a license for owning real property. The remaining head under which license taxes may be imposed is that of regulation. When the possession or the use or vending of a particular kind of property is dangerous or deleterious to the health or safety of the community, it may be regulated by the State, either in its possession or disposition, under the exercise of the police power inherent in government; that oils, highly inflammable and kept in large quantities, are within this class of property will not be denied. The words of this particular subsection are: "To each oil depot in this State, wherein petroleum, lubricating or other oils are stored in bulk or tank, $10." * * *

Some meaning must be given the provision, if possible. We think the legislature had in mind, and the words fairly import the purpose to be, the licensing of storing oils in bulk or tank in depots in this State, intending the provision as a police regulation, the license tax imposed being an incident of the regulation, as is the case in peddlers' licenses. We are further of opinion that any warehouse or place where oils are stored in large quan-

tity is a depot within the meaning of the statute. The remaining question is the construction of the words "in bulk or tank."

It is well known that merchants dealing in oils generally keep, and heretofore almost universally kept, a quantity of oils in barrels, or small metallic tanks of about one barrel capacity. In many localities in this State the custom doubtless continues. Yet they were never regarded the subject of license taxation. If the legislature had intended such a sweeping change of policy as to include them in the provisions of the act, they would more likely have worded the clause thus: "To each oil depot in this State, wherein petroleum, lubricating or other oils are stored, $10," omitting the words "in bulk or tank." Because if it had been intended to include all places used exclusively for storing oils, no qualification would have been necessary or proper. The words "in bulk or tank" imply that all places where oil was stored exclusively was not intended to be covered by the statute. The old custom of keeping oil in barrels, until within the last few years the almost universal custom throughout the State, can not have been unknown to the legislature; that they omitted that class of storage is significant, indicating a purpose not to include it. The term "in bulk" has long been understood in commercial circles as contradistinguished from package or parcel, as where wheat, lard, and the like, are sold in bulk. Yet manifestly everything, even wheat in bulk, must have some confining receptacle; that would be true of even a lake of water. The term has come to be applied so generally that it is defined in Webster's Unabridged Dictionary as "in a mass; loose; not enclosed in separate package or divided in separate parts; in such shape that any desired quantity may be taken or sold;" and "laden in bulk" and "stowed in bulk" as meaning "having the cargo loose in the hold, or not enclosed in boxes, bales or casks" Bouvier defines bulk, in law, as merchandise which is neither counted, weighed nor measured.

In re Sanders, 52 Fed. Rep., 806, a statute of North Carolina providing that persons selling seed in packages unmarked by the date when such seeds were grown, except farmers selling in open bulk to other farmers, was construed. The court said: "What is meant by open bulk? The natural meaning of the word is: 'In the mass; exposed to view; not tied nor sealed up.'"

Section 460, Kentucky Statutes, requires: "All words and phrases shall be construed and understood according to the common and approved usage of language; but technical words and such as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such meaning."

The common and approved usage of language, the technical meaning given by the business world, and the legal definition of the expression "in bulk," are opposed to the idea of a number of packages, parcels or barrels, containing merchandise, being regarded as being in bulk.

In recent years appellant in particular, and other producers of oil, have adopted the plan of storing their product in large metal tanks, holding many hundred or many thousands of barrels of oil. These tanks are built of as permanent nature as are houses, and are in a sense buildings peculiarly adapted for the storing of oil in bulk. This practice has become so

revalent of late years that it has now become quite common in many, if not most, of the counties of this Commonwealth. From these large tanks, which are of themselves oil depots, the oil is drawn off and distributed by wagons. But of course it might also be drawn off, and doubtless in some instances is drawn off, into barrels, cans or other smaller receptacles for shipment and delivery to retail dealers and consumers. The word "tank," used in the statute before us, unquestionably had reference to the class of large tanks which have just been described. A tank of any kind is "an artificial receptacle for liquids; a large basin or cistern." (Webster.) The first definition given would also apply to barrel or can, when they were tight enough to hold liquids. The legislature in enacting this section was not aiming at the small merchant with a barrel or so of oil, but at the large dealer who kept it stored in great quantity. The words "in bulk or tank" are used to express the same thing, tank being another word to indicate the size of the mass, the storing of which should be the subject of license tax.

If storing oils in barrels in a warehouse or shed made the owner amenable to the statute, it would apply necessarily to all who so stored two or more barrels. If the legislature had intended to include such it would, as it so easily could, have used the simple word to indicate that purpose, or have omitted the qualifying words restricting it. But from the whole statute we are satisfied such was not the intention. When appellant owns and stores its property not in bulk or tank, but as merchants and others may do, it has the same rights that such merchants have.

For the reasons indicated the judgment is reversed and cause remanded for a new trial, with directions to the circuit court to sustain the demurrer to the indictment.

Whole court sitting.

GRAY v. PEAY.

(Filed November 17, 1904—Not to be reported.)

1. Land—Trespass—Pleading—Allegations—Claim of title—In an action for trespass "quare clausum fregit" the petition should describe the land so that it may be identified and allege title in the plaintiff, and also designate the particular injury or wrong sued for, so that defendant can not avoid pleading to that identical cause of action, but it is not necessary that plaintiff's claim of title should be recited. This is a matter of proof, if denied.

2. Possessory title—Patents—In a controversy as to the ownership of a tract of twenty-three acres of uninclosed land, to which neither party has a possessory title, but from which both have been cutting timber and fire wood, and to which both claim title by patents from the State, the one to whom the first patent was granted is the lawful owner.

W. R. Gardner for appellant.

W. W. Helm for appellee.

Appeal from Butler Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, E. E. Peay, brought this action in the Butler Circuit Court against the appellant, Luther Gray. He alleged in his petition that he was

the owner, and that he and his vendors had been in the actual, peaceable and adverse possession of the tract of twenty-three acres of land for more than thirty years; and that the defendant had, without right, cut and removed oak timber therefrom of the value of $75, and prayed judgment therefor. The defendant, in his answer, denied that plaintiff was the owner of the boundary described in his petition, or that he and his vendors had been in the actual and adverse possession thereof for thirty years, or any length of time, and further plead that in February, 1884, a patent from the Commonwealth of Kentucky had issued to his father, Granville Gray, and C. L. Stewart, for the land described in plaintiff's petition; that subsequently his father had acquired the interest of Stewart therein; and that his father and he, as his heir at law, had been in the undisturbed possession of this tract of land, claiming it as their own for more than twenty years. Plaintiff, in his reply, admitted that a patent had issued to defendant's father and Stewart, as alleged, but averred that in January, 1878, his father, N. M. Peay, had entered and had surveyed this boundary of land by the county surveyor of Butler county, which survey was duly entered upon the books of the county surveyor; that he had paid the surveyor to see to the issuing of a patent thereon; that his ancestor had taken possession of and used the land by cutting timber thereon; and that at his death it passed under his will to his daughter, Mrs. Andrews, who subsequently conveyed the interest devised to her to plaintiff; and that in June, 1898, he had the survey carried into patent. Copies of the survey, entry and patent were filed as exhibits with the reply.

It is admitted by the parties that the entry and survey of Peay antedated appellant's patent many years. The twenty-three acres in controversy laid between the tracts of land owned by the elder Peay and the father of appellant. It was never fenced, and both parties seem at different times to have procured timber and fire wood therefrom. The agreed facts do not show a possessory title in either party. The case must, therefore, turn upon the question as to who first acquired title to the property under grant from the Commonwealth. Section 4704 of the Kentucky Statutes, which was also a provision of the Revised and General Statutes, says: "None but vacant land shall be subject to appropriation under this chapter. Every entry, survey or patent made or issued under this chapter shall be void so far as it embraces lands previously entered, surveyed or patented. * * * The legal title of the land shall bear date from the time of making the survey."

In construing this provision of the statute it was held in Kirk v. Williamson, 82 Ky., 161, that "if a person entered land, pays for it and complies with the statute in having the entry and survey made in the time fixed by law, no other person has any right either to enter, survey or patent the land, and whenever the Commonwealth lawfully patents lands once, it can not for any cause patent the same land as vacant or unappropriated land again, for that would breed confusion and contention."

This case was followed by Goosling v. Smith, 90 Ky., 157; Gibson v. Board, 102 Ky., 505. As appellees entered and surveyed the land long before the patent of appellant, we are of the opinion that he held the legal title thereto; and that the patent issued to appellant was void.

In an action of trespass "quare clausum fregit" the petition should describe the land so that it may be identified and allege title in the plaintiff,

and also designate the particular injury or wrong sued for, so that defendant can not avoid pleading to that identical cause of action; but it is not necessary that plaintiff's chain of title should be recited in the petition. This is a matter of proof if denied.

For reasons indicated the judgment is affirmed.

BUCKEL, BY, &c. v. SMITH'S ADM'R, &c.

(Filed November 17, 1904—Not to be reported.)

Morris B. Gifford and A. E. Willson for appellants.

Wm. Furlong and John Roberts for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Judge O'Rear delivered the following extension of opinion of the court:

It is sought to charge the surety upon the bond of the administrator with the debt which he owed the estate of his intestate at the time of his appointment and qualification. Smith, the administrator, has not charged himself with the amount of his own debt, nor has he accounted for it at all in his settlement. It is said that he is insolvent, and has been since his qualification as administrator.

At the common law the qualification of an administrator who was also debtor to the estate operated to discharge his liability to it. (Gatewood v. Lyle, 5 Mon., 7.) He could not be both plaintiff and defendant in an action to recover it. The title to the personal estate, including such choses, was deemed to be vested in the personal representative. From this fact it doubtless came to be held in a certain line of cases that the sureties upon the administrator's bond were liable for a debt owing by the latter to the estate whether he was solvent or not. But, according to another line of decisions, it is held that a debt owing by an executor or administrator to the decedent's estate is regarded, so far as the liability of the sureties is concerned, as if the debt were owing by a third person. If the personal representative actually pays his debt, the sureties are of course liable for its proper application, as for other assets coming to his hands. Or, where he was solvent and the debt could have been collected, there being nobody else capable of suing to recover it, he ought to have paid it. His failure to account for it should in that case be treated as would his failure to collect a debt owing the estate by any other solvent debtor. (Rader v. Yeargin, 85 Tenn., 486; Conditt v. Winslow, 106 Ind., 142; Gay v. Grant, 101 N. C., 206.)

But where he was always insolvent and unable to pay, the liability of his sureties upon their undertaking for his faithful performance of his duties should not be enlarged by a mere fiction of the law to such an unreasonable extent as to mulct them for something that no amount of diligence and no degree of honesty on the part of the administrator could have guarded against. Men sometimes can not pay their debts. Their sureties as administrators do not undertake more than that they will diligently and honestly do what can be done in the administration of the estate committed to them.

While this court does not appear to have passed upon this identical question, yet in Bush v. Bush, 2 Duvall, 275, it was said: "The appointment of

a debtor as executor or administrator suspends the right of action; but as this is really not the payment of the debt, the executor or administrator must be held chargeable with the amount of his individual indebtedness in his fiducial account, and so far as he charges himself with such indebtedness in his fiducial accounts it must be held a cancelment of his individual liabilities; but if he should not charge this individual liability, or so far as he fails to do so, and then ceases to be executor, the right of action to such extent revives against him."

The question of the sureties' liability does not appear to have been involved in that case. Yet if the debt could still be collected from the former administrator by his successor, it would seem to follow that the former's sureties were not bound for it as a debt extinguished by his appointment, and presumably collected by him on that account. It is not clear in the case at bar that the administrator could not have collected the debt, for he seems to admit that he had the money in bank, or some part of it, which he had recently got from his wife (creating the debt in question), when he was appointed.

The chancellor is authorized upon a return of the case to weigh the evidence in the record, and any other that may be adduced, wherefrom his judgment may be entered upon the principle herein laid down.

COMMONWEALTH v. KEATHLY.

(Filed November 17, 1904—Not to be reported.)

W. H. Hester and N. B. Hays for appellant.

H. J. Moorman for appellee.

Appeal from Fulton Circuit Court.

Judge Nunn delivered the following response to petition for rehearing:

The appellant shows in his petition for rehearing that he was the keeper of a house of private entertainment at the time the offense was alleged to have been committed. Unfortunately for him this fact was not made to appear in the record. The agreed facts made it appear that he was the keeper of a hotel at that time and had failed to procure license.

The appellant also contends that this court had no power to reverse the case and remand it for a new trial; that he had once been acquitted on a trial in the lower court, and that to put him on trial again for the same offense would be in violation of his constitutional rights. This principle is correct with reference to felonies and misdemeanors where imprisonment may be inflicted as a part or all of the punishment. Section 352 of the Criminal Code provides: "A judgment on a verdict of acquittal, of an offense the punishment of which is imprisonment, shall not be reversed."

Where imprisonment is not a part of the punishment and only a fine can be assessed, a reversal for a new trial may be had for either the Commonwealth or the defendant.

TANDY v. RILEY.

(Filed November 17, 1904—Not to be reported.)

H. G. Botts for appellant.

Cammack & Perry for appellee.

Appeal from Owen Circuit Court.

Judge Nunn delivered the following response to petition for rehearing:

Upon another investigation of this record we find that we were mistaken in the statement that appellee's pleading in this case was not controverted. But we are still of the opinion that under the evidence appellee was entitled to the peremptory instruction.

COMMONWEALTH v. CLARK, &c.

(Filed November 17, 1904.)

1. Wills—Life estate—Remainderman—Death of life tenant—Adverse possession—Limitation—Elizabeth Bedford died in 1860, leaving a will by which she devised all her land in this State to her son, Robert, during his life, with remainder to his children, if he left any, otherwise to the State for the poor. Testator, at her death, had a suit pending against the heirs of one Bedinger for 470 acres of land of which she was the equitable owner. Her son, Robert, revived the suit by filing an amended petition, claiming that he was the sole devisee of his mother and her heir at law, and asked that the suit be prosecuted in his own name and for his own use, and a judgment was entered whereby the commissioner was ordered to convey the land to him in fee simple, which was done, and this deed was put to record in June, 1868. He died in 1887, childless and testate, leaving his widow, Susan, his sole devisee, who conveyed the land to appellees. This action was brought by the Commonwealth in January, 1902, claiming the land under the will of Elizabeth Bedford. Held—That the judgment of the chancellor dismissing the petition on the ground that it was barred by the fifteen and thirty years' statute of limitation was proper.

2. Deed—Renunciation of will—Notice—As the son, Robert, acquired and held the legal title to the land by and under the deed of the commissioner from the Bedinger heirs, his title and possession were adverse to the reminderman, who had only an equitable title, and his act in taking to himself the title in fee simple was a repudiation of the trust created by the will and amounted to a renunciation thereof, of which the deed gave notice to the remainderman.

W. C. Halbert, R. D. Wilson and L. W. Robertson for appellant.

Thos. R. Phister, E. L. Worthington and Sam'l J. Pugh for appellees.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Settle.

Elizabeth M. Bedford died February 20, 1860, domiciled in Lewis county, leaving a will which was duly admitted to probate. Her son and only child, Robert Bedford, was named and appointed therein as executor without security, and qualified as such.

Such parts of the will as bear upon the question presented for our consideration by the record herein are as follows:

"1st. I give and bequeath to my son, Robert Bedford, all of my lands in Lewis county, to have and to hold during his natural life. If said Robert Bedford should die leaving a child or children of his own body, then those lands are to go to those children and their heirs forever.

"2d. I give and bequeath to my son, Robert Bedford, all the lands and other property I own in the county of Nicholas, to have and to hold during his natural life.

"4th. In case my son, Robert, dies leaving children of his own natural body, I give and bequeath all my lands to them and their heirs forever. But if my son dies without a child or children, then I desire that all my lands in Lewis and Nicholas be sold, and the money arising from said sales I give and bequeath to the State of Kentucky forever in trust; that the said State will forever hold the same for the use and benefit of the children of the State; that the said State will invest said money in some profitable bank stock, and the profits therefrom I desire to be appropriated annually forever toward the education of the children of the State of Kentucky, particularly the poor and most unenlightened. I desire that this money constitute a permanent school fund, and the interest from this fund to be appropriated annually toward the education of the children of this State."

The testatrix owned at the time of her death in fee simple a tract of 348 acres of land situated in Lewis county; one of 300 acres in Nicholas county, and an undivided one-fifth interest in 460 acres in Nicholas and Robertson counties. In addition to these lands she had in possession, under a title bond from H. C. Bedinger, 452 acres lying on the Ohio river at the mouth of Quick Run creek, in Lewis county.

Robert Bedford survived his mother twenty-seven years, and died testate in Mason county, Kentucky, where he then resided, December 23, 1887. His will was probated in the Mason County Court February 14, 1888. He died without issue, and by his will devised all his estate to his wife, Susan Bedford, who survived him. It does not appear that the estate of Elizabeth M. Bedford was settled by Robert Bedford, executor, and after his death T. S. Clark was, by order of the Lewis County Court, appointed administrator thereof, with the will annexed, and duly qualified as such. Thereafter he brought suit in the Lewis Circuit Court to obtain a decree for the sale of the lands, owned in fee simple by Elizabeth M. Bedford at the time of her death. The Commonwealth of Kentucky and its then agent, G. S. Wall, were made parties to the action, together with the brothers and only heirs at law of Elizabeth M. Bedford. An answer was filed for the State by its agent, wherein claim was set up by it to the proceeds of the lands under and by virtue of the will of Elizabeth M. Bedford, and consent given to accept it as a trust for and on behalf of the children of the State.

Susan Bedford, widow and sole devisee under the will of Robert Bedford, also filed an answer in the action, which was made a cross petition, and in which it was insisted that the devise in the will of Elizabeth M. Bedford to the State of Kentucky for the education of its children was so vague and uncertain as to make it absolutely void, for which reason the absolute title to the lands sought to be sold vested in her husband as the only child and heir at law of the testatrix, and at his death in her by the provisions of his will. The chancellor adjudged, however, that the State of Kentucky was

entitled after the death of Robert Bedford, the life tenant, to the proceeds of the lands described in the petition, under the devise in the will of Elizabeth M. Bedford, and directed its payment to the State's agent. From that judgment an appeal was taken by Susan Bedford, but it was affirmed by this court and the validity of the devise to the State upheld. (Bedford, &c. v. Bedford's Adm'r, &c., 99 Ky., 278.)

The tract of 452 acres lying on the Ohio river at the mouth of Quick Run creek, in Lewis county, was not mentioned or sold in the action referred to. This tract was purchased by Elizabeth M. Bedford of her brother, H. C. Bedinger, in 1833, for $3,700 cash in hand paid, and was then supposed to contain 470 acres. At the time of its purchase Bedinger executed to her a title bond, wherein the land was particularly described, the payment of the full consideration acknowledged, the undertaking expressed that the possession of the land would be delivered to the vendee December 1, 1833, and that a deed of general warranty conveying the same would be executed and delivered to her by the vendor on or before August 1, 1834. Possession of the land was delivered at the time stipulated in the bond, but the vendor, Bedinger, before the arrival of the time fixed for the execution of the deed, removed to and became a resident of the State of Missouri, where he died in 1847; without having executed a deed to his vendee.

On October 12, 1857, Elizabeth M. Bedford brought suit in the Lewis Circuit Court against the children and heirs at law of her vendor, H. C. Bedinger, setting forth her purchase of the land, the payment by her of the purchase money, and the covenants of the title bond, which was filed with the petition, and prayed a specific performance of the contract by the execution to her of a proper deed upon the part of the heirs at law of the vendor.

The heirs filed answer, admitting the sale of the land upon the terms contained in the title bond, the payment of the purchase money, and expressed their willingness to execute the deed demanded, but averred that the vendee, under color of the title bond, was claiming and holding more of their father's land than had been sold her. For the purpose of recovering the alleged excess of land, or its value, the answer was made a counterclaim against the plaintiff, and judgment asked against her. It, however, later appeared from a survey of the land described in the title bond, made at the instance of the defendants, that, instead of an excess, there was a shortage in the quantity. In other words, it was found that instead of there being 470 acres in the tract, as expressed in the title bond, it contained only 452 acres, 2 rods and 18 poles.

During the pendency of the action, and before a judgment was entered therein, the death of Elizabeth M. Bedford occurred, as hereinbefore stated. In June, 1860, this fact was suggested to the court and an order of revivor entered, and at the succeeding term Robert Bedford filed an amended petition and answer to the counterclaim, in which he set forth the fact that he was the sole devisee under the will, and the only child and heir at law of the testatrix, and asked that the suit be prosecuted in his own name and for his own use.

In June, 1863, a judgment was entered in the cause by agreement of the parties, whereby the commissioner was ordered to execute a deed conveying him the land in fee simple, which was done accordingly, and the deed put

to record June 6, 1868. The land was held by Robert Bedford under this deed until his death, which occurred December 28, 1887, and after his death Susan Bedford, his widow and sole devisee, held it, under and by virtue of the provisions of his will, until her death in 1899, though on October 11 she, by deed of general warranty, conveyed it, together with a more valuable tract in Mason county, to her nieces, Nettie Pogue and Carrie E. Clark and their husbands, reserving, however, to herself the control, use and profits thereof during her life. Susan Bedford never had any children, but had reared the two nieces to whom, and their husbands, respectively, the land was conveyed by her as stated. The lands thus conveyed them were jointly held by the grantees after the death of Susan Bedford until March 20, 1900, at which time they agreed that Clark and wife should take and own the 452 acres at the mouth of Quick Run creek, in Lewis county, and Pogue and wife the land in Mason county, and pay Clark and wife $5,000 in cash, which was done, and deeds to that effect were passed between the parties. This action was instituted January 8, 1902, by the appellants, Commonwealth of Kentucky and R. D. Wilson, its agent, against the appellees, T. S. Clark, Carrie B. Clark, his wife, B. F. Jackson, Chas. Variers, John D. Hendrickson and C. B. Liles, to recover possession of and quiet its alleged title to the 452 acres of land situated on the Ohio river at the mouth of Quick Run creek, in Lewis county. The petition, as amended, contained the averments that the land mentioned was by the will of Elizabeth M. Bedford, deceased, devised to her son, Robert Bedford, for life, with remainder, in the event of his dying without issue, to the Commonwealth of Kentucky in trust for the education of the poor children of the State; that though Robert Bedford survived his mother many years, he remained and died childless, by reason of which the title to the land in question vested in the Commonwealth in trust for the education of the poor children of the State, and that the appellees were wrongfully holding the possession of the land and claiming it as their own. Besides seeking to recover possession of the land and the quieting of the State's alleged title thereto, it was also asked in the petition that the land be sold and its proceeds applied to the use expressed in the will of the testatrix.

The appellees, T. S. Clark and Carrie E. Clark, filed an answer, in which it is denied that the Commonwealth of Kentucky has any title to the land in controversy, and averred that they have and hold the title to same; and further, that they and those under whom they claim the land have had and held the actual possession thereof, adversely to appellants and all others, continuously for more than thirty years before the institution of this action, and pleaded the five, ten, fifteen and thirty years' statute of limitation in bar of any recovery of the land.

Appellants demurred to so much of the answer as pleaded the statute of limitation. The demurrer was sustained by the court as to the pleas of the statutes of five and ten years' limitation, but overruled as to the paragraphs that relied upon the statutes of limitation of fifteen and thirty years. Thereupon all affirmative matter in the answer was denied by reply and the cause was submitted upon the issues thus formed, the deposition of George M. Thomas, and a statement of facts reduced to writing by agreement of the parties. The chancellor, by the judgment rendered, dismissed the appel-

lant's petition, upon the ground that the action was barred by the fifteen and thirty years' statutes of limitation. The action of appellant is bottomed upon the theory that as by the will of Elizabeth M. Bedford, her son, Robert, had a life estate in the land in controversy, the State of Kentucky had no right of action until his death in 1887, and that as this action was brought within the fifteen years next following that event, the statutes of limitation do not apply.

In other words, the contention is, first, that during the lifetime of Robert Bedford limitation did not run, because his possession during that time is not to be counted as adverse to the remaindermen; second, that having qualified as executor of the will of his mother, the converting of his life estate into a fee simple title should not be allowed to defeat the trust created by her will. While it is true that the possession of a life tenant can not be adverse to the holder of the legal title in remainder, and likewise true that the possession of a trustee as such is not adverse to the cestui que trust, manifestly these principles can not apply to the case at bar unless the legal title in remainder had vested in appellant, and a legal title in the life estate had been held by Robert Bedford; in that event the remainderman would have no right of action either in law or equity until the termination of the life estate. But such was not the case here, for Robert Bedford acquired and held the legal title in fee simple by and under the deed from the heirs of Bedinger, and his title and possession were adverse to the remaindermen who had only an equitable estate or equitable title in remainder. Under such circumstances it would seem that the holder of the equitable title in remainder had a right of action during the life tenancy, if not to recover the land or its proceeds, at least to set aside or reform the deed or have the trust declared by a court of equity, and such a decree entered as would ultimately lead to its enforcement.

It is apparent that the legal title to this land was never in Elizabeth M. Bedford. Though she endeavored to obtain it by the action against the Bedinger heirs, her death occurred before the end in view could be accomplished. After her death the judgment of the court in the action then pending should have directed that Robert Bedford be conveyed by deed from the Bedinger heirs an estate for life in the land, with remainder in the event of his death without issue, to the State of Kentucky in trust for the education of the children of the State, as in the will of Elizabeth M. Bedford provided, and the deed should have been executed by the commissioner pursuant to such judgment, but this was not done. It is evident that the vesting of the fee-simple title to the land in Robert Bedford was not accidental. It was intentionally done, because he and his counsel, George M. Thomas and Harrison Taylor, were of the opinion that his mother's will in respect of the devise of the proceeds of her lands to the State for purposes of education was void for uncertainty, and that, therefore, no remainder was created by it, failing which he would take the estate absolutely as the only heir at law. It afterwards developed that this conclusion was erroneous, but the act of Robert Bedford in taking to himself the title in fee simple manifested a purpose to repudiate the trust created by the will, and amounted to a renunciation thereof, of which the deed gave notice to the remainderman.

From that time until his death Robert Bedford's possession of the land was adverse to the remainderman and all others, and such was the character of the possession of his successors to the legal title down to the time of the institution of appellants' action, a period of more than thirty-eight years.

We are of opinion that appellant's cause of action accrued upon the renunciation of the trust by Robert Bedford, which occurred when he accepted and put to record the deed from the heirs of Bedinger, June 6, 1863. It must be presumed that the recording of the deed gave the appellant, Commonwealth of Kentucky, notice of the renunciation by Robert Bedford of the trust created by his mother's will, and that his possession of the land was adverse to the remainderman. The appellant, at any time within five years after its discovery of the wrongful conversion by Robert Bedford of the title to the land from a life estate to a fee simple, and not later than ten years after the act, might have sued to correct or set aside the deed whereby the title was thus changed. (Kentucky Statutes, sections 2515 and 2519.)

In Treadway v. Pharis, 90 Ky., 663, which was an action brought by the children and heirs at law of Pharis by his first wife, against his second wife and her children by him, for a division of his lands fairly, but in such manner as to exclude a tract of fifty-eight acres conveyed the decedent in 1848 by one Tarlton Embry, which they prayed might be adjudged to belong to them to the exclusion of the last wife and her children, because the consideration was paid to Embry out of the estate of their mother under an agreement between her and their father that the deed therefor was to be made to her, but which the father fraudulently, and without her knowledge or consent, caused to be made to himself. The inquiry was whether the recovery sought was barred by the thirty years' statute of limitation, in passing upon which the court said: "Notwithstanding about forty years elapsed from the execution of that deed to the institution of this action, avoidance of the statute of thirty years was pleaded in the reply upon the ground that their father was tenant by curtesy, and no action to recover the land could have been maintained until his death. But without considering or deciding as to the sufficiency of the reply in that respect, it seems to us that they are barred by section 6, if not by section 2, article 3, chapter 71, General Statutes, for as the ground of relief is the alleged fraud of their father in causing the deed made to himself instead of their mother, they had a cause of action, if ever, upon her death, and not having sued within five or ten years thereafter, they can not now maintain an action to set aside the deed, which has to be done before they can recover the land. While they could not recover the land during the lifetime of their father, there was nothing to prevent institution of an action to set aside the deed, and thereby changed the character of his claim and possession from that of an absolute ownership to a tenancy by courtesy."

Obviously, the plaintiffs in the case supra could in no event have recovered the land, the title of which had been wrongfully converted by their father, except upon the theory that a court of equity would treat his holding of the title under the circumstances as in trust for the heirs at law of his first wife, subject to his right to the possession and use thereof for life as a tenant by the curtesy. The trust was a constructive or implied trust, created by operation of law, consequently it did not stop the running of the

statute of limitation, and though the trustee could not be disturbed in his possession of the land during his life, there was nothing to prevent the heirs at law from maintaining an action before his death and within the statutory period to set aside the deed by which he wrongfully took to himself the title, but having failed to avail themselves of this plain and certain remedy, they slept upon their rights until the statute of limitation interposed a complete bar to the enforcement of the trust.

In Packard v. Beaver Valley Land and Mining Co., 96 Ky., 249, which was an action to recover land of the plaintiff that had been sold for taxes and bought by the State, and was thereafter conveyed by deed from the auditor to one Rice and by the latter, by a subsequent deed, to the defendant, the plaintiff prayed a cancellation of the deeds, and for the recovery of the land. One of the defenses interposed was a plea of the five years' statute of limitation. The court said: "It can not be doubted that when, by fraud or questionable contrivance or irregularity, the title of the owner of land has been wrested from him and converted to the use of another, he may bring his suit to cancel the conveyance, and it is no obstacle to the obtention of relief that the plaintiff is not in the actual possession of the land; that fact does not make less real the cloud on his title, and prevent the value of his property from being affected by the obnoxious deed. In such a case courts of equity will afford relief, or otherwise a wrong would be remediless. (Herr, &c. v. Martin, 96 Ky., 879; National Bank of Commerce v. Licking Valley L. & M. Co., 15 Ky. Law Rep., 211; Kant v. Hall, 15 Ky. Law Rep., 511.) * * * But while the pleas of the defendant so far as they are founded on the particular statutes invoked (section 16, 'Auditor's Agent Act,' 1880, etc.) are unavailing, the plea in the first paragraph is a general one, and avers the lapse of five years between the procurement of the deeds sought to be cancelled, and the institution of the action. * * * The limitation in such case is five years, though the cause of action is not deemed to have accrued until the discovery of the fraud or mistake, but in no event can such an action be brought ten years after the act complained of. (Sections 2 and 6, article 3, chapter 71, General Statutes.) The presumption is that plaintiff knew of these deeds when they were executed and recorded in the clerk's office, but whether he did or not, more than ten years have elapsed since their execution and the institution of this action."

In the case of Baseman's Heirs v. Batterton, 1 Dana, 432, the facts are strikingly similar to those of this case. Baseman died possessed of a tract of land which he held by virtue of a bond for the title from Owings, and commissioners appointed by the county court of Bourbon in 1785 made partition of it among five of his children, of whom Catharine Baseman was one. One Hopper afterwards married Catharine and took possession of the part allotted to her. In 1808 Catharine and her husband united with the others between whom the land had been divided, in a suit in equity against Owings, Baseman's vendor, for a conveyance of the land to them respectively, according to the stipulations of the title bond given their father and division as made. Pending the action Catharine died, having first given birth to a child who survived her several weeks. The suit was abated as to Catharine and revived in the name of Hopper, heir at law of Francis Hopper (the child), who was the heir at law of Catharine. This was done upon

the mistaken idea entertained by the parties and the court that upon the death of the child the father was entitled to her share of the land as heir at law, whereas he was only entitled to the possession and use thereof for life as tenant by the curtesy, as the legal title went to those who would have inherited from Catharine if she had died without children.

A decree was rendered in the action ordering a conveyance by commissioner of the part that had been allotted Catharine to Hopper as heir at law of his child, which was done, the commissioner's deed reciting, as the decree had done, that he was heir at law to the child, who was heir at law to the mother. Hopper continued in possession of the part thus conveyed him until 1807, when he sold and conveyed it to Batterton, who took and thereafter held it in possession. In June, 1827, Hopper died, and soon thereafter Baseman's heirs instituted suit, in the nature of a bill of review, against Batterton and the heirs of Hopper, alleging the mistake committed in the decree and commissioner's deed to Hopper in conveying him in fee that part of the land allotted to his wife, Catharine, and seeking to recover the land of Batterton, Hopper's vendee.

Batterton relied on the undisturbed possession in himself and Hopper of upwards of twenty years before the institution of the suit, and that he was a purchaser for value, without notice of the equity of the complainants. In passing upon and deciding the questions involved the court said: "The sufficiency of the latter ground of defense, that Batterton was a purchaser for value (without notice), need not be inquired into, as we think the first must avail and protect him. It has been attempted to obviate the effect of the lapse of time by asserting that as Hopper originally took possession in right of his wife, he must have continued to hold after her death as tenant by the curtesy, and as such he and his alienee had a right to hold during his life, and consequently that the limitation would not commence running until after his death. All this might well be conceded provided there had been no decree and conveyance pursuant to it, purporting to transfer to Hopper the absolute fee. * * * The right to correct the mistake in the decree accrued to Baseman's heirs the instant it was rendered, and it must, on every principle, be held to have been barred before the institution of this suit. Whether if the application to correct the decree and for the relief now sought had been made against Hopper alone, before the lapse of twenty years, but after the period allowed for bills of review, relief would have been granted, need not now be determined. The case is now presented in a very different attitude from that. Hopper and his alienee held the property upwards of twenty years in undisturbed possession before the institution of this suit. However gross, therefore, may have been the error or mistake committed by the decree in supposing the land had descended to Hopper from his infant child, we think it is entirely too late, on the ground of such error or mistake merely, to disturb a purchaser from Hopper for a full and valuable consideration."

In the case supra Batterton took the legal title from Hopper, who, though a life tenant, in fact, had the legal title also and claimed the fee. In this case the appellees, Clark, derived the title from Robert Bedford, who, though only entitled to a life estate, also held the legal title to the fee. The heirs of Baseman claimed the land under Catharine Hopper's child, subject

to the life estate of Hopper as tenant by the curtesy, while here the land is claimed by the State of Kentucky under Elizabeth M. Bedford, who had an equitable title only, subject to the life estate of Robert Bedford. In the one case the legal title was acquired by Hopper through a mistake, and in the other by Bedford in the same manner. As well said by counsel, the only practical difference in the two cases is in the nature of the prayer of the petition, as in that case the plaintiff recognized the effect of the decree of the court and asked that it be set aside, while in this the plaintiff seeks to ignore the decree of the court and the deed to Bedford, and asks that they be treated as void. But in both cases the plaintiffs sue to recover the land.

If limitation barred a recovery in Treadway v. Pharis and Baseman's Heirs v. Batterton, supra, why, upon both principle and analogy, should it not do so in this case? The following additional authorities, which we will not take time to notice in detail, will, we think, sustain the doctrine announced in those already considered: Patrick's Heirs v. Chenault, 6 B. M., 315; Edwards v. Woolfolk's Adm'r, 17 B. M., 376; Barclay, &c. v. Goodloe, 88 Ky., 500; Black v. Black, 21 Ky. Law Rep., 408. We think an examination of the cases cited by counsel for appellant will show that they do not conflict with the authorities supra. While many of them hold that the cause of action does not accrue to the remainderman until the termination of the life estate, it will be found that they are cases in which the remaindermen had the legal title in remainder, and being without right of possession during the life estate, limitation did not commence to run until the life estate ended.

Realizing this, counsel for appellant would avoid the rule by insisting that the Bedinger heirs, whose ancestor was Elizabeth M. Bedford's vendor, held the legal title in trust for her, and that in conveying the legal title to Robert Bedford they made him the trustee of the legal title for the benefit of the owner of the equitable interest in remainder. But conceding this to be true, he was not the trustee of an express trust. The trust thus created was merely a constructive trust, and if the action had been brought in time his holding would doubtless have been adjudged to have been that of a trustee. But if his holding under the deed from the Bedinger heirs is to be regarded as adverse to the remainderman, and such was manifestly the case, it amounted to a renunciation of the trust, and such adverse holding, if extended by him and those claiming the land after him as against the remainderman, so as to cover the time fixed by the statutes of limitation before the institution of appellants' action, then the action is barred by limitation.

In Tiedman on Real Property, section 496, it is said: "All the trusts which have been heretofore discussed receive the further appellation of express trusts, because they are expressly created by some deed or other instrument of conveyance, and are to be distinguished from those trusts which are explained in the succeeding paragraphs, and which arise by operation of law for the prevention of injury and the furtherance of justice. Express trusts are created by the express act of the party owning the property. * * * (Section 497.) Trusts which arise by implication of law are subdivided by the books into implied, resulting and constructive trusts."

It is well settled that limitation does not run during the existence of an

express trust. But it is equally well settled that it does run during the existence of a constructive trust.

In Perry on Trusts, 865, 4th edition, it is said: "It has been urged that the statute can not apply in favor of persons who become trustees by construction of law, as where a person is construed into a trustee of property fraudulently obtained, or where a trust estate is traced into his hands, or where a resulting trust arises; and that the cestui que trust is not precluded, in such cases, from his remedy by lapse of time. But the later authorities establish the doctrine that the statute applies in such cases. * * * All trusts arising by operation of law, whether implied, resulting or constructive, are subject to the statute. Where persons claiming in their own right are turned into trustees by implication, the bar will become effective. Equity will refuse to interfere in cases of implied trusts after long acquiescence, not only when time has dimmed the facts, but even where it is perfectly clear that relief would originally have been given."

It seems to be clearly established that Robert Bedford claimed adversely to the remainderman and all others from the time he took the deed from the Bedinger heirs, and such was the possession of his widow and appellees, the Clarks, after his death. Neither the judgment nor deed under which Robert Bedford held the land in controversy was or is void. But both might have been avoided at the suit of the remainderman, if brought in proper time.

In Wickliffe v. City of Lexington, 11 B. M., 161, it is said: "It is argued, however, that in cases of trust there is no limitation, and that the lapse of time does not bar this claim (a land controversy) against the city. This doctrine, however, applies alone to cases where there is a direct, express and subsisting trust of a purely equitable nature, and not to cases where the trust which once existed has been violated, and a suit is brought to obtain redress for the injury resulting from the breach of trust." (C. & L. R. R. v. Bowler's Heirs, 9 Bush, 468; Clarke, &c. v. Seay, 21 Ky. Law Rep., 896; Robinson v. Stone, &c., Sup. Court, Alabama, 45 L. R. A., 66.)

It can not be contended that Robert Bedford in qualifying as executor of his mother's will undertook to discharge the duties of the trust created thereby; he was not authorized or expected to sell any of the lands of the testatrix, the proceeds of which are directed by the will to be paid to the State of Kentucky for the education of its poor children, for there could be no sale of the lands until the termination of his life estate, that is, until his death without issue. At most he was only charged with the duty of preserving the property from which the trust fund was ultimately to be raised. In taking to himself the deed from the Bedinger heirs he converted his interest in the land in controversy from an equitable life estate into a legal title in fee simple, which he had no right to do; he, therefore, became a constructive trustee and nothing more, though he did not regard himself as such. Upon the contrary, by his act in thus taking to himself the legal title, and his adverse holding of the land until his death, he threw upon the equitable remainderman the burden and responsibility of taking the necessary steps to have the trust declared and its rights fixed. This responsibility the remainderman did not accept until its right to sue had been barred by limitation.

We strongly incline to the opinion that appellant's action is barred by the five years' statute, as in Treadway v. Pharis and Packard v. Beaver Valley Land and M. Co., supra, but whether that statute, or section 2522, which provides that "an action for relief not provided for in this or some other chapter can only be commenced within ten years next after the cause of action accrued," applies, need not be decided; in any event we are clearly of opinion that, as the cause of action accrued in 1863, and this action was not filed until 1902, whatever rights or equities the appellants may have had are barred by the statutes of limitation of fifteen and thirty years.

Wherefore, the judgment is affirmed.

GILCHRIST, &c. v. COLLOPY, &c.

(Filed November 18, 1904.)

1. Corporations—Directors —Election — Stockholders—Working agreement—Where two cities own each one-half of the stock in a bridge connecting them, and by the charter of the bridge company the affairs of the company are to be managed by five directors chosen yearly by the shareholders on a named day, and by a working agreement between the two cities, in alternate years, one should elect three and the other two of the directors, and on the day named in the charter, at the proper time and place for the meeting, the shareholders of one of the cities by their authorized representative voted the shares of the stock of said city for two directors, the stockholders of the other city not being represented at said meeting, the two directors so chosen were legally elected, although but half of all the stock was represented, and the fact that the stockholders elected only two directors instead of five, does not invalidate the election of the two.

2. Installing directors—Injunction—Courts of equity—Jurisdiction—Upon the refusal of a corporation to install directors into office who have been legally elected by the stockholders, a court of equity has jurisdiction to grant a mandatory injunction for their installation.

Byrne & Reed for appellants.

S. D. Rouse and C. B. Thompson for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

The Newport and Covington Bridge Co. owns and operates a bridge over the Licking river, connecting the two cities of Newport and Covington. The stock of the corporation consists of 1,000 shares of the par value of $25 each, the whole owned by the two municipal corporations equally. By the charter the affairs of the corporation are to be managed by five directors, chosen annually by the shareholders on the first Monday in June. There seems to have been a working agreement between the cities that in alternate years one should elect three and the other two of the directors.

On the first Monday in June, 1903, the mayor of Covington attended at the office of the bridge corporation, and being properly authorized so to do, voted the stock of the city of Covington for the appellees as directors for the ensuing year. The stock of the city of Newport was not represented at the meeting. The appellees qualified by taking the oath of office, and presented

themselves to the corporation for installation, which was refused on the ground that there had been no legal election, and, therefore, they were not directors. Whereupon they instituted this action in equity against appellants for an injunction restraining them from preventing appellees exercising their duties as directors. Without further statement of the pleadings in this case, it is sufficient to say that they present for adjudication the following questions: First. Can less than a majority of the shareholders of a private corporation, upon the regular charter day, hold a valid election for directors? Second. Can persons claiming to be elected directors at such meeting, upon the refusal of the corporation to permit them to be installed, be placed in office in an equity action for an injunction? Third. Was the election void because only two of the five directors were elected? Of these in their order.

There is no question in this action as to sufficiency of notice of election, it being held on the day prescribed in the charter. Only half of the stock was represented. Some confusion has arisen on the subject in hand by a failure to distinguish those cases which turn upon statutes or by-laws, which require the presence and participation of the holders of a majority in value of the shares in order to constitute a legal quorum for the purpose of transacting the business of the corporation, from those cases which turn upon the common-law regulation of the matter. As we have no statute bearing upon this subject, and there is no provision in the charter or the by-laws of the corporation prescribing what proportion of the shares constitute a quorum, we must of necessity rely upon the common-law rule.

In Morawetz on Private Corporations, 2d edition, section 476, the rule is thus stated: "The majority of a corporation means that portion of the shareholders present at a general meeting who are entitled to control the corporation by their votes. It is not necessary that a majority of all the shareholders, or a great part of its shares, be present at a meeting in order that the resolutions of the meeting shall be binding on the corporation. In the absence of an express provision to the contrary, the rule is that such of its shareholders as actually assemble at a properly convened meeting constitute a quorum for the transaction of business, and a majority of that quorum have authority to represent the corporation."

Kent in his Commentaries, volume 2, page 293, says: "There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case a majority of those who appear may act: but in the former a majority of the definite body must be present, and then a majority of the quorum may decide. This is the general rule on the subject; and if any corporation has a different modification of the expression of the binding will of the corporation, it arises from the special provision of the act or charter of incorporation."

Cook in his work on Corporations, 4th edition, section 607, says: "The question has arisen whether the meeting can be held and business transacted when the majority in interest of the stockholders are not present. But the law is clear that the stockholders who attend a duly called stockholders meeting may transact the business of the meeting, although a majority in interest, or in numbers, of the stockholders are not present." * * *

The case of Brown v. The Pacific Mail Steamship Co., 5 Blatchford, 525' was an action instituted by the stockholders of a majority of a corporation to prevent an election for directors to take place until certain questions relating to the right to vote the stock could be settled, it being alleged that at the approaching election the stockholders who constituted a minority had entered into a conspiracy to obtain an injunction against the holders of the majority of the stock, preventing them from voting, and before the matter of injunction could be adjudicated the minority would elect directors and secure control of the corporation. It became necessary for the court to consider whether such an election would be valid. If valid, the holders of the majority of the stock would be injured; if invalid, they would have no ground for injunction. The court said: "Certainly, if there ever was a case for relief of some kind by injunction, this case is one of that kind, to prevent the commission of so great and admitted a wrong, wholly undefended. It is a case in which there would be no adequate remedy at law; because the law, as settled by the Supreme Court of the United States, in regard to the jurisdiction, in suits in equity, of the courts of the United States, in view of the statute, which declares that there shall be no remedy in equity where there is a plain, adequate and complete remedy at law, is that the remedy at law must be as efficient to the ends of justice, and its complete and prompt administration, as the remedy in equity. Now, in the present case, the election taking place under these circumstances, which it is thus admitted will be the circumstances of the case, would be perfectly legal, although accomplished in this way by a minority of the votes. There would be no ground, so far as I am able to perceive, for setting aside the election, because an injunction, obtained from a proper court having jurisdiction, had excluded certain persons from voting."

The learned judge thus fully recognized that a minority in value of the shares of the stock of a corporation could hold a valid election for directors, although the majority were kept from participation therein by the wrongful acts of the minority. The principle has not been carried so far in any other case with which we are acquainted.

In the case of Morrill v. Little Falls Manufacturing Co. (Supreme Court of Minnesota), 21 Ky. Law Rep., 174, it is said: "The second objection (a want of a majority of the stockholders at the meeting) is equally untenable. Where the charter and by-laws of a corporation are silent on the subject, the common-law rule is that such of the shareholders as actually assemble at a properly convened meeting, although a minority of the whole number, and representing only a minority of the stock, constitute a quorum for the transaction of business, and may express the corporate will, and the body will be bound by their action. (Omitting authorities cited.) The contention of appellants, that this rule applies only to such organizations as towns, churches, and the like, and not to stock corporations, finds no support either in reason or authority. The correct distinction is between a corporate act to be done by a select body, of a definite number, as, for example, a board of directors or trustees, and one to be performed by the constituent members of the corporation. In the latter case, a majority of those who appear may act."

The reason for the common-law rule is obvious. If it were otherwise, the

affairs of the corporation, through either the negligence or the malevolence of a majority of the shareholders, might be allowed to go to ruin. We know of no power by which the shareholders can be forced to attend the meeting of the corporation, but the law affords a sufficient remedy for this danger by placing the control of the property in the hands of those shareholders who are sufficiently interested in its affairs to attend the corporate meetings. If the rule we have announced did not prevail, a designing majority of the shareholders, who had obtained possession of the corporation, by electing the directors, could retain the management indefinitely, no matter how injurious that management might be to its affairs, by simply abstaining from its corporate meetings. The second objection urged by appellants against the judgment is that an equitable proceeding is not warranted in a case like this. This claim is based upon section 488 of the Civil Code, which is as follows: "If a person usurps an office or franchise, the person entitled thereto, or the Commonwealth, may prevent the usurpation by an ordinary action." It is said that where the Code points out a remedy, it is exclusive. This position is, perhaps, sound, but it has no application to the case at bar. The office meant by the section of the Code is a public office, and the remedy is given, either to the person entitled to the office, or to the Commonwealth. It has no application to the office of director of private corporations. The cases cited by counsel for appellant all involve public offices. In the case of Proctor Coal Co. v. Finley, &c., 98 Ky., 405, there was involved, alone, the question as to which of two contending sets of directors had been legally elected at a stockholders' meeting, and the remedy adopted was by bill in equity, with injunction. In the case of Kelly v. Mitchell, Id., 218, Judge Lewis, speaking for the court, said: "The subject-matter of controversy in this action is possession and control, according to articles of incorporation, of the property and business affairs of the 'Oregon Gold Mining Co.,' and is exclusively between plaintiffs, suing therefor as directors and executive officers, certain stockholders uniting with them, and defendants, who, as incumbents, plead an adverse claim. And thus was formed the single issue in the action of title to the office."

To the same effect is Schmidt v. Mitchell, 101 Ky., 570. And yet both were in equity with injunction as an ancillary remedy. But even if this position is unsound, the question between appellants and appellees was purely one of law, there being no real dispute as to the facts, and must, necessarily, have been disposed of by the court, no matter in what form the action was brought. The injunction came as a part of the final judgment, and appellants were not injured by the form in which the action was brought. They made no motion to transfer to the common law side of the docket, and we think the facts stated in the petition fully warranted the judgment, which, in effect, was that appellees, being lawfully elected directors of the corporation at the election held on the first Monday in June, 1903, were given their offices.

We are not impressed with the suggestion that the election was void for the reason that only two directors were elected, instead of five. The charter provides that five directors shall be elected annually, and that they shall hold over until their successors are elected. As said before, there seems to have been a working agreement between the cities, who owned the stock, as

to which should elect two, and which should elect three, of the directors in any one year. In 1903 it was Covington's time to elect only two directors, and, in good faith, it carried out that agreement, although it might have elected the five in the absence of the stock of the city of Newport from the meeting. The agreement between the cities alluded to, is essential to harmony between them, each owning one-half of the stock, and there being five directors to be elected. It is one so absolutely practical, and so eminently fair, that we think it should be upheld.

Perceiving no error in the record the judgment is affirmed.

GREEN'S EX'OR v. GREEN.

(Filed November 18, 1904.)

1. Decedent's estate—Action against—Services rendered—Instructions—In an action by a nephew against the estate of his deceased uncle for services on the farm and for nursing and caring for him while sick, an instruction to the jury that "if you believe from the evidence that the plaintiff rendered the decedent any services, and that said services were accepted by the decedent and that plaintiff has not been paid therefor, then you will find for plaintiff such sum as you believe from the evidence would be a just and fair compensation for the services rendered," did not correctly state the rule applicable to the case.

2. Expectation—Intention—The instructions should have been that in order to find for the plaintiff the jury must believe from the evidence that at the time the services were rendered there was an expectation and intention on the part of both plaintiff and the decedent that they should be paid for, and unless these facts were found by the jury they must find for the defendant.

3. Incompetent evidence—Error not assigned—Effect on appeal—On the trial of an action on a claim against the estate of a decedent, where the plaintiff was allowed to testify in the case without objection, and the fact that this was permitted by the court was not assigned as error in support of a motion for a new trial, the objection to the court's action can not avail the defendant on appeal.

Clore & Green for appellant.

W. W. Dickerson and Robert L. Greene for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted in the Grant Circuit Court by the appellee, Elijah A. Green, to recover from appellant, the executor of William P. Green, a claim of $950, alleged to be due him from the decedent's estate for work performed by him at the special instance and request of the decedent within two or three years next before his death, and which had never been paid.

The appellee was the nephew of William P. Green, and lived some two miles from the residence of the latter. The uncle was an old man, greatly afflicted and practically helpless. The services of appellee consisted in feeding the decedent's stock, looking after his farm, and other menial work,

but particularly in nursing and caring for him while sick. He sat up with him at nights, gave him injections so that his bowels would properly perform the functions of nature, carried out and emptied the slops, and performed other services for the sick man of a nauseating character.

The answer placed in issue the material allegations of the petition, and alleged affirmatively that the services rendered by appellee were gratuitous, being such as a relative and neighbor would naturally render without expectation or hope of reward. This was denied by a reply, thus completing the issues. A trial by jury resulted in a verdict and judgment in favor of the plaintiff (appellee) for the sum of $600. Of this appellant now complains. The objection of appellant, that the claim of appellee was not properly proved as required by section 3870, Kentucky Statutes, is untenable. An examination of the claim as made out shows that it comes up fully to the statutory standard, and the trial court properly overruled the motion to dismiss the case on that ground.

The appellee was unquestionably incompetent to testify as a witness in his own behalf against the estate of the decedent, but he was allowed to do so without objection on the part of appellant, and the fact that this was permitted by the court was not assigned as error in support of the motion for a new trial, therefore, the objection to the court's ruling on this subject can not avail appellant on appeal. It is urged that the witnesses who testified to the value of appellee's services did not qualify themselves as experts to depose on that subject. These were the neighbors and friends of both the appellee and his deceased uncle; they all professed to know the nature of the services rendered, and their value, and while they were not professional nurses, we think they were competent, under the circumstances, to express an opinion as to what the services were were reasonably worth.

At the close of the testimony the court instructed the jury as follows: "If you believe from the evidence that the plaintiff rendered the decedent any services, and that said services were accepted by the decedent, and that the plaintiff has not been paid for said services, then you will find for said plaintiff such sum as you believe from the evidence in this case would be a just and fair compensation to plaintiff for the services which you find he rendered the decedent, not exceeding $750, the amount claimed in the petition."

This instruction does not correctly state the rule of law applicable to this case. Galloway's Adm'r v. Galloway, 24 Ky. Law Rep.,, 857, was, in principle, similar to the one at bar. The claimant was the niece of the decedent, and claimed from his estate pay for household services rendered him. The court, in the opinion, said: "There was some proof that Nelson Galloway intended and expected that appellee should receive pay for her services from him, and also that she expected to be paid something, probably by devise, but there is no pretense of any sort of contract or agreement as to amount, or how or when the payment was to be made."

The court instructed the jury, in three instructions, that, in order to find for plaintiff, they must believe that the services were rendered; that there was an intention and expectation on the part of both appellee and decedent that she should be paid therefor, and that the services were performed at the instance or request of decedent with this intention and expectation or agreement on the part of both appellee and decedent; that unless these facts were found the verdict must be for defendant."

Instructions Nos. 1 and 2, given in the case cited, aptly state the law in this, and are as follows:

"No. 1B. If the jury believe from the evidence that the plaintiff, Maggie Galloway, within the time beginning August 24, 1894, and ending August 24, 1899, did, at the instance or request of Nelson Galloway, render to him services or labor, in the way of looking after and keeping clean and in order his room in the house in which he lived, making up and dressing his bed, mending, washing and darning his clothing, or in cooking for the family, of which he was a part, or did, after her father's family and said Nelson Galloway ceased to occupy the same house, at the instance or request of said Nelson Galloway, cook his meals, carry them to his room in cold weather, wash or mend his clothing, dress and keep in order his room, or perform such general housework for him; and shall further believe from the evidence that said service and work, if any, was rendered by the plaintiff with the intention and expectation on her part, and the intention and expectation or agreement on said Nelson Galloway's part, that she should be paid therefor, they should find for the plaintiff the customary and reasonable value of her services and labor so rendered by her, if any, as shown by the evidence, to said Nelson Galloway, not to exceed $10 per month, nor $600 in the aggregate.

"No. 2B. Second, upon the other hand, although the jury may believe from the evidence that labor and services were performed by the plaintiff for said Nelson Galloway of the character described in her petition, and at his instance and request; and if they further believe from the evidence that the same were performed without any intention at the time upon her part to charge her uncle therefor, or intention or agreement on his part to pay therefor, the law will presume that such labor or services were performed gratuitously, and in that event the jury should find for defendant."

Upon the return of the case the above instructions should, in legal substance, be given as the law upon the next trial. (Reynolds v. Reynolds, 18 Ky. Law Rep., 798; Lowe's Adm'r v. Webster, 19 Ky. Law Rep., 1208; Baxter's Adm'r v. Knox, Id., 1978; Frailey's Adm'r v. Thompson, 20 Ky. Law Rep., 1179.)

It is insisted by counsel for appellee that because appellant did not present instructions to the court he can not be heard to complain of the instruction given, although it may be erroneous. This is not the rule. In the City of Louisville v. Kehler, 25 Ky. Law Rep., 2008, it is said: "The rule is that only errors prejudicial to the substantial rights of the party complaining are grounds of reversal. In civil cases the circuit court is not required to give the whole law of the case in his instruction, but it is incumbent upon the litigants to ask such instructions as they deem proper."

The error in the instruction given was prejudicial to the substantial rights of the appellant, it permitting the jury to find for appellee (plaintiff) if the evidence shows that the services were rendered to, and accepted by, the decedent, and had not been paid for, all of which might have been true without affording appellant any right to recover under the principle enunciated in the cases above cited. The fact that appellant offered no instruction of his own preparation did not waive a positive and prejudicial error in the instructions given by the court. The court struck from appellee's

claim an item of $200, because he could not itemize it with sufficient certainty and definiteness. From this ruling of the court appellee has prosecuted a cross appeal. This claim is rather vague and indefinite, but, considering the fact that the parties were farmers, and unused to the keeping of books or accounts, we think it should have been submitted to the jury.

For the reasons indicated the judgment is reversed on the original and cross appeals for further proceedings consistent herewith.

CAUDILL v. LEMASTER.

(Filed November 18, 1904—Not to be reported.)

Contracts—Evidence—In this action by appellee for the cancellation of a deed made by her to appellant, her son-in-law, on the ground that he had failed to comply with the stipulations as to maintenance, the answer putting in issue the allegations of the petition, and the evidence on the whole conflicting, the verdict and judgment of the trial court will not be disturbed.

Conley & Williams for appellant.

C. C. Middaugh for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 27th of July, 1898, appellee, Anna Lemaster, conveyed by general warranty deed to her son-in-law, G. V. Caudill, a tract of land owned by her lying on the lower Laurel Fork of Blaine, in Johnson county, Kentucky, for the recited consideration that he should maintain and provide for her during her natural life; and that he should pay to the three daughters of the grantor $50 each. It was expressly stipulated in the deed that if appellant at any time failed to maintain the party of the first part, that the deed should be null and void. Appellant had moved to the home of appellee on the land conveyed some eighteen months before the execution of this paper and during the lifetime of her husband. About twelve months after the execution of this deed appellee left her home and took up her residence with another of her daughters, who was married to one Wm. Grims, and refused thereafter to return to appellant's house, and on the 28th of September, 1900, brought this action, asking a cancellation of the deed made by her to appellant upon the ground that he had failed to comply with the stipulations as to maintenance, etc. The answer of appellant was in substance a denial of the alleged failure of consideration, and averred that in addition to maintaining plaintiff, he had in fact paid the $50 stipulated for to one of the daughters. The evidence, as is usual in such cases, is extremely conflicting. Appellee and a number of her witnesses testified that appellant had failed to furnish her with necessary clothing and food, and that he habitually treated her with such rudeness and neglect as to make it impossible for her to live with him in peace and happiness. On the other hand, the testimony of appellant was to the effect that he treated her kindly, and furnished her such maintenance as was proper for people in their station of life. But the uncontradicted testimony shows that for the twelve months succeeding the execution of the deed he only expended $3.50 for shoes and clothing for her,

and that the wearing apparel was of the poorest character and insufficient to protect her at her advanced age from the rigor of winter weather. It is also shown that appellant collected $25 from the sale of the mineral rights of the farm and sold a calf belonging to appellee, which he failed to account for. The testimony shows that the reasonable rental value of the farm in connection with these items was amply sufficient to compensate him for the $50 paid to plaintiff's daughter. Upon the whole case we have reached the conclusion that we would not be justified in disturbing the finding of the trial court.

Judgment affirmed.

MOTLEY v. WILSON.

(Filed November 18, 1904—Not to be reported.)

1. Contested elections—Appointment of election officers—The fact that election commissioners within five days before the election appointed two Democrats to act as election officers in lieu of two others who declined to serve, and that this was done without notice to the Republican member of the board, is not sufficient to invalidate the election. The rule is that irregularities in the appointment of officers, or even in the holding of elections, does not vitiate the election.

2. Same—The true policy of the law is to sustain elections, and they will not be set aside on the ground of fraud, unless the facts definitely show that there has been such fraud in the holding of the election as that neither candidate can be adjudged to be fairly elected. There is nothing in the record in this action which connects appellee with any fraud, and one should not be deprived of an office to which he has been elected because of the fraud of third persons with whom he is in no way connected unless the fraud affected the result. To set aside an election it must be affirmatively shown that there was fraud, and that it affected the result to such an extent that it can not be determined who was elected.

John E. DuBose, Mitchell & DuBose and Sims & Grider for appellant.

Lewis McQuown, Jos. G. Covington, Thos. W. Thomas, R. C. P. Thomas and Sam'l D. Hines for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hobson.

On November 8, 1903, an election was held in Bowling Green for the office of mayor. Appellant Motley received 855 votes, and appellee Wilson received 880 votes on the face of the returns. Motley contested Wilson's election, and the circuit court having dismissed his petition, appeals to this court.

The only ground of complaint which we deem it necessary to notice is the charge that Wilson entered into a conspiracy with five persons to secure for him the certificate of election, regardless of the number of votes cast for him or the means necessary to obtain for him the certificate of election. One of the alleged conspirators was an election commissioner, three were election officers, and the fifth was not connected with the election. The ballots cast at the election were not offered in evidence by either party. The fact that

the election commissioners, within five days before the election, appointed two Democrats to act as officers of the election in lieu of two other Democrats who declined to act, and the further fact that this was done without notice to the Republican member of the board, is not sufficient to invalidate the election. The rule is that irregularities in the appointment of officers, or even in the holding of elections, do not vitiate the election. In view of all the evidence we concur in the conclusion of the circuit judge that the evidence does not warrant a judgment that the election commissioners were guilty of fraud or conspired for a fraudulent purpose in making these changes. They were sworn officers of the law and must be presumed to have done their duty, and their explanation of their conduct is reasonable. Aside from the action of the commissioners in substituting the two election officers for two other Democrats who declined to act, the charge of fraud rests entirely upon circumstances from which it is inferred that these two election officers and others practiced frauds in their precincts.

The city of Bowling Green is divided into six precincts, known as numbers 20, 21, 22, 23, 24 and 25. The charges of fraud in the conduct of the election and the counting of the votes relate to precincts 20, 21 and 24. In precinct 20 there were eight blurred ballots where plainly the blur had been placed on the ballot after it had been voted by the voter, and these were counted by the trial judge for appellant. In precinct 21 there were 345 names registered; seven were stricken off by the county court, leaving 338 voters. Appellant contends that thirty of these did not vote. The trial judge found that twenty-seven did not vote. This would leave 311 who did vote. The record shows that 312 votes were cast in the mayoralty race. It also appears that 321 ballots were counted as valid, there being eight spoiled, questioned or rejected ballots, making a total of 329, and that 342 ballots were taken out of the book. But after the election was over thirteen ballots signed by the clerk were found in an outhouse. How they got there is not shown. These thirteen ballots added to the 329 would make 342. It may be that these thirteen ballots were prepared for the purpose of stuffing the box, but if so they evidently were not counted, or, in fact, ever in the box. It may be that these ballots were prepared for some plan that was not carried out, and the evidence as much tends to sustain this theory as any other. The evidence also shows by all the election officers, both parties being represented and their representatives evidently being on the watch, that the ballots were placed in the box as received from the hands of the voters; that the boxes were empty when the voting began; that no other ballots were placed in the box except those received from the voters, and that at the close of the election the count was properly made of the ballots, and each candidate received all of the votes to which he was entitled.

In precinct 24 there were fourteen Republican ballots and one Democratic ballot found in the box which had not been signed by the clerk of the election. He offered to sign them, and the judges permitted him to do so, and the ballots were then signed and counted. There are, in addition, some minor matters, such as the drinking of some whisky by the officers on both sides in one precinct, a charge of attempted bribery after the election was over, which seems to have been without foundation, and a charge of misconduct by the clerk of the election in marking a ballot in precinct 20,

which is not supported by the weight of the evidence. These are, in substance, the facts relied on to annul the election on the ground of fraud.

The main ground for setting aside the election is the discrepancy in precinct 20 between the ballots voted and the number of registered voters in the precinct after deducting those who were shown not to have voted. We think the number of ballots taken from the book pretty well accounted for. If it be true that all the witnesses who testified as to not voting at the election are correct in their recollection, it is evident that more ballots were found in the box than were in fact cast by the true voters who were registered and entitled to vote. But it does not follow from this that the whole election should be set aside. There seems to have been an entire agreement between the election officers as to who was entitled to vote, and as to the placing of the ballots in the box and the counting of the votes. If there was a fraud in the election to the extent of the excess of ballots used over the number of registered voters, it can not be determined from the record that appellee was solely the beneficiary of the fraud, or that he was a beneficiary to such an extent as to vitiate the result. It was a very hotly contested election, and there was, perhaps, fraud on both sides to some extent; there nearly always is in hotly contested elections. If all elections were set aside where there was evidence of some fraud, few would stand. It may be that some of the persons stricken off by the county judge were allowed to vote, or that some votes were repeated or were given by persons personating others who failed to vote, or that some persons who testified to not voting at the election were mistaken in their recollection; and for all that appears, the result might have been the same had there been no fraud in this precinct. The election officers who represented both parties, as well as the challengers of both parties, were present, and it is hard to conceive that ballots could have been put in the box that were not voted without some of them perceiving it. The statute provides: "In case it shall appear from an inspection of the whole record that there has been such fraud, intimidation, bribery or violence in the conduct of the election that neither contestant nor contestee can be adjudged to have been fairly elected, the circuit court, subject to revision by appeal, or the Court of Appeals finally may adjudge that there has been no election. In such event the office shall be deemed vacant, with the same legal effect as if the person elected had refused to qualify." (Section 1596, Kentucky Statutes.)

There are usually irregularities in all elections, and, as a general rule, the misconduct of the election officers will not vitiate an election unless it is shown that the result was thereby affected. The true policy of the law is to sustain elections, and they will not be set aside on the ground of fraud unless the facts are such as to definitely show that there has been such fraud in the conduct of the election that neither candidate can be adjudged to have been fairly elected. To set aside an election is to deprive all the voters who voted at that election of their ballot, and it is to deprive the person who is successful at the election of the office which he won. The result, therefore, of the election should not be lightly set aside. Appellant does not show that the result of the election was affected; he merely shows that it might have been affected. He does not show that fraud was practiced against him; he only shows that it might have been practiced. There is nothing in the

record to connect appellee in any way with the fraud, or alleged fraud. A man should not be deprived of the office to which he has been elected by the fraud of third persons with which he is in no way connected, unless the fraud affected the result. Under all the proof, and in view of the result in the other elections held at the same time, we conclude that the circuit judge properly refused to set aside the election in contest for the reason that it did not sufficiently appear from an inspection of the whole record that there had been such fraud in the conduct of the election that neither the contestant nor the contestee could be adjudged to have been fairly elected. (Wilkins v. Duffey, 24 Ky. Law Rep., 918; Napier v. Cornett, 24 Ky. Law Rep., 76.)

It can not be maintained for appellant that he was in fact elected. It is earnestly insisted for him that the election should be set aside for fraud. But we can not throw out precinct 20 and decide the case on the other precincts simply because there were more ballots found in the box than there were registered voters who in fact voted at the election; for this would be to disfranchise all the legal voters in the precinct. Still less should the election in the entire city be set aside for that which is not sufficient to throw out the vote of the precinct in which it occurred. Fraud is not presumed; it must be proved, and to set aside an election it must be affirmatively shown not only that there was fraud, but that it affected the result to such an extent that it can not be determined who was elected.

Judgment affirmed.

LAWSON v. DAVIS.

(Filed November 22, 1904—Not to be reported.)

1. Conveyances—Liens—W. B. Davis conveyed to his daughter, the appellant, a tract of thirty-six acres of land in consideration of $200 to be paid within thirty days of his death to his personal representative, to be used for the payment of medical bills, funeral expenses, a tombstone and the payment of other debts which he might owe, and in this action to set aside the deed on the ground of fraud, while the court does not feel justified in setting aside the verdict, appellant pleaded and proved that she had paid out $218 in pursuance of her contract with her father, and for this she should be adjudged a first lien on the land.

2. Reversal of judgment of lower court—Where there was neither objection nor exception to the instructions of the court to the jury on the trial, and no ruling of the court in the admission of evidence which was prejudicial, this court will not disturb the verdict and judgment.

C. W. Lester, Tye & Denham and Sharp & Siler for appellant.

K. D Perkins for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Hobson.

On March 11, 1901, W. B. Davis conveyed to his daughter, Leanna Lawson, a tract of about thirty-six acres of land, which was part of his home place, in consideration of $200 to be paid within thirty days after his death to his personal representatives, to be used for the payment of his burial expenses, medical treatment, tombstone over his grave and that of his wife,

and the payment of any debts he owed at his death. He afterwards died on June 23, 1901, and this action was brought by J. H. Davis, one of his sons, to set aside the deed referred to on the ground that at the time of its execution he was not competent to make a deed, and that the deed was obtained by undue influence. On motion of the defendant the case was set for a jury trial on the question of the validity of the deed and the jury by whom the case was tried found by their verdict that the paper was not the deed of W. B. Davis. The court entered judgment on the verdict cancelling the deed, and Mrs. Lawson appeals.

Neither objection nor exception to the instructions of the court to the jury were made on the trial, and there can, therefore, be no reversal here on account of the instructions. We are not referred to any ruling of the court in the admission of evidence which was prejudicial, and from the reading of the bill of exceptions we do not see any error in this regard.

While the evidence was very conflicting, and there was evidence on behalf of the defendant from which the jury might well have found a verdict in favor of the deed, we do not think that, giving some weight to the finding of he jury, which has been approved by the judge presiding at the trial, we ought to set it aside on the ground that it is contrary to the evidence. The jury saw and heard the witnesses; they were on the ground and were much better qualified to judge the conflicting testimony than we are, especially as to the value of the land which some of the witnesses placed as high as $800. The grantor was seventy-nine years of age and was living with his daughter when the deed was made. He was in quite feeble health, and there is some evidence from which it may be inferred that he did not correctly understand the operation of the deed. At any rate it was a case where much weight should be given to the disparity of the consideration as compared with the value of the land. But it was pleaded and proved that Mrs. Lawson had paid out $218 on account of the burial expenses, medical attendance, tombstone and the like, and for this she should have been adjudged a first lien on the land when the deed was set aside. This money was paid out on account of the deed and in payment of the consideration on which it was made; and when the land is taken from her she should be made whole by the restoration of the money which she had paid out, with interest. If she received rents she must account for them, or if she enjoyed the use of the land she must be charged its fair and reasonable rent, and if she has paid taxes or other necessary expenses she should be credited therefor. On the return of the case, if necessary, it will be referred to the commissioner to report on these matters.

Judgment reversed and cause remanded for further proceedings consistent herewith.

STONESTREET v. JACOBS.

(Filed November 22, 1904—Not to be reported.)

H. G. Botts, G. B. Winslow and Winslow & Howe for appellant.

J. S. Gaunt and J. A. Donaldson for appellee.

Appeal from Carroll Circuit Court.

Judge Barker delivered the following response to petition for rehearing:

The plaintiff in her petition set out that she owned a tract of land which embraced the entire bed of Lick creek. The defendant denied the allegation of the petition, but did not make her answer a counterclaim. The spring which was in controversy lay on the defendant's side of the creek. The circuit court dismissed the plaintiff's petition, and that judgment was affirmed by this court on the ground that the center of the stream was the dividing line between the parties. There is not a syllable in the record to show that the defendant has any title beyond this line. There is nothing in the record upon which a judgment in favor of the plaintiff beyond this line could be predicated. The answer was not made a counterclaim and there was no proof of any trespass by the defendant beyond the center line of the stream. The judgment in favor of the defendant simply establishes the center of the stream as the dividing line between the parties, for that judgment must be read in connection with the opinion of this court affirming it.

Petition overruled.

HELY, &c. v. HOERTZ & CO.

(Filed November 23, 1904.)

1. Commissioner—Allowance—Under Kentucky Statutes, sections 398 and 1740, no allowance in any case should be made to the commissioner or receiver until he has filed in court a written statement under oath of the number of days he had acted, and he is only entitled to receive $3 per day for each day actually engaged in the consideration of the case, in the absence of an agreement by the parties that a larger sum should be allowed.

2. Same—Where the records of the court show a reference to the commissioner for report, and he accompanies the report made thereunder by a written statement under oath, reciting the number of days he acted in the case, this is sufficient evidence to establish the fact if not rebutted or the contrary proven by the party excepting.

W. M. Bullitt, Thos. W. Bullitt and Samuel Kirby for appellants.

Dodd & Dodd, Burnett & Burnett and Forcht & Field for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Chief Justice Burnam.

We are asked in the petition for an extension of the opinion heretofore delivered in this case to pass upon the exceptions of appellant to the allowance of $300 to the master commissioner for his services. Accompanying the report of the deputy commissioner, to whom the case was referred, was his affidavit, made in conformity with section 346 of the Kentucky Statutes, that he had been continually engaged in the consideration of the case forty-five days, and asked that he be allowed $300 for his services. Exception was filed to the allowance of this claim, which was overruled.

Upon this appeal appellant insists, first, that in the absence of an agreement between the parties that on the showing made by the commissioner in his affidavit that he was only entitled to be paid under section 1740 of the Kentucky Statutes $3 per day, or, in the aggregate, $135. But the further contention is made that after appellant had filed formal exceptions to the

claim made by the master commissioner for the allowance that the burden was upon him to establish the validity of his claim; and that his affidavit made in conformity with the statute was not prima facie evidence for that purpose, and, in the absence of other competent evidence, that his entire claim should have been rejected.

This court has frequently decided that under section 896 of the Kentucky Statutes no allowance in any case could be made to the commissioner or receiver until he had filed in court a written statement under oath of the number of days he had acted; and that under section 1740 of the Kentucky Statutes he was only entitled to receive $3 per day for each day actually engaged in the consideration of the case in the absence of an agreement by the parties that a larger sum should be allowed. (McHenry v. Winston, 105 Ky., 307; Garr v. Ray, 20 Ky. Law Rep., 1607.) But when the records of the court show a reference to the commissioner for report, and he accompanies the report made thereunder by a written statement under oath reciting the number of days he acted in the case, the affidavit is sufficient evidence to establish the fact, if not rebutted or the contrary proven by the party excepting thereto.

For reason indicated the allowance to the commissioner in this case is reduced to $135 and the case remanded for proceedings consistent with this opinion.

HALL, &c. v. DINEEN, &c.

(Filed November 23, 1904—Not to be reported.)

Judicial sale—Exceptions—Overruled—Sale confirmed—Payment in part—Subsequent appeal—Reversal—Recovery—Improvements—Rents—Where appellee after purchasing land at commissioner's sale filed exceptions to the sale which were overruled and sale confirmed, to which she excepted, and after paying part of the purchase money and taxes and making improvements thereon, was led to believe the sale was invalid, and took an appeal to the Court of Appeals, which sustained her exceptions and set aside the sale, Held—That she was entitled to recover back the purchase money she had paid, with interest, the taxes paid, and for the improvements to the extent they had enhanced the vendible value of the land; from which should be deducted the reasonable rent of the property during the time she held it, said rents to be regulated by the interest on the consideration and on the value of the improvements made in so far as they have enhanced the vendible value of the land.

W. H. Mackoy and H. B. Mackoy for appellants.

Wm. A. Byrne for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Settle.

The appellee, Ellen Dineen, purchased a house and lot in the city of Ludlow, Kenton county, at commissioner's sale, made under a decree of the Kenton Circuit Court in the action of Ronan v. Hall, &c., and executed bonds for the purchase price, amounting in the aggregate to $2,750.

Upon the filing by the commissioner of the report of sale appellee, as a matter of precaution, filed exceptions thereto, which were overruled by the court, the sale confirmed and a deed ordered to be made her by the commissioner, which was accordingly done. Thereupon she took possession of the property, and upon the maturity of the first bond paid it to the commissioner as therein and by the decree of sale provided, the amount thereof, principal and interest, then being $934.50. About that time, and after she had made certain necessary, lasting and valuable improvements upon the real estate, there arose in her mind, and that of her counsel, serious doubt as to the validity of the decree and sale under which she had purchased the property, and she prosecuted an appeal from the judgment of the chancellor confirming the sale. Upon that appeal this court decided that the lower court erred in confirming the sale and in decreeing a sale of the house and lot, and reversed the judgment, with directions to that court to sustain appellee's exceptions, and set aside the sale and the decree under which it was made. (Dineen v. Hall, 112 Ky., 278.)

Upon the filing in the court below of the mandate from this court, that court, by order duly entered, referred the case to a special commissioner, who was directed to take proof and report, first, the fair rental value of the real estate during the time it was in the "use, occupancy and possession" of appellee under her purchase thereof at the commissioner's sale; second, the amount paid by appellee upon the sale bonds executed by her to the commissioner for the purchase price; third, the taxes and assessments, if any, paid by her upon the real estate while it was in her possession; fourth, what improvements, if any, she made upon the property during her possession thereof, the value thereof, and extent, if any, to which they enhanced the value of the real estate; fifth, what waste, if any, was committed by appellee while in possession of the property.

The commissioner reported as directed, and charged appellee with rent at $12.50 per month; allowed her credit by interest on the amount paid on the first sale bond from the date of payment; also credited her with certain taxes which she paid upon the property and costs paid out of the proceeds of the sale bond, including the fees of the commissioner and the attorney who brought the action, and further credited her with the value of certain improvements upon the property, amounting to $173.17. Appellant excepted to so much of the report as fixed the rental value of the real estate at $12.50 per month while in appellee's possession, claiming that it should have been placed at $15 per month; also to the allowance of interest and the value of improvements, for which it gave appellee credit, and later filed an additional exception to the credits allowed her for the sums paid in satisfaction of the fees of the attorney and commissioner. In passing upon the exceptions the court sustained them to the extent of raising the charge for rent from $12.50 to $14 per month, and reducing the value of the improvements from $173.17 to $117.94, but in other respects the exceptions were overruled.

Under the judgment of the chancellor the accounts between the parties may be stated as follows:

IN BEHALF OF APPELLEE.

Amount paid by her in satisfaction of sale bond No. 1	$984 50
Interest on same from November 1, 1898, to August 1, 1903	266 19
Amount expended in repairing and improving house and lot	117 94
Amount paid in taxes on house and lot	156 09
Total	$1,474 72

IN BEHALF OF APPELLANTS.

Rent of house and lot from November 1, 1898, to August 1, 1903, at $14 per month	854 00
Amount due appellee	$620 72

It will be observed that the above statements show appellee entitled to $620.72, and this sum the commissioner was directed to pay her.

As far back as 1823 this court, in the case of Ewing's Heirs v. Handley's Ex'ors, 4 Littell, 363, laid down the rule that in all cases of rescission of contract the object of the chancellor should be to place the parties as far as possible in the condition they occupied before making the contract, and this rule, in all cases where the subject of the contract is real estate, recognizes the right of the vendee to have refunded to him the consideration paid for the property, with interest, and to be compensated for all lasting and valuable improvements he may have made thereon whilst he, bona fide, considered it his own, to the extent that such improvements enhance its vendible value.

Upon the other hand, the vendee, according to the same rule, is to be charged with the fair rental value of the property while he has it in possession, but "the rents should be regulated by the interest on the consideration, and on the value of the improvements, being neither greater nor less than their united amount." The foregoing rule was re-affirmed by this court in the later cases of Bell's Heirs v. Barnett, 2 J. J. Marshall, 258; Norton's Heirs v. Ridgeway, &c., 3 J. J. M., 258; Thomas v. Thomas' Ex'or, 16 B. M., 400; Hawkins v. Brown, 80 Ky., 186, and further adhered to in several more recent cases, one of the latest of which is Floyd, &c. v. Mackey, 23 Ky. Law Rep., 2030.

Without commenting in detail upon the several items constituting the sum allowed for improvements, we are of opinion that only three of them, aggregating $12.50, can not properly be classed as improvements, but while this is true, we think, upon the other hand, that the court improperly excluded at least eight of the items, aggregating $49.03, which were considered by the commissioner in making up the account for improvements. We do not, however, understand it to be the rule that in estimating the value of improvements, in a case like the one at bar, the court is to be governed by the cost thereof to the purchaser. The prime cost of the improvements may be considered as one of the elements in determining their value to the real estate, but after all the questions to be considered are, first, whether the improvements are of a lasting and valuable character; second, how far have they increased the vendible value of the real estate. So any allowance to appellee for improvements in this case must be made in accordance with these

principles. And in this view of the matter, we think it safe to say that the evidence furnished by the record shows that the sum allowed by the chancellor for the improvements made by the appellee upon the real estate, she has been compelled by the judgment of the court to surrender, was barely sufficient.

There is no ground for the contention of appellants' counsel that the chancellor erred to the prejudice of appellants in fixing the rental value of the house and lot at only $14 per month. The rent allowed is larger than the amount indicated by the weight of the evidence, and in excess of the interest on the consideration paid and on the value of the improvements, but as appellee had not paid the full consideration for the house and lot, it was proper to allow her interest only on what was paid, and this was what the chancellor did. It is, however, insisted for appellant that as appellee did not supersede the judgment, she can not recover that part of the consideration paid by her, or interest thereon, nor is she entitled to compensation for improvements made upon the real estate by her after the confirmation of the sale. We are unable to see any force in these objections. Though in taking the appeal appellee did not supersede the judgment, that fact does not manifest bad faith upon her part, but only raises the inference that she was unable to give bond. Whatever risk attended the failure to supersede the judgment was assumed by her. If the appellants did not get the use of the money paid by her in satisfaction of the first sale bond, it was their own fault. They had the right at any time after its payment to obtain from the court an order directing the commissioner to pay it to them, or to lend it out at interest.

As the result proved, appellee's doubt as to her title was well founded, and she acted wisely in taking the appeal, for had she not done so her defective or void title might, and probably would, have caused the loss to her of the property. We think, therefore, that her conduct throughout manifested the utmost good faith and prudence. For the foregoing reason it is apparent that the payment of the sale bond was proper, and that the improvements were not, in fact, made mala fide, and these facts being ascertained, it only remained for the court to adjust the matters of indebtedness arising from the setting aside of the sale, between the parties, according to the rule clearly defined by the authorities supra, and this, we think, has been fairly done.

We do not think the chancellor erred in refusing to charge appellee with the fees of appellants' attorney, the commissioner and clerk, which were satisfied out of the amount paid by her in discharge of sale bond No. 1. The fees of the attorney and commissioner had been allowed by the court, those of the clerk were properly taxed as allowed by law, and all were doubtless owing by appellants. If their payment out of the proceeds of the sale bond was proper, as was decided by the lower court, and no reason is apparent for our holding otherwise, no injustice resulted to appellants from their payment. In any event, whether the sale had been permitted to stand, or was set aside, the purchaser, who was not a party to the action nor interested in the proceeds of the sale, was not liable for any part of the costs.

Being unable to discover that the judgment of the chancellor is in any respect prejudicial to the rights of the appellants the same is affirmed.

IRONTON FIRE BRICK CO. v. TUCKER.

(Filed November 22, 1904—Not to be reported.)

E. B. Wilhoit for appellant.

Armstrong & Woods for appellee.

Appeal from Carter Circuit Court.

Judge Barker delivered the following response to petition for rehearing:

In the amended answer of the Ironton Fire Brick Co., which is copied on page thirty-five of the transcript, occurs the following language: "It denies * * * that said Mockaby died without issue on the 17th of December, 1867, or other time, or that he is dead at all."

The allegation of the petition as to the death of William David Mockaby, or as to his dying without issue, were, therefore, not uncontroverted on the record as urged in the petition for rehearing.

Petition overruled.

GUTHRIE v. BRIGHT.

(Filed November 22, 1904—Not to be reported.)

Contracts—Principal and agent—Pleading—In this action by appellee against appellant for $1,000 for services in procuring for appellant a purchaser for his farm, the only ground of complaint by appellant is that the trial court erred in striking the second paragraph from his answer, in which he avowed a willingness to sell and convey his farm to the alleged purchaser at the price agreed on per acre, payable in five equal installments. * * * This presented no defense to plaintiff's cause of action. An offer to pay the purchase price in cash, in the absence of stipulations for other terms, is a good tender, and an agent who has found a purchaser is entitled to his commissions, although the owner may refuse to consummate the trade as appellant did in this case.

Gilbert & Gilbert for appellant.

Willis & Todd for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, James C. Bright, brought this action against the appellant, James Guthrie, to recover $1,000 alleged to be due to him from the defendant for services in procuring, at his instance, a purchaser for his farm, containing about 416 acres, at the price of $100 per acre. The petition alleges that on or about the 1st day of September, 1902, the defendant, Guthrie, who was at that time the owner of a large and valuable farm, containing about 500 acres in Shelby county, which he wished to sell, contracted, agreed and covenanted with the plaintiff that if he would procure him a purchaser therefor at the price of $100 per acre that he, the defendant, would pay the plaintiff for such services the sum of $1,000; that pursuant to this agreement he did, within a reasonable time, procure a purchaser for defendant's farm, who was ready and able to take and pay for it at the rate of $100 per acre; and that plaintiff tendered such purchaser to the defendant, who

offered to purchase and pay for the farm either in cash or on such terms as defendant might desire as to payments, but that the defendant failed and refused to accept the said purchaser or price agreed upon. The answer was in two paragraphs. In the first he denied all the affirmative allegations of the petition. In the second, whilst he denied that he ever employed plaintiff at any time or on any terms to sell his farm at any price, he avowed a willingness to sell and convey same to the alleged purchaser at the price of $100 per acre, payable in five equal installments, which were to bear interest from date at the rate of 10 per cent. per annum until paid, principal and interest to constitute part of the purchase price of the land. On motion of the plaintiff the second paragraph of the answer was stricken out, and the issues raised by the first paragraph having been tried out before a jury, resulted in a verdict and judgment for the plaintiff, and the defendant appeals.

Substantially the only ground relied on for a reversal is that the trial court erred in striking out the second paragraph of the original answer. The plaintiff's cause of action as set out in his petition is that the defendant had agreed to pay him $1,000 if he would procure a purchaser for his farm at the price of $100 per acre; and that pursuant to this agreement he had procured a purchaser, who was ready, willing and able to pay for the farm $100 per acre. The allegation that the purchaser was willing to take the farm on such terms as the defendant might desire as to payment is mere surplusage, as it does not appear, either from the proof or pleadings, that their terms were included in the original authority to sell, but appear to have been inserted in the petition as mere make weights, showing the willingness of the purchaser to comply with any reasonable demand on this point by the defendant. The second paragraph of the answer, therefore, presented no defense to plaintiff's cause of action. An offer to pay the purchase price in cash, in the absence of express stipulations for other terms, is a good tender, and a real estate agent who has actually found a purchaser ready and able to comply with the terms of sale is entitled to his commission, although the owner may refuse to consummate the trade. (Jacob v. Buchanan, 11 Ky. Law Rep., 861; Cook v. Friar, 3 Ky. Law Rep., 612; Hobbs v. Miller, 14 Ky. Law Rep., 719.)

Perceiving no error the judgment is affirmed.

BROOKER, BY, &c. v. MAYSVILLE & BIG SANDY R. R. CO.

(Filed November 22, 1904.)

Removal of causes—Joint action—Ferry privileges—Allegations—Presumptions—In a joint action against the M. & B. S. Ry. Co., the C. & O. Ry. Co. and F. T. D. Wallace, who, as trustee, holds for the railroad companies the ferry privileges across the Ohio river from Springville, Ky., to Portsmouth, Ohio, for personal injuries to plaintiff on the ferry boat, in which plaintiff alleges that all three of the defendants were operating the ferry, Held—That the M. & B. S. Ry. Co., a resident corporation, under its charter, was given the same rights and privileges as apply to individual holders of ferry franchises, and under the statutes the C. & O. Ry. Co., being a nonresident corporation, can not lease or operate a ferry in this State (without consent of the county court and giving bond), and if it does it must do

so by virtue of the power given the M. & B. S. Ry. Co. by its charter. From the allegations of the petition that all three of the defendants were operating the ferry, the presumption is that the C. & O. Ry. Co. was operating under the charter granted the M. & B. S. Ry. Co., and it was error in the lower court to sustain a demurrer to the petition by the M. & B. S. Ry. Co. on the ground that it was not a necessary party to the action, and then sustain the motion of C. & O. Ry. Co. to transfer the action to the Federal court.

W. T. Cole, E. E. Fullerton and A. D. Cole for appellants.

W. H. Wadsworth and Worthington & Cochran for appellees.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Hobson.

Appellant, Harry Brooker, filed this suit against the appellees, the Maysville & Big Sandy R. R. Co. and the Chesapeake & Ohio R. R. Co., to recover for personal injuries received by him on a ferry boat operated across the Ohio river from the town of Springville, Ky., to the city of Portsmouth, Ohio, alleging that the Maysville & Big Sandy R. R. Co. owned a railroad running from Catlettsburg, Ky., to Covington; that the Chesapeake & Ohio R. R. Co. had leased the roadbed from it and has since operated it; that in connection with the railroad companies F. T. D. Wallace, who was also made a defendant, holds as trustee for the railroad companies, the ferry privilege referred to, and that all three of the defendants operate a steam ferry across the river from Springville to Portsmouth, transporting freight and passengers. By an amended petition he alleged that the Maysville & Big Sandy R. R. Co. was incorporated by an act of the legislature of Kentucky, and authorized by it and certain amendments thereto to conduct and operate a ferry across the Ohio river; that pursuant to the provisions of the charter the defendant, Wallace, holds in trust the ferry, landing and ferry franchise under which the ferry boat is operated, and holds the same in trust for the benefit of the Maysville & Big Sandy R. R. Co.; that this company leased and transferred its entire road together with its franchises so granted to it, including the ferry and landing to the Chesapeake & Ohio R. R. Co., which latter has been since in the exclusive possession and control of the ferry, and was operating it at the time he was injured. The Maysville & Big Sandy R. R. Co. filed a demurrer to the petition, which was sustained. The Chesapeake & Ohio R. R. Co. filed its petition praying a removal of the case to the United States Circuit Court, showing that it was a corporation created by the laws of the State of Virginia, and alleging that neither the Maysville & Big Sandy R. R. Co. nor its trustee, Wallace, both of whom were residents of the State of Kentucky, were either necessary or proper parties to the action, and were only made parties for the purpose of preventing a removal of the case to the Federal court. The court ordered the case removed to the Federal court, and the plaintiff appeals.

The only authority which the Maysville & Big Sandy R. R. Co. had to acquire or operate a ferry to which we have been referred is in these words: "That the said Maysville & Big Sandy R. R. Co. shall have power and authority to acquire ferry franchises on the Big Sandy and Ohio rivers, or any of the tributaries of the Ohio river, on the line of their road, in whole or in part, to facilitate the transit of passengers and freight, and to use and ne-

joy the same in the same manner and under the same restrictions, provisions and privileges applying to individual holders of ferry franchises under the laws of this State." Session Acts 1853-4, volume 1, page 358.)

It will be observed that by this provision of its charter the Maysville & Big Sandy R. R. Co. was simply given the same rights and privileges as apply to individual holders of ferry franchises under the laws of the State. In other words, it was placed simply in the same position as an individual so far as ferry rights were concerned and might, under the general law, obtain a grant of a ferry franchise and operate just as an individual might. It possessed no greater rights than an individual would if granted a ferry privilege under the general law. By section 1809, Kentucky Statutes, when a sale is made of a ferry franchise or a lease it must be with the leave of the county court and the lessee must execute a covenant with sufficient surety in lieu of the former covenant. A nonresident owner of the ferry right shall sell the same to a resident citizen of this State within a year after accrual of his rights, and upon the failure to comply, the court shall revoke the grant after summons is served upon the party affected. Under this statute the Chesapeake & Ohio R. R. Co., which is a Virginia corporation and a nonresident of the State, can not lease or operate a ferry in this State, and if it operates the ferry in question it must do so by virtue of the power given the Maysville & Big Sandy R. R. Co. in the charter provision above quoted. The lease by the Chesapeake & Ohio R. R. Co. of the ferry not being warranted by law, the Maysville & Big Sandy R. R. Co. remained liable just as though that lease had not been made. The liability of the grantee of the ferry can not be affected by any arrangement made between him and another in violation of the statute. There is no statute authorizing the Chesapeake & Ohio R. R. Co. to own or operate a ferry in this State.

It is not averred that the lease was made with the leave of the county court, and from the allegation that all three of the defendants are operating the ferry the presumption would be that the Chesapeake & Ohio R. R. Co. is operating under the authority granted the Maysville & Big Sandy R. R. Co.

In McCabe's Adm'r v. Maysville & Big Sandy R. R. Co., 112 Ky., 861, it was held that the only authority of the Maysville & Big Sandy R. R. Co. to lease its road was that derived from the act of February 17, 1866, authorizing it to "make contracts with individuals, corporations and other railroad companies for the building, completion and operating of said road or any part thereof," and it was held that thereby no exemption was granted from any liability which attached to the company. The court said: "In the case before us there is only a grant to the lessor of power to contract for the operating of the road. The company enjoys all its franchises in the fruits of the contract. There is nothing in the provision to show that the legislature had in mind authorizing the company to divest itself of its franchises, or permitting it, while enjoying them or their fruits, to be acquit of responsibility for their abuse, without regard to the financial ability of the lessee or his amenability to suit." To this construction of the statute we adhere.

Judgment reversed and cause remanded for further proceedings consistent herewith.

ADAMS EXPRESS CO. v. WALKER.

(Filed November 22, 1904.)

1. Carrier—Contract—Common law liability—Under Constitution, section. 196, providing that "no common carrier shall be permitted to contract for relief from its common law liability," a contract made in the State of Ohio. by a carrier with a shipper to carry a dog to Kentucky in which the value of the dog was fixed at $50, when its actual value was $200. and which was permitted by the carrier to escape, the owner of the dog in Kentucky was. entitled to recover its full value from the carrier.

2. Limitation—Interstate comity—Limitation is governed by the laws of the forum in which the suit is brought, and the courts of this State will not, as a matter of comity, enforce a contract made in Ohio as to the time when the suit shall be brought, for this is regulated by the Kentucky Statutes.

Maxwell & Ramsey and John R. Schindel for appellant.

S. D. Rouse and Charlton Thompson for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

Appellee Walker was the owner of an English setter bitch. On November 18, 1903, he delivered her, securely crated, with two other dogs, to the Adams Express Co. at Wooster, Ohio, to be carried to Vanceburg, Ky., and there delivered to J. C. Walker, his agent. When the crate reached Vanceburg the bitch was missing, and he filed this suit to recover of the express company $250, her alleged value. The defendant, by its answer, denied that it was a common carrier of live stock, or that the bitch was lost by its negligence, or was of value exceeding $25. It also pleaded as follows: "Prior to the delivery of said dogs to the defendant it notified plaintiff that its charges for carrying the same would be based upon the value of the dogs, said value being unknown to defendant, and requested plaintiff to declare the value thereof in order that defendant might fix its charges; that its charges would be $2.70 if the value of each dog did not exceed the sum of $50, and proportionately greater if the value of the dogs exceeded $50 each; and the plaintiff, in pursuance of said notice and request, then well knowing the value of said dogs, and their value being wholly unknown to the defendant, declared to the defendant that the true value of said dogs did not exceed the sum of $50 each, and on the faith of said declaration and in consideration of said charge of $2.70 based upon said valuation of said dogs, the plaintiff and defendant entered into an agreement in writing, which was valid by the laws of Ohio, whereby the defendant agreed to carry said dogs from Wooster, Ohio, to Vanceburg, Ky., for the sum of $2.70, and the plaintiff agreed to and did release and discharge the defendant from all liability for loss of said dogs from any cause whatsoever, unless such loss should be caused by the negligence of the agents or employes of the defendant, and that the defendant should not be liable to the plaintiff in any event in excess of $25 on account of the loss of any of said dogs. Said agreement further provided that no suit should be brought against the defendant for recovery for the loss of said dogs unless commenced within six months next after such loss should have occurred, and that if any suit should be commenced against the

defendant after the expiration of said six months, lapse of time should be taken as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

The court sustained a demurrer to this part of the answer.

On the trial of the case the following agreed statements of facts was filed: "By consent of parties a trial by jury is waived, and the following facts are agreed to; that the bitch in the petition described was shipped as alleged in the petition; that her value was unknown to the defendant; that a special contract of shipment was signed by the parties; that the defendant held itself out as a carrier of live stock only under the conditions of said special contract, a copy of which is filed as a part of this agreed statement that the bitch was properly crated; that she escaped from the custody of the defendant somewhere between Wooster, Ohio, and Vanceburg, Ky., and that her value was $200."

The circuit court entered judgment in favor of the plaintiff, and the defendant appeals.

In Western Union Telegraph Co. v. Eubanks, 100 Ky., 591, a telegram was sent from Atlanta, Ga., to Franklin, Ky. One of the conditions printed on the back of the message was that no action should be brought for damages unless commenced within sixty days after the message was sent. The court, after laying down the rule that public policy forbids that a carrier should, by any contract, exempt itself from damages resulting from its own negligence, said in reference to the contract limitation of sixty days for the bringing of the action that it is the province of the law-making power to prescribe the time in which an action may be brought, and that the limitation of sixty days, if not an attempt to vary the statute of limitation, would, if enforced, have that effect.

This case was approved in Davis v. Western Union Telegraph Co., 107 Ky., 527, where the court again said as follows as to the limitation of sixty days contained in the contract: "That such a provision, as respects telegrams, is contrary to public policy, and will not be upheld, seems to be indicated in Smith v. W. U. Telegraph Co., 83 Ky., 104; 4 Am. St. Rep., 126; and the rule is authoritatively so announced by this court in Telegraph Co. v. Eubank, 100 Ky., 591. It was error to hold that the stipulation presented a valid defense."

It is insisted for appellant that the contract here having been made in Wooster, Ohio, it must be governed by the laws of Ohio, and that by the laws of Ohio such a limitation is valid. Limitation is governed by the law of the forum in which the suit is brought, and the courts of this State will not, as a matter of comity, enforce a contract made in Ohio as to the time when the suit shall be brought, for this is regulated by our statute. From the agreed facts, negligence on the part of the defendant may be inferred, for if three dogs were delivered to it securely crated, and two remained in the crate when delivered at Vanceburg, no account being by the defendant of the missing dog, clearly it should be presumed that the defendant or some of its agents converted the dog, or by negligence allowed it to escape. We are referred to decisions of the supreme court of Ohio holding that a common carrier can not, by contract, protect itself from its own negligence, and that this rule applies to the carriage of animals. (Wilson v. Hamilton,

4 Ohio State, 728; U. S. Express Co. v. Backman, 28 Ohio State, 144; Railroad Co. v. Sheppard, 56 Ohio State, 68.) But we can not take judicial notice of the law of Ohio. The demurrer admits the truth of the plea.

In Cleveland, &c., R. R. Co. v. Druien, 26 Ky. Law Rep., 103, this court had before it the question by what law a contract of carriage is governed where the contract is made in another State and the goods are to be delivered in this State. The rule was there laid down that where the contract is valid in the State where it is made, the law of that State governs it, so far as it is to be performed outside of this State, but that the law of this State governs it so far as it is tc be performed in this State. In the case of Western Union Telegraph Co. v. Eubanks, 100 Ky., 591, it was not pleaded that the contract was valid under the law of Georgia, or that the loss occurred here, and the court seems to have had in mind in what it said in that case only the limitation of the action to sixty days. The same is true of the case of Cincinnati, &c., R. R. Co. v. Graves, 21 Ky. Law Rep., 684. The cases of I. C. R. R. Co. v. Radford, 23 Ky. Law Rep., 886, and L. & N. R. R. Co. v. Frazee, 24 Ky. Law Rep., 1273, involved contracts made in this State. Section 196 of the Consitution governs such contracts. Its lanugage is, "No common carrier shall be permitted to contract for relief from its common law liability." The Constitution of Kentucky has no extra-territorial effect, and this provision does not govern contracts made elsewhere which are lawful by the law of the place where they are made. It governs contracts made in Kentucky, and these being unlawful at the place where they are made are void everywhere; but contracts that are made elsewhere and are valid where made will be governed here by the law of the place where they are made, so far as they are not performed here. Under this rule the court properly sustained the demurrer to the defendant's plea of the law of Ohio, as it did not show that the dog was lost in Ohio, and to protect itself under the Ohio law it should have shown not only that the contract was valid under the law of Ohio, but that the nonperformance of the contract occurred there.

It remains to determine what are the rights of the parties under the law of Kentucky. In Orndorff v. Adams Express Co., 3 Bush, 194, a contract limitation similar to the one relied on here was considered by the court, and it was held that a common carrier could not by such a contract exempt itself from losses by negligence. This case was followed in L., C. & L. R. R. Co. v. Hedger, 9 Bush, 645, which was, like this, a case where damages were sought for the carriage of animals. (Rhodes v. L. & N. R. R. Co., 9 Bush, 688; L. & N. R. R. Co. v. Brownlee, 14 Bush, 590; L. & N. R. R. Co. v. Owen, 93 Ky., 201; Baughman v. L. & N. R. R. Co., 94 Ky., 150.)

The precise question here raised was made in Cincinnati, &c., R. R. Co. v. Graves, 21 Ky. Law Rep., 684, where it was alleged that the stock was undervalued and thereby the defendant was mislead as to its value. The plea was held bad. That shipment was made from Cincinnati, O., to Lexington, Ky. The same question was again made in I. C. R. R. Co. v. Radford, 23 Ky. Law Rep., 886, where the shipment was from Hopkinsville, Ky., to Evansville, Ind. And L. & N. R. R. Co. v. Frazee, 24 Ky. Law Rep., 1273, where the contract was also made in Kentucky. While the exact question here made was presented in one of these cases, and there are ex-

pressions in some of the opinions limiting them to the particular facts before the court, still the reasoning in all the cases is against the validity of such contracts, and we regard them as settling the rule in this State under our constitutional provision. In the absence of a special contract it would not be maintained that the defendant is not liable for the value of the dog lost. But our Constitution declares the contract limiting this liability void; so the contract is as though it had not been made, and the defendant is liable, unless sufficient facts are shown independently of the special contract to avoid the contract for fraud or to create an estoppel at common law.

Judgment affirmed.

FALLS BRANCH JELLICO LAND AND IMPROVEMENT CO. v. COMMONWEALTH.

(Filed November 22, 1904—Not to be reported.)

1. Taxation—Assessment of property—In an action by the auditor's agent where the circuit court assessed the land for the year 1892, when it was only charged in the statement to have been omitted from taxation for the years 1893-1902, there being no allegation that the land was omitted from taxation for the year 1892, the judgment was unauthorized.

2. Pleading—Where an amended answer pleading the five years' statute of limitation in an action to assess property for taxation, was not made a part of the record by bill of exceptions, or by any order of court, no objection is available on the part of the defendant filing it that the five years' statute was not applied.

A. T. Siler for appellant.

C. W. Lester for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Hobson.

The auditor's agent in Whitley county began this proceeding by filing in the Whitley County Court a statement charging that appellant had failed to assess for taxation a tract of 118 acres of land worth $40,000, or to pay taxes thereon for State or county purposes for the years 1893-1902, inclusive. The defendant filed answer controverting the allegations of the statement, and on the hearing of the case in the county court judgment was entered fixing the value of the land at $4,000, and listing it for taxation for each of the years 1893-1902. The defendant appealed to the circuit court, and while the case was pending in that court it tendered an amended answer pleading the five years' statute of limitations as to the years 1893-1897. The plaintiff objected to the filing of the amended answer and, without any action on the motion, the case was submitted and judgment entered to the effect that the defendant had failed to list the land with the assessor for taxation for the years 1893-1902, and adjudging that it be assessed for taxation for each of these years at the valuation of $4,000, and this was ordered to be certified to the auditor of public accounts, and to the sheriff of Whitley county. The defendant was also adjudged to pay a penalty of 20 per cent. on the amount of the taxes due and the cost of assessment together with the cost of the proceeding. From this judgment the defendant appeals to this court.

It has been held by this court in several cases that the five year statute of limitation is applicable to proceedings of this sort, but the circuit court did not rule on the motion to file the amended answer and was not required by the defendant to do so. The amended answer was not made a part of the record by bill of exceptions or by any order of the court and is not, therefore, before us on the appeal and no objection is available on the part of the defendant that the statute of five years' limitation was not applied. But it will be seen that the circuit court assessed the land for the year 1892, when it was only charged in the statement to have been omitted from taxation for the years 1893-1902. There was no allegation that the land was omitted from taxation for the year 1892, and, therefore, the judgment as to the year 1892 was unauthorized.

It is earnestly maintained that the land was not omitted from taxation in any year, but was in fact assessed and the taxes paid, although in the name of the wrong person. If this is true, it should not be assessed again. For if the agent of the appellant gave in the land, and it was by mistake set down in the name of the Wooldridge Jellico Coal Co., as both corporations were owned by the same stockholders, this mere mistake would not make the land liable to assessment a second time. It is also insisted that the assessment at $4,000 is much too high, but as the proof may be materially different on another trial, we deem it improper to express any opinion now on this subject. On another trial it would seem that the parties can more definitely show to the court what the corporation owns, and whether the tract in controversy was owned by it in addition to the land that was given in for assessment.

For the error of the court above referred to, the judgment is reversed. On the return of the case the circuit court will allow the amended answer to be filed.

CHENAULT, &c. v. THOMAS.

(Filed November 22, 1904.)

1. Deed—Warranty—Breach—Action—Ancestor—Liability of Heirs—Criterion of damages—Where appellee exchanged certain real estate in Paris, Ky., with appellant's ancestor, for a five-twelfth interest in lands in Wolfe and Powell counties, and thereafter in an action in the Powell Circuit Court by H. and M. and P. F., etc., against appellee, of which action appellants had notice, it was adjudged that appellee's grantors only had a five-twenty-fourth interest in the land conveyed by them to appellee. In an action by appellee against the heirs at law of one of the grantors to recover of them damages for a breach of the warranty in the deed of their ancestor, it being alleged that they had inherited and received from their father's estate, property of greater value than apppellee claims against them, Held —That appellee was entitled to recover, and there being no evidence of the money value of the land lost, and no effort to show it was less than the lots given in exchange therefor, it was proper to assume the value of said lots as a criterion of the damages sustained by appellee.

2. Eviction of appellee—Paramount title—Allegations—Where in an action for damages for breach of warranty for land, the petition alleges that "by a judgment duly rendered in an action of H. and M. and P. F., etc., as plaintiffs against this plaintiff, etc., in the Powell Circuit Court, it was ad-

judged that the grantors, who made the deed to this plaintiff, did not own the five-twelfths interest in the land conveyed to this plaintiff, and adjudged to the said plaintiffs in said action all of said land except five-twenty-fourths interest therein, thus evicting this plaintiff from the possession and depriving him of the ownership of five-twenty-fourths interest thereof which had been conveyed to him by said grantors," it was an adjudication that plaintiff's grantors did not own the interest that plaintiff lost, but that plaintiff in said action did own it, which necessarily means that the latter held the paramount title.

Hazelrigg, Chenault & Hazelrigg and C. W. Goodpastor for appellants.

T. E. Moore, Jr., and Beckner & Jouett for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Barker.

In 1881, Josiah Anderson, Maria L. Anderson, his wife, and B. Frank Chenault, executed and delivered to the appellee, J. M. Thomas, their general warranty deed whereby they conveyed to him an undivided five-twelfths interest in a large boundary of land lying in Wolfe and Powell counties, Ky. The consideration for this deed was the conveyance by Thomas to them of three houses and lots situated in the city of Paris, Ky.

Afterwards, actions were instituted in Wolfe and Powell counties against appellee, by several parties, concerning the title to the land conveyed to him, but particularly by Howe and Marks, and Permelia Fiisher. These were finally all transferred to the Powell Circuit Court, there consolidated, and, on the 27th day of November, 1893, a final decree was rendered by which it was adjudged that appellee's grantors owned only an undivided five-twenty-fourths interest in the land conveyed by them, and that the remaining five-twenty-fourths interest, which they undertook to convey to him, belonged to Howe and Marks, and Permelia Fisher. This judgment was afterwards appealed to this court, and affirmed in an opinion contained in the 18th volume, Kentucky Law Rep., page 909, under the style of Thomas, &c. v. Turner, &c.

After being thus evicted from half of the undivided interest in land conveyed to him, the appellee instituted this action against Maria L. Anderson, her husband being dead, and the appellants, Carroll Chenault, Cortland Chenault and Frank Chenault, as heirs at law of their father, B. Frank Chenault, who had also died in the meantime, to recover of them damages for a breach of the covenant of warranty in the deed to him; it being alleged, as to the Chenaults, that they had inherited and received from their father's estate property of greater value than appellee's claim against them. The issues between the parties were completed by various responsive pleadings and amendments thereto, and the evidence being in, a judgment was rendered, on the 10th day of February, 1903, in favor of appellee against appellants for the sum of $2,408.21, with interest until paid. To revise which this appeal has been prosecuted.

In favor of a reversal it is urged, first, that the petition is fatally defective in failing to allege that the eviction of appellee from one-half of the land conveyed to him was by paramount title, and the case of Jones v. Jones, 87 Ky., 83, is cited in support of this proposition. The position is, undoubtedly, sound, and, if the petition is open to the objection named, the

judgment must be reversed. The allegation with reference to the eviction is as follows: "Plaintiff (appellee) says that subsequently in an action brought by Howe and Marks, Permelia Fisher, etc., as plaintiffs against this plaintiff, etc., as defendants, the Powell Circuit Court, by judgment duly rendered, adjudged that said Andersons and said Chenault, who made said deed jointly to this plaintiff as aforesaid, did not own said five-twelfths interest in said land, and adjudged same to said plaintiffs in said action then pending in the Powell Circuit Court, and adjudged to said plaintiffs the possession of all of said land save an undivided five-twenty-fourths interest therein, thus evicting this plaintiff from the possession, and depriving him of the ownership of five-twenty-fourths interest thereof, which had been conveyed to him as aforesaid."

While the word "paramount" does not occur in the foregoing quotation from the petition, the language used is not susceptible of any other construction than that appellee was evicted by paramount title. The adjudication, that his grantors did not own the interest which he lost, but that Howe and Marks, and Permelia Fisher did, necessarily means that the latter held the paramount title. While admitting the right of a grantee, who has been evicted by paramount title, to recover from his grantor as part of the damages for breach of the covenant of warranty, his proper costs, including reasonable attorneys' fees, it is said that, in order to recover these, notice of the pending action, by which he was evicted, must have been given to the grantor, thus affording him an opportunity of defending the title in his own way, and through his own counsel. And it is urgently insisted that the pleadings in this case do not contain the necessary allegation of notice to appellee's grantors of the litigation in which he was evicted.

By an amendment of his petition, filed on the 17th day of September, 1902, appellee alleged that his grantors were parties to the action in which he lost the land, and the record abundantly shows that they were actually aware of the litigation, and its progress. Appellee, in his deposition, testified that he filed a cross petition against them, and files, as evidence thereof, a certified copy of the pleading in question. He testified that John J. Cornelison represented them, and filed a letter from the former in regard to the proper managment of the defense. He also filed an execution for $433.50 costs, which issued from this court against the appellants, as the heirs of their father, and against the administrators of B. Frank Chenault, and appellee, in favor of Howe and Marks, upon the affirmance of the case in which the eviction took place. There can be no reasonable doubt that the ancestor of the appellants, and the appellants, themselves, after his death, were properly before the court in the case involving the title, and had actual notice of it. The uncontradicted testimony of appellee, together with the exhibits and vouchers, which he files, conclusively show the validity of his claim for costs, counsel fees, etc., as allowed by the judgment, and the necessity for the outlay in defending the title to the land conveyed to him.

It is said that the judgment should be reversed because the court mistook the criterion of damages by adopting the value of the lots in Paris conveyed by appellee, instead of the value of the lost land conveyed by appellants' ancestor, and we are referred to the case of Cummings v. Kennedy, 8 Littell, 118, in support of this position. It is not disputed by appellants' coun-

sel that, ordinarily, the damages for a breach of covenant of warranty is presumed to be the money price for the conveyance, that being considered the agreed damages; but it is said that, where parties exchange land, as in the case at bar, and there is a breach of the covenant of warranty, the value of the lost land at the time of the conveyance is the criterion. This is true, but the consideration, where that is known and definite, is sufficient evidence of the value of the land, which has been lost by eviction. This is recognized in the opinion cited, it being said: "Still, however, the question recurs, which of the tracts, at the date of the conveyance, ought to be taken; that in Lincoln, or the one in Bourbon. No doubt the parties plaintiff at the date rated the two at an equal value, and if that value was known, we should not hesitate to adopt it. But that is unknown, and all we have now is the assessment of each tract by a jury, founded on the memory and opinion of witnesses as to the value of the respective tracts at that date; and this has determined the tract in Lincoln to be then the most valuable. The value of the thing conveyed by the deed of warranty, which is broken, is, however, still the proper measure."

In the case at bar, the criterion was assumed to be the value of the Paris lots, which constituted the consideration for the conveyance to appellee, and this was abundantly proved by the evidence to be the sum fixed by the judgment. There was no evidence as to the money value of the land lost; there being neither effort on the part of appellants to show that it was less than that of the lots, nor on the part of the appellee to show that it was more. We, therefore, assume, as we have the right to do, that the parties regarded the consideration for the respective deeds between them to have been equal, and this being true, no injury accrued to appellants in the selection of the criterion of damages.

The testimony of appellee in his own behalf is not within the inhibition of section 606 of the Code, because B. F. Chenault was dead at the time the deposition was taken; appellee testified to no conversation, or transaction had with, or any act done, or omitted, by the dead man, and, therefore, the section of the Code has no application. But, as there was no exception reserved as to his competency as a witness, the alleged error of permitting him to testify would not avail on this appeal. Although there is some allusion in the record to the fact that the interest in the land conveyed to appellee did not contain as many acres as estimated, this action is not for a deficiency in the estimated acreage, but is for a breach of the covenant of title. It follows, therefore, that the cause of action arose at the time of the eviction. There was no attempt to sustain the plea of fraud or mistake in the insertion of the covenant of warranty in the deed to appellee.

The plea of coverture on the part of Maria L. Anderson, as a bar to appellee's action, was sustained by the court, and the petition, as to her, dismissed by final judgment. There being no cross appeal by appellee, she is out of the case. B. Frank Chenault, appellants' ancestor, warranted only one quarter of the land conveyed to appellee. The judgment against them is based upon their proper proportion of the whole liability; the costs, including counsel fees, considering the magnitude of the interests involved, the number of suits instituted concerning the land, and the fact that the litigation was actively in court for about twenty years, are very reasonable.

Perceiving no error in the record the judgment is affirmed.

CARTER, &c. v. HIBBARD.

(Filed November 22, 1904—Not to be reported.)

Oil leases—Contracts—Rescission of—Where appellants had leased from appellee oil rights upon his land, paying him $10 down and agreeing to pay him $490 when the land was run out and a deed made to the oil lease, but before the contract was executed appellants having learned that appellee's title was not good offered to surrender to him the contract upon his paying them the $10 back, when he notified them to send the contract to some one and notify him, which they did, sending it to Olliver, at Barbourville, directing him to give it to appellee and collect the $10, and notifying appellee at the same time of the sending the contract to Olliver, but appellee refused to pay the $10 and take the contract and later sued upon it, Held—That the offer being accepted by appellee the contract was closed and he could not subsequently withdraw it, nor could he be released by the miscarriage of appellants' letter.

W. B. Black for appellants.

J. D. Black and P. D. Black for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Hobson.

Appellants, E. E. Carter and H. C. Jones, live in Bluefield, West Virginia. In April, 1902, they were taking oil leases in Knox county, Kentucky, and appellee, M. F. Hibbard, executed to them the following writing: "Received of H. C. Jones and E. E. Carter $10 as part payment on lease of oil right on twenty-five acres of land to be taken off east end of my farm where I now live, and adjoining the Berry farm, terms of lease $500 cash to be paid (of which the $10 here receipted is a part), when land is run out and located and a good and sufficient deed is made to oil lease, one-eighth of oil to be paid to me, and if drilling is not commenced in sixty days from date a rental of $1 per day is to be paid until such operation is commenced, and to pay same amount of $1 per day till pipe line is put in after well is completed and ready for producing. Operation to be pushed with all due diligence till well is completed, rental to be paid at bank of John A. Black in Barbourville at the end of each month and placed to my credit. Lease not to take house, nor no well to be located under 200 yards of house."

After the contract was executed, and before anything further was done, appellants learned at Barbourville that appellee's title to the land was not good and that his farm was included in a thirty-six thousand acre survey belonging to other persons. There was some discussion between them as to what should be done. Finally, on the 6th of June they wrote him this letter:

"Bluefield, W. Va., June 6, 1902.

"Mr. M. F. Hibbard,

"Girdler, Ky.:

"My Dear Sir—I am in receipt of your letter of some days ago, as I told you when I was out we would surrender you the contract on your paying the $10 back that we had paid you. You have never proven to us that you have anything. We do not propose to pay out any more money till that old survey is run out and you demonstrate to us you have got something. As far as the records show you have nothing outside of the thirty-six thousand

acre survey. You return to us the $10 we paid you so there will be nobody hurt and no harm done. We have no desire to encumber our land in any way whatever.

"Yours, etc.,

"H. C. JONES."

The letter to which this is the answer is not filed, but it is shown that about the 5th of July appellant Jones met appellee Hibbard in Knox county. They differ as to what occurred in that meeting. Jones says it was there agreed that the trade should be rescinded; that they should give up the contract and Hibbard should return to them the $10 which he had received. Hibbard denies that this was agreed to at that meeting, and says that nothing was said upon the subject. But he does not explain what answer he made to the letter of June 6, or show that he had any other meeting with Jones before July 23, and on that day he wrote Jones the following letter:

"Girdler, Ky., July 23, 1902.

"Mr. H. C. Jones,

"Bluefield, W. Va.:

"Dear Sir—You said you would give me the contract back for your money back. Send the contract to anybody you want to and notify me at once. If you fail to do this I will sue at once. I have the chance to lease my land.

"Yours truly,

"M. F. HIBBARD."

Jones got this letter on July 27, and on the same day he mailed the contract to E. T. Olliver at Barbourville, directing him to deliver it to Hibbard and collect from him the $10. He also wrote Hibbard at his postoffice, Girdler, telling him he had sent the contract to Olliver and for him to get it and pay Olliver the $10. Some time after receiving the contract Olliver saw Hibbard and told him he had the contract, and that Jones requested him to collect the $10 and deliver the contract to him. Hibbard then said that he would not pay the $10, and would expect Carter and Jones to carry out the contract. Olliver does not fix the date of this conversation, but Hibbard says it occurred later than August 20. Carter and Jones thought the matter was settled, until some time in the fall they learned that the $10 was not paid. On November 21, 1902, Hibbard filed this suit against Carter and Jones to recover $490, the balance of the contract price; also $1 a day for each day they had failed to work under the contract. He tendered with his petition a deed of lease acknowledged by himself and wife on the same day the suit was filed. The deed is based upon a survey made by Hibbard in the fall and shortly before the suit was brought. The defendants pleaded, in effect, that Hibbard did not survey and run out the land within sixty days of the date of the contract, and that the contract had been, by consent of parties, rescinded and abandoned. Hibbard testifies that he did not make the survey within sixty days, and that the defendants told him he need not make it until they notified him, but this they deny. On final hearing the court gave judgment against the defendants for $490, with interest, and dismissed the claim for rental at $1 a day for the failure of the defendants to commence operations.

The letter of June 6 was an unequivocal proposition to surrender the contract upon Hibbard's paying them the $10 he had received, and it shows on

its face that this proposition had before this been made by word of mouth to Hibbard. It was very natural when the parties met on July 5, having not seen each other in the meantime, and Hibbard not having answered the letter of June 6, that Jones and he would have some talk about the rescinding of this contract. The evidence is clear that this is the only meeting had between them between the letter of June 6 and Hibbard's letter of July 28, and it will be observed that that letter begins with these words: "You said you would give me the contract back for your money back." If this language does not refer to the conversation between the parties on July 5, it is hard to understand from the record what it does refer to. But to what ever previous communication it may have referred, it was clearly an acceptance of the proposition, coupled with the condition that Jones was to send the contract to anybody he wanted, and notify Hibbard at once. Jones immediately sent the contract to Olliver, in Knox county, and notified Hibbard immediately by mail that he had done so. Hibbard says that he did not get this letter, but it was not returned to Jones, and Hibbard admits that some time afterwards he saw Olliver and that Olliver told him he had the contract to deliver to him, and he refused to take it or pay the $10.

As it took Hibbard's letter four days to go to Bluefield, it would reasonably take Jones' letter four days to return, and, therefore, the contract reached Barbourville about August 1. If Hibbard got no notice of the acceptance of his proposition until after August 20, there was a delay of twenty days in notifying him of the acceptance of his offer. On these facts, what are the rights of the parties? When a proposition is made on one side and is accepted on the other the contract is closed. Hibbard made Jones the proposition and Jones immediately accepted it and mailed to Hibbard notice of his acceptance. The general rule is that where a proposition is made by letter, and is accepted by the person to whom it is made, the contract is closed when the letter of acceptance is mailed by the person accepting it, and the proposition can not thereafter be withdrawn by the person making it. The rule is thus stated in 9 Cyc., 295: "Where a person makes an offer and requires or authorizes the offeree, either expressly or impliedly, to send his answer by post or telegraph, and the answer is duly posted or telegraphed, the acceptance is communicated and the contract is complete from the moment the letter is mailed or the telegram sent. * * * Since agreements made by means of the post or the telegraph are simply an illustration of the general rule before stated, that the offerer takes the risk as to the effectiveness of communication if the acceptance is made in the manner either expressly or impliedly indicated by him, it necessarily follows that the contract is complete as soon as the letter containing the acceptance is mailed or the telegram sent, and it makes no difference whatever that through mistake of the postoffice authorities or the telegraph company, or through accident in transmission, it is delayed or is lost in transit and never received by the offerer." (Chiles v. Nelson, 7 Dana, 281; Hutcheson v. Blakeman, 8 Met., 79; Bishop on Contracts, section 328; 1 Parsons on Contracts, side page 485, but in these authors it is well said that the result may be varied by the special terms of the offer.)

The only thing in this case to take it out of the general rule stated is that Hibbard said in his letter that if Jones accepted the propositon he must

notify him at once, and if he failed to do this he would sue immediately. Considering the location of the parties, one at Bluefield, West Virginia, the other at Girdler, Knox county, Kentucky, the only meaning we can properly give this stipulation is that Jones was to notify him by letter through the mail. He sent his proposition by mail, and being silent as to how the acceptance was to be signified, must have contemplated that Jones should answer by mail. There seems to have been no other practical way for Jones to answer. The acceptance of Jones was in strict accord with the offer. He at once sent the contract to Olliver and at once mailed a letter to Hibbard, notifying him what he had done, and for him to pay Olliver the $10 and get the contract. The offer of Hibbard being thus accepted, the contract was closed. Hibbard could not subsequently withdraw his offer, nor was he released from the contract by the miscarriage of Jones' letter to him; for Jones was not responsible for this, his acceptance having been in the manner evidently contemplated by Hibbard when he wrote the proposition.

We are also satisfied from the long delay of Hibbard to make the survey or tender a deed or complain of operations not being begun, that his subsequent refusal to receive the contract and pay the $10 when demanded by Olliver was due to the fact that he had in the meantime changed his mind about rescinding the contract. For this no adequate reason is given. The natural inference from Hibbard's letter of July 23, under all the facts, is that they had agreed before this to rescind the contract, and that he meant that they must at once close up the agreement by sending the contract to some one to deliver to him or he would sue them at once.

Judgment reversed and cause remanded for a judgment for the defendants.

DOLLINS v. DOLLINS.

(Filed November 23, 1904—Not to be reported.)

Divorce and alimony—In an action by the wife for divorce and alimony the judgment of the chancellor denying her alimony and a restoration of the property owned by her upon her marriage will not be disturbed where upon the separation from her husband she disposed of some of her property remaining to her and the husband paid her a note of $150, which sum he owed her, the evidence showing that at the time the husband only owned about $875 worth of property, and other evidence pointing unerringly to the fact that she was guilty of repeated acts of adultery.

Max Harlin and Harlin & White for appellant.

Hatchett & James for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Nunn.

The appellant brought this action in the Barren Circuit Court against the appellee for a divorce from bed and board, alleging abandonment of her by appellee, and also asked alimony. She attached his property. He answered, denying her allegations, and asked the court to grant him a divorce from the bonds of matrimony, alleging adultery on her part. The court on the trial dismissed her action, granted him a divorce, and adjudged that he should pay the cost of the action, and pay her attorneys a fee of $40. From

this judgment she has appealed, claiming that the court erred in refusing her alimony, and a restoration to her of the property she owned at the time of her marriage to appellee.

It was agreed in the record that appellee was the owner at the time of the trial of real and personal property to the value of only $875. The proof showed that while they lived together they were both hardworking, energetic people. They each owned a small amount of property at the time they were married. Hers consisted in a small interest in a piece of real estate which she sold after her marriage, for about the price of $150. At the time of the separation she was the owner of a cow, a horse, some articles of household furniture, and also a note upon her husband for $150. A few days before she left the home of appellee she sold her horse and cow and her other property and received the money therefor, and after this suit was instituted the appellee paid her the amount of the note, with its interest.

Under these facts we are of the opinion that the court did not err in failing to restore to her the property which appellee obtained from her during the marriage. The question with reference to alimony claimed by her depends upon the proof with reference to his charge of adultery on her part. The proof on this question was mostly circumstantial. There was one witness, however, who testified of having had unlawful intercourse with her after she had married appellee upon at least four occasions. The officer taking the deposition did not certify as to the credibility of this witness. Several witnesses were introduced to prove that his reputation for truth and veracity was good. They made this proof, but one or two of them, upon cross-examination, stated facts which, if true, showed him to be a man of bad moral character. Appellant claims that this witness was not corroborated, as required by section 2119 of the statutes. While this witness' evidence is corroborated to some extent, we would not be willing to permit this judgment to stand upon his evidence alone, corroborated as it is. But there was other evidence introduced which unerringly pointed to the fact that she was guilty of repeated acts of adultery with the person named in the answer of appellee as corespondent. Without going into the details of the proof, we are of the opinion that the lower court did not err in refusing to appellant alimony.

Wherefore, the judgment of the lower court is affirmed.

COLLINS, TRUSTEE, &c. v. COLLINS.

(Filed November 23, 1904—Not to be reported.)

Liens—Material furnished for building house—Husband and wife—In this action to recover for building material where the wife of one of the firm which furnished the material, the evidence showing that the wife had paid her husband who was a member of the firm for the material furnished, the verdict and judgment in favor of the wife will not be disturbed, it being a well-settled principle that a payment to one member of a firm is a payment to all, and if a member misappropriates the funds the firm should lose rather than the payor.

G. B. Likens for appellants.

Heavrin & Woodward for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Nunn.

This is an appeal from a judgment of the Ohio Circuit Court rendered at its May term, 1904, in favor of appellee. The action was instituted by the appellant as trustee in bankruptcy of the estate of B. B. Collins & Co., seeking to recover a judgment against the appellee for $421.75 for material furnished for building a house for appellee in the town of Hartford. The firm of B. B. Collins & Co. was composed of B. B. Collins and John R. Phipps. The appellee answered and pleaded payment, and denied that she was indebted to the company in the sum named, or any part thereof.

On motion of appellant the question of fact as to the payment was submitted to a jury, which returned a verdict as above stated. The proof showed that appellee's brother gave her $500 for the purpose of building her a house. With this sum, together with $125, the price for which she sold a mule, she erected a one-story frame cottage. The lumber used in the erection thereof was purchased from the firm of B. B. Collins & Co. B. B. Collins, one of the members of this firm, was the husband of appellee. Appellee testified that she paid her husband, as a member of this firm, the $500 received from her brother to pay the account which she owed the firm for lumber. She also stated, without objection, that her husband told her that he had paid this money on the debts of the firm.

Under the proof in this case we have no doubt that appellee paid the money to B. B. Collins, a member of the firm, for the purpose of paying her account due the firm, but there is some doubt under the proof as to whether or not Collins applied the money as he should have done. But the principle is well settled that the payment of a debt due a firm to one of the members thereof is a payment to all. And if a member misappropriates the fund received the firm should lose, rather than the payor. The question at issue was properly submitted to the jury, and it found in favor of appellee.

Wherefore, the judgment of the lower court is affirmed.

KELLY v. COMMONWEALH.

(Filed November 23, 1904—Not to be reported.)

1. Local option law—Evidence—In the trial of this prosecution the evidence showing that the prosecuting witness testified that on a certain day he saw defendant and asked him if he could get him a half pint of whisky; that defendant responded that he did not know, but would try; that he gave him 25 cents to pay for the whisky and in a few minutes defendant returned with it; and defendant testified that he only procured the whisky from another and he himself had no interest in the transaction, it can not be said there was not sufficient evidence to support a verdict of guilty.

2. Construction of statutes—Section 353, Civil Code, provides that judgments in misdemeanor cases shall be reversed only for errors of law apparent on the record to the prejudice of appellant.

Murphy & Evers for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Jack Kelly, was convicted in the lower court of a violation of the local option law, and his punishment fixed at a fine of $60 by the jury. He asks a reversal upon the sole ground that there was no evidence to support the verdict. David McKendree, who was introduced as a witness for the Commonwealth, testified that on a certain Sunday morning, about the last of October or the first of November, 1903, he saw defendant on Water street, in the city of Mayfield, about thirty or forty yards west of his residence, and asked him if he could get him a half pint of whisky; that the defendant responded that he did not know, but would try; that he gave him 25 cents to pay for the whisky; and that defendant went to the corner of his residence on Water street, then turned north around his yard fence and passed out of his sight; that he was gone twenty or thirty minutes and returned with the half pint of whisky. The defendant, testifying for himself, said that he procured the whisky from one George Elliott, but that he had no interest in it, and only acted as an accommodation for McKendree. On this testimony two juries have found the defendant guilty, and we are not prepared to say that there was no evidence tending to establish his guilt. Section 358 of the Criminal Code of Practice provides that judgments in misdemeanor cases shall be reversed only for errors of law apparent on the record to the prejudice of appellant.

Judgment affirmed.

BRAY, &c. v. ELLISON.

(Filed November 23, 1904—Not to be reported.)

Mortgage—Homestead—Construction of writing—Use of singular pronoun "I" and "my"—Appellants, Frank Bray and wife, Belle Bray, for the purpose of indemnifying appellee Ellison as surety on a note for $369.60 owing by Frank Bray, executed to him the following writing, viz.: "To make a lien and secure Wm. Ellison as surety on a note executed of even date hereof for the sum of $369.60, payable to Jeb Parks, I doth hereby agree and doth agree to give unto the said Wm. Ellison a mortgage lien upon my home place, where I now live, and known as a part of the James Perkins farm. To have and to hold the said property to secure the said Ellison from all harm and liability as surety upon said note. To be void upon the following conditions, to wit: That if the said Frank Bray, maker and principal of said note, pays, or causes said note to be paid, at or before maturity in full, then this instrument is null and void, otherwise to be and remain in full force and effect. January 1, 1901.

"FRANK BRAY,
"MRS. BELLE BRAY."

Held—That said writing is a mortgage, and by the use of the singular pronouns "I" and "my" therein the appellants intended to, and did, create a lien on the tract of land on which they then resided, as indemnity to appellee Ellison to secure him from loss as surety for appellant, Frank Bray, although said land was the homestead of appellants, and worth less than $1,000.

K. D. Perkins and L. L. Peace for appellants.

Sharpe & Siler for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted by the East Tennessee Coal Co. against the appellant, Frank Bray, but we are unable to ascertain the purpose thereof, as neither the original petition, answer nor other pleading as between the parties named appears in the record. It does, however, contain a petition for and on behalf of the appellee, William Ellison, in which he asked to be made a party to the action, which request was granted, and an order to that effect entered.

It was averred in the petition of appellee that on January 1, 1901, the appellant, Frank Bray, as principal, and appellee, as his surety, executed to one Jeb Parks their promissory note, whereby they promised on a certain day named therein to pay him $869.60, and that to indemnify appellee against loss as such surety the appellant, Frank Bray, together with his wife, the appellant, Belle Bray, at the time of giving the note, executed to him a mortgage upon a tract of land containing eleven acres lying in Whitley county, referred to therein as "my home place and known as a part of the James Perkins farm," and more particularly described in an amended petition by metes and bounds, courses and distances. After it was acknowledged by appellants, the mortgage was duly recorded in the office of the clerk of the Whitley County Court.

The petition contains the further averments that the note was paid to Parks by appellee after its maturity, and that by reason thereof he was entitled to the enforcement of the lien given by the mortgage to reimburse him for the loss sustained, and the prayer of the petition asked its enforcement and the sale of the land for that purpose. The appellants, Bray and wife, filed answer, in which was denied that appellee had a lien upon the land, but it contained no denial of the execution of the mortgage of indemnity to appellee as surety for the husband, nor did it deny that the wife was a party thereto, or that she was bound thereby. It is not even affirmatively averred in the answer that appellants are entitled to the land embraced in the mortgage as a homestead, but only averred that they are husband and wife, and sustained that relation to each other at the time of the execution of the mortgage; that they were then and are now bona fide housekeepers with a family of four children, and were then and are now occupying the land as a homestead, and that it is worth less than $1,000. The lower court gave appellee a personal judgment against the appellant, Frank Bray, for the amount of the note, held that the mortgage gave him a lien upon the land to indemnify him against loss as surety in the note executed to Parks, and adjudged the sale thereof for the payment to him of the face of the note, with interest and costs. It is contended by counsel for appellants that the writing executed by them to appellee is not a mortgage, but only a promise to give him a mortgage; and further, that as the wife's name does not appear in the body of the writing, it is not to be treated as her act and deed, but only that of her husband. The writing in question is as follows:

"To make a lien and secure William Ellison as surety on a note executed of even date hereof for the sum of $869.60, payable to Jeb Parks, I doth hereby agree, and doth agree to give unto the said William Ellison a mortgage lien upon my home place, where I now live, and known as a part of the James Perkins farm. To have and to hold the said property to secure the said Ellison from all harm and liability as surety upon said note. To be

void upon the following conditions, to wit: That if the said Frank Bray, maker and principal of said note, pays, or causes said note to be paid, at or before maturity in full, then this instrument is null and void, otherwise to be and remain in full force and effect. January 1, 1901.

"FRANK BRAY.
"MRS. BELLE BRAY."

Though awkwardly expressed, it is clear that the above instrument is a mortgage, and was intended by the parties to be so understood. Its language excludes any other meaning. If it had been intended as a mere undertaking upon the part of appellants to give appellee a mortgage at some future time, it doubtless would have said so in terms, and fixed the date for the execution of the mortgage.

No reason appears from the writing or postponing the giving of the mortgage. The note is of the same date as the writing, the wife was present, or in reach, and it is but fair to presume that the appellee was enough of a business man to know that to afford him indemnity and guard against possible attacks from those to whom the appellant, Frank Bray, might be indebted, it was necessary that the mortgage be executed simultaneously with the note, and that it was so executed is to be inferred from the fact that it bears the same date as the note, and the further fact that it was acknowledged by appellants on the same day before the notary public as shown by his certificate. Besides, the language of the writing shows that the purpose of the appellants was "to make a lien and secure William Ellison as surety on a note of even date hereof for the sum of $369.60, payable to Jeb Parks, etc." The words immediately following, "I doth hereby agree and doth agree to give unto the said William Ellison a mortgage lien," etc., were intended to have, and do have, the same meaning as "I hereby give." The language subsequently employed is, we think, sufficient to remove all doubt, for "to have and to hold said property to secure William Ellison from all harm and liability as surety upon said note" can have no other meaning than that the land was then and there conveyed, or pledged, to indemnify him against loss.

Additional proof that the instrument is in fact a mortgage is furnished by its closing provisions, for they tell us in unambiguous language "that if the said Frank Bray, maker and principal of said note, pays or causes said note to be paid at or before maturity, in full, then this instrument is null and void, otherwise to be and remain in full force and effect." The remaining contention of appellants presents a more serious question, but one which we think has been fully settled by a former decision of this court. Does the mortgage sought to be enforced in this case embrace the homestead exemption in the land?

In Hays, Adm'r v. Froman, &c, 103 Ky., 350, the question we are now considering was raised in regard to a mortgage, the language of which was very much like that of the one here involved. It was as follows:

"I hereby mortgage to B. E. Froman a tract of land lying on the Rolling Fork and Salt rivers, in Hardin county, Kentucky, and bounded as follows: Beginning at and running J. G. Brashear's line; thence with same to B. E. Froman's line; thence with same to J. A. Froman's line; thence with same to Rolling Fork river; thence with same and Salt river to the beginning,

containing 106 acres, being the land on which I now reside, to secure him in the payment of one note for the sum of $1,490, payable five years after date, with 6 per cent. interest from date, to be paid annually. Given under my hand this 5th of February, 1891.

"JEREMIAH FROMAN,
"MATILDA E. FROMAN."

Froman and wife lived upon the land when the mortgage was given and he was a bona fide housekeeper. In passing upon the question whether the above mortgage embraced the homestead exemption in the land, the court said: "If the instrument purports to convey the entire estate and the wife is a party grantor to it, then it operates as a waiver of the homestead exemption in the land which it purports to convey. * * * The instrument under consideration is as much that of the wife as it is of the husband. She says, as also does the husband, 'I hereby mortgage to B. E. Froman a tract of land,' etc. In the closing part of the instrument she says: 'Given under my hand this 5th of February, 1891.' The wife is as much a grantor in the instrument as is the husband. The language of the mortgage is of that import. If it was a grant from the husband alone, it would not have recited to secure the payment of 'one note,' but would have said 'my note.' It described the land as 'the land on which I now reside.' She resided upon the land just the same as did the husband. * * * We are of the opinion that the language in the mortgage conveys the entire interest in the land which embraces the homestead exemption; hence the homestead exemption is waived thereby."

When we turn to the mortgage in this case we find that it, too, is as much the act of the wife as it is of the husband. The singular pronouns "I" and "my" are used throughout the instrument, instead of the plural "we," or "our," and refer to and include the wife as they do the husband. The instrument says: "To make a lien and secure William Ellison as surety on a note, etc., I doth hereby agree, etc., to give him a mortgage lien upon my home place where I now live," etc. Here the word "my" means the wife as much as the husband, for she also lived on the land. In fact a comparison of this mortgage with that in Hays, Adm'r v. Froman, supra, will show a striking resemblance between them.

In announcing the rules for the construction of statutes and legal terms, Kentucky Statutes, section 457, declares that "a word importing the single number only may extend and be applied to several persons or things, as well as to one person or thing, and a word importing the plural number may extend and be applied to one person or thing as well as to several persons or things. A word importing the masculine gender only may extend and be applied to feminine as well as masculine." * * *

There is no apparent reason why these rules should not apply in this case. In addition it may be said that there is nothing in the language of the instrument under consideration which would exclude the wife any more than the husband as a grantor, and if the rule of construction adopted in Hays, Adm'r v. Froman, supra, is sound, it is manifest that this instrument must, as in that case, be treated as a joint conveyance from the husband and wife, and if so, it embraces the homestead exemption in the land. We also find that the foregoing rule of construction has been applied in numerous cases to notes and other obligations, signed by two or more parties, in which the

singular pronoun "I" was used in the body of the instrument, instead of the plural "we." (Harrow v. Dugan, 6 Dana, 341; Hemenway v. Stone, 7 Mass., 57.)

For the foregoing reasons the judgment is affirmed.

COX v. HIGGINBOTHAM'S ADM'R.

(Filed November 24, 1904—Not to be reported.)

Life insurance—Advancements—Assignment of policy—Death of insured—Reimbursement—Where an insurance policy was assigned to appellee's intestate by the insured and his wife, who was the beneficiary named in the policy, to reimburse him for advancements made on the faith that he was thus secured, where there is included a premium of $471 paid by intestate for the insured on a separate policy payable to his children, which appellant, in writing, directed him to pay, said sum should be charged to appellant for the reason that she directed intestate to pay it and promised to reimburse him out of her part, but she ought to receive this amount back out of the policies payable to the children.

John T. Hays for appellant.

J. W. Alcorn and Walker & Johnston for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1889 the appellant, who was then Mary C. Johnson, instituted this action against John M. Higginbotham, by which she sought to recover from him her alleged portions of four insurance policies which had been issued on the life of her former husband, M. W. Johnson, which had been collected, as she alleged, by Higginbotham by authority from her and had never been paid over to her. Two of the policies were issued by the Mutual Life Insurance Co., of Michigan, one for $2,500, payable to the appellant and the children of the assured, the other for $7,500, payable to the appellant alone. One of the policies was in the Mutual Life Insurance Co. of New York for $10,000, which she alleged was payable to her. The other one in the Ætna Life Insurance Co. for $5,000, payable to appellant and the children of the assured.

Appellant afterwards, by an order of court, dismissed without prejudice so much of her action as sought a recovery for money collected on the policy in the Mutual Life Insurance Co. of New York and the Ætna Life Insurance Co. Higginbotham answered, and it was agreed between the parties that the action should be continued from time to time to await the result of litigation in Louisville, Ky., with reference to some of the insurance policies on the life of M. W. Johnson, deceased. In the meantime Higginbotham died, and the action was revived against the appellee as administrator. The pleadings were completed, which resulted in an agreement that Higginbotham had collected on the first-named $2,500 policy the sum of $665.20 as appellant's portion thereof, and that he collected, in the way of a compromise with the insurance company, $3,375, which belonged to appellant on the $7,500 policy. Appellee alleged that she had been paid the full amount thereof. A statement of the account against her was filed, the greater portion of which she denied, and especially $2,436.80 thereof, which

she alleged was an account due her husband and made by him during his lifetime, and that she was not responsible therefor. On the trial of the case the evidence on this claim was objected to. The court overruled the objections, and permitted the evidence to be heard, to which the plaintiff excepted. The jury returned a verdict in favor of appellant for the sum of $90.90, with interest from the 23d of November, 1898, and the judgment of the court was rendered accordingly, from which judgment appellant has appealed.

The only question necessary to be determined is whether or not the lower court properly permitted the appellee to be credited with $2,436.80, the amount of Higginbotham's claim against M. W. Johnson, the husband of appellant. It appears that J. M. Higginbotham became the surety of M. W. Johnson on his bond to the Michigan Mutual Life Insurance Co. for the faithful performance by Johnson of the duties as agent of the company, but before he became so bound, or agreed to become so bound, as surety it was mutually agreed between him, M. W. Johnson and Mary C. Johnson that in consideration of his becoming bound as such surety and as indemnity as against his liability by reason thereof and as security to him for any money which he might thereafter advance to or for the benefit of Johnson, either for the purpose of enabling him to successfully carry on and perform his duties as agent or for the purpose of paying any premiums on any policies he might hold in this company or other life insurance companies or other indebtedness which Johnson then or might thereafter owe him, they, M. W. Johnson and Mary C. Johnson, agreed to procure and cause to be issued by this company a policy of $7,500 on the life of M. W. Johnson, and payable to Mary C. Johnson at his death, and that upon the issual of the policy they would transfer and assign the same to Higginbotham, the proceeds to be collected by him on the death of Johnson, and out of such proceeds he was to fully reimburse and indemnify himself against all such liabilities and debts as aforesaid, the surplus, if any, to be paid over to her, appellant, Mary C. Johnson. After the policy was obtained in accordance with the agreement, and on the 6th of April, 1895, the appellant and her husband, did assign and transfer the policy to Higginbotham, but in the wording of the assignment it only indemnified Higginbotham to the extent of indebtedness already created. Upon the discovery of the error in this assignment, and after the $2,436.80 debt had been created, the appellant and her husband, on the 6th of October, 1896, made another transfer and assignment of that policy to Higginbotham which did indemnify and secure him for the whole of his debt, which was created by advancements made by Higginbotham upon the faith that he was secured in this policy by the terms of their agreement. Appellant says that this last assignment was obtained from her by fraud, but the proof fails to sustain her allegations. It appears from the proof in this case, without any contradiction, that in this claim of $2,436.80, charged against appellant, is included a premium of $471 on a $20,000 policy on the life of M. W. Johnson, payable to the children. While this amount should be charged to her in the account of Higginbotham for the reason that she directed him in writing to pay it and promised to reimburse him out of her part, she ought to receive this amount back out of the policies payable to the children, if it has not already been done.

Wherefore, the judgment of the lower court is affirmed.

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VOL. 26. JANUARY 1, 1905. No. 13.

COURT OF APPEALS OF KENTUCKY.

CASH, &c. v. HAYDEN'S ADM'R.

(Filed November 30, 1904—Not to be reported.)

Collateral—Assignment of insurance policy—Where the owner of a life insurance policy gave his note to N. for $250 borrowed money, and assigned and delivered to him his policy as collateral and N. subsequently assigned the note and policy to C., in an action by the administrator of the insured for the policy, in the absence of an averment of insolvency on the part of the defendant or that the plaintiff would be in danger of loss from permitting him to collect the policy, defendant was entitled to hold possession of the collateral until his debt was paid.

W. B. Stanfield for appellants.

W. J. Webb for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by the appellee, J. N. Harris, as administrator of R. L. Hayden, deceased, against the appellants, Ed. Cash and Marshall Neely, for the possession of a policy of insurance issued during his lifetime to R. L. Hayden, by the Pennsylvania Mutual Life Insurance Co. for $500, which the petition alleges the defendants were in the wrongful possession of and which they had refused to surrender to the administrator upon demand. The defendants for answer admitted that at the death of R. L. Hayden he was the owner of the policy for $500 sued for; and that it was in the possession of the defendant, Cash; but denied that the plaintiff, as administrator, was entitled to the possession of the policy for the reason that R. L. Hayden, during his lifetime, had transferred, assigned and delivered the policy sued for to the defendant, Neely, as collateral to secure the payment of his promissory note to Neely for $250, which was executed simultaneously with the transfer of the policy; and that subsequently thereto Neely had, for a valuable consideration, assigned and delivered the note executed to him by

Hayden, and the policy of insurance hypothecated with him as collateral to the defendant, Cash, without recourse; that the note had never been paid, and averred that he was entitled to the possession of the policy and to collect it from the insurance company and to retain enough of the proceeds so collected to extinguish the note of Hayden held by him. A general demurrer was sustained to the answer, and defendants declining to plead further, the petition was taken for confessed against the defendants, and a judgment entered giving the plaintiff possession of the policy, and defendants have appealed.

As no opinion accompanied the judgment of the trial court, we are somewhat at a loss to know upon what theory the demurrer was sustained. In the absence of any averment of insolvency on the part of the defendant, or that the plaintiff would be in danger of loss from permitting him to collect the policy, defendant was entitled to hold possession of his collateral until the debt was paid. (Tiedman on Commercial Paper, 504; Jones on Pledges, section 1; 18 A. & E. En. of Law (1st.), 655; Pollock's Adm'r v. Smith, 21 Ky. Law Rep., 1227.)

For reasons indicated the judgment is reversed and cause remanded, with instructions to overrule the demurrer and for other proceedings consistent with this opinion.

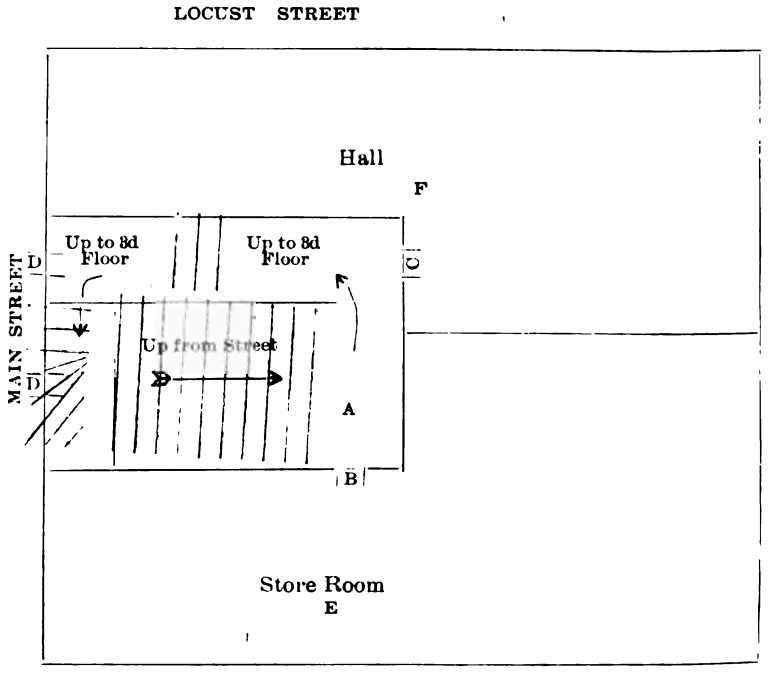
CRABTREE, BY, &c. v. DAWSON.

(Filed November 29, 1904.)

Appellee was having a dance in the third story of his premises, when one Noble intruded in a drunken condition, and when taken down by appellee threatened to "fix him," and as appellee got back up stairs some one called out that Noble was getting some bricks. Appellee got hold of an old musket to protect himself and company. At this time appellant Crabtree, who was a guest at the dance, came hurriedly up the stairway, which was dimly lighted, and appellee thinking he was Noble, called to him to stop, but Crabtree, not hearing, him came on, and on reaching the landing was struck by appellee with the musket and knocked down the stairs injuring him severely, and brought this action for assault and battery. On the trial the jury found for the defendant, and the plaintiff has appealed. Held—

1. Consequential injury — Intention — Lawful act — Negligence — No one is liable, civilly or criminally, for an unintentional consequential injury which resulted from a lawful act where neither negligence nor folly can be imputed to him. In other words, the foundation of defendant's liability in all such cases is negligence, or the failure on his part to exercise that degree of care to avoid making a mistake which an ordinarily prudent man would exercise under the same or similar circumstances.

2. Instructions — Degree of care — Reckless striking — Damages — The jury should have been instructed that if defendant at the time he struck plaintiff believed, and had reasonable grounds to believe, that he was Ollie Noble, and further believed that it was necessary in the exercise of a reasonable judgment to strike Noble in order to defend himself from a threatened attack about to be made upon him by Noble, and that he used no more force than was necessary, or appeared to him to be necessary, for this purpose, then he is excused on the ground of self-defense and apparent necessity. But it was the duty of defendant to have exercised the highest degree of care practicable under the circumstances to have ascertained whether the person he was about to strike was in fact the one whom he believed him to be, and from whom he apprehended danger to himself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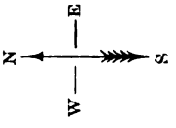
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and if he recklessly and wantonly struck plaintiff, the plaintiff was entitled to exemplary as well as compensatory damages.

8. Same—An instruction which specifically calls the intention of the jury in detail to the facts testified to by the defendant, and relied on to excuse his conduct, is objectionable, and has frequently been condemned by this court.

J. D. Atchison and L. P. Tanner for appellants.

Wilfred Carrico and Lavega Clements for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action for assault and battery instituted by appellant, Roy Crabtree, against the appellee, John T. Dawson, grew out of the following facts: Appellee Dawson owns a three story building on the corner of Main and Locust streets in Owensboro, Ky. The room on the first floor is used as a business house. The second floor is divided by a partition, the room on one side being used for private entertainments. The third floor is a large hall which was rented by appellee for dancing and public entertainments. The following diagram of the second floor will give a fair understanding of the location of the parties and place at the time of the assault: (See plat on accompanying page.)

A. is Dawson at the head of the stairs when he struck Crabtree. The red mark is the stairway leading from the store to the landing of the second floor. B. is a door entering the storeroom from the landing, which is about six feet wide and which Dawson opened to get the musket with which he struck appellant. C. is a door opening into the entertainment hall on the second floor. D. D. are two windows looking from the second floor to the third floor. E. is a storeroom on the second floor, and F. is the hall on the second floor. On the night on which this accident occurred Dawson had rented the large hall in the third story to Philip Dorn and Ed. Riney to give what was known as a "pay dance" for the benefit of the young people of the city. On the same night the daughter of appellee and a number of friends were giving a social entertainment in the small hall on the second floor. While these two entertainments were in progress one Noble, while intoxicated, gained admittance to the hall on the third floor, without having paid the customary charge for admittance. Riney, one of the lessors, approached him, and insisted that he should either pay or leave the hall. He at first refused, but finally Riney succeeded in enticing him out of the room into the hall, and then closing the door, leaving Noble on the outside. He became disorderly, thereby attracting the attention of Dawson, who approached him. Dawson's version of what took place after this is as follows: "Noble remarked that he was going back and clean out the whole thing, and I said: 'No, you won't, friend.' He replied: 'I am doing no harm.' I told him he must go down stairs. He said he would not. I replied, 'you will,' and took hold of him. He went down. I may have shoved him a little. He stopped in front of the door of the hall on the second floor, where he tried to go in. I pushed him by and got down to the platform on the first floor, where he sat down; he then got up and said: 'If you will come down here, I will fix it with you.' I replied: 'I don't want to bother with

you.' This platform goes into my storeroom. And when I got up to the head of the steps somebody remarked: 'He is getting some bricks.' I stepped into the door and got an old musket; just then Crabtree came running rapidly up the steps from the store below. I believed it was Noble returning to attack me, and called out to him 'don't come up here,' but he paid no attention to me; and when he got up within striking distance, supposing it was Noble, I struck him with the butt of the musket, when I discovered that I had made a mistake and hit the wrong man."

It is also shown that the hall at this point was somewhat dimly lighted, and that after appellee discovered his mistake he took appellant to a drug store, had his wounds dressed by a physician, and sent him home in a carriage; and that he went the next day to express his regret at the occurrence, and offered to pay his doctor's bill, for loss of time, and for a new suit of clothes, the one worn by appellant having been greatly injured. The testimony for plaintiff is to the effect that he was only seventeen years old; that he was on his way as a guest to the dance being given in the hall on the third floor; that whilst he heard Dawson tell Noble not to come back at the time he pushed him out of the store, that he did not hear any one call to him not to come up; that as a result of the blow he was knocked to the bottom of the steps, and sustained serious injuries. The jury on these facts and the instructions given by the court returned a verdict for the defendant, and plaintiff has appealed.

The main ground for reversal is that the court did not properly instruct the jury. As the question is a somewhat novel one, we deem it best at this point to insert the instructions in full. They are as follows:

"1st. The court instructs the jury that if they believe from the evidence that the defendant on the —— day of November, 1903, did wrongfully, willfully, recklessly or unlawfully assault, beat, bruise or wound the plaintiff, by striking him violently on the head with the butt of a heavy gun or musket, thereby inflicting dangerous wound on his head, from the effect of which assault and wounding the plaintiff suffered physical and mental pain and anguish, and was damaged thereby, they should find for the plaintiff such a sum of money as will reasonably compensate for the physical and mental pain which he sustained as the proximate result of said assault, not exceeding the sum of $5,000.

"2d. The court further instructs the jury that if they believe from the evidence that the assault of the defendant on the plaintiff was willful and reckless, and the defendant did not believe or have reasonable grounds to believe when he made said assault that the person he was assaulting was Ollie Noble, then they may find any sum as punitive damages in favor of the plaintiff, provided, however, all damages they may find for the plaintiff do not exceed in the aggregate the sum of $5,000.

"3d. The court further instructs the jury that if they believe from the evidence that the striking of the plaintiff by the defendant as set out in the petition was unintentional, and they further believe that it was recklessly committed by the defendant, and that the defendant did not use ordinary care and diligence, considering all the circumstances, to discover who the person was that he was about to strike before he struck, then the law is for the plaintiff, and the jury should find for the plaintiff; and if they find for

the plaintiff, the measure of their finding should be such sum as will reasonably compensate the plaintiff for the physical and mental pain which he sustained as the proximate result of said striking or assault, not exceeding the sum of all as mentioned in instruction No. 1.

"4th. The court further instructs the jury that if they believe from the evidence that the defendant believed, and had reasonable ground to believe, that the person whom he struck was Ollie Noble, and said Noble had been on the premises of the defendant immediately before said assault, and had been ordered to leave defendant's premises, and had threatened to return and assault the defendant or his guests, and the defendant believed, and had reasonable grounds to believe, that when the plaintiff was coming up his stairway that it was Ollie Noble, and that it was necessary to strike the plaintiff in order to defend himself and his guests from the threatened attack upon him and his guests, and the defendant used due care and diligence, considering all the circumstances and facts surrounding him, and his connection with said Noble, immediately before said time, and unintentionally struck the plaintiff, mistaking the plaintiff for the said Noble, then the law is for the defendant, and the jury should so find.

"5th. The court further instructs the jury that if they believe from the evidence that at the time the defendant assaulted the plaintiff he had just previously thereto had a difficulty with one Noble, and he had ordered said Noble to leave the premises, and took him out of his house, and that said Noble threatened to immediately return to the defendant's house and threatened to assault the defendant, and immediately thereafter he did see the plaintiff coming up the defendant's stairway on his premises, and after exercising due care to ascertain whether or not it was Noble, did believe the plaintiff to be said Noble, and defendant was in the exercise of reasonable care for his own safety and protection of his property and guests, and in his own house, and was also reasonably careful and exercised due care to discover whether the person he was about to strike or assault was, or not, the said Noble, and they further believe that before striking the plaintiff he ordered the plaintiff to leave defendant's premises, and the plaintiff did not do so, or offer to leave, and the defendant believed at the time he struck the person he was about to strike Ollie Noble; that he was then in danger of great bodily harm or death at the hands of the said Noble, and that it was necessary to strike him in order to protect his guests, property, family or himself, from the threatened assault, and he had used no more force than was reasonably necessary to protect himself, his guests, or his property, from said assault, then the law is for the defendant, and the jury should so find, except they believe from the evidence that the defendant used more force and violence in striking than was necessary to eject the person from his premises, if he believed it to be Ollie Noble, or more force and violence than was necessary to protect his property, his guests, his family and himself from the threatened assault of said Ollie Noble.

"6th. The court further instructs the jury that if they believe from the evidence that the striking of the plaintiff by the defendant was unintentional, and that the defendant was intending to strike one Ollie Noble, and that the defendant would not have struck the plaintiff except for the plaintiff's own carelessness and negligence in coming up the stairway of the de-

fendant, and they further believe that the plaintiff's own carelessness and negligence contributed to and brought about the damages now complained of, then the law is for the defendant, and the jury should so find.

"7th. Due care as used in the foregoing instructions is that degree of care that a prudent man would exercise under the same or similar circumstances.

"8th. The court further instructs the jury that if they believe from the evidence that the striking of the plaintiff by the defendant on the occasion mentioned in instruction No. 1 was willful or reckless, or that the defendant did not exercise due care in ascertaining who he was about to strike, then the jury can not consider mitigating circumstances as against the actual damage that the plaintiff sustained by such striking, but can only consider the mitigating circumstances and the justification, if any, of the defendant, in so far as it affects the punitive damages sought to be recovered in this action."

Both the plaintiff and defendant excepted to all the instructions given by the court, and offered instructions covering their respective views of the law. Those offered by appellant were based upon the theory that he was in any contingency, under the admitted facts of the case, entitled to compensatory damages for the injuries resulting from the assault and battery made upon him by the defendant. On the other hand, those offered by defendant are based upon the theory that if he believed, and had reasonable grounds to believe, at the time he struck plaintiff that it was Ollie Noble whom he was striking, and that it appeared to him to be necessary in order to protect himself or guests from a threatened assault at the hands of Noble, he was excusable on the grounds of apparent necessity and self-defense. From a careful examination of the decisions of this court and those of other jurisdictions, we feel warranted in asserting that no one is liable, civilly or criminally, for an unintentional consequential injury, which resulted from a lawful act, where neither negligence nor folly can be imputed to him; and that the burden of proving negligence or folly, where the act is lawful, is always upon the plaintiff. In other words, that the foundation of defendant's liability in all such cases is negligence, or the failure on his part to exercise that degree of care to avoid making which an ordinarily prudent man would exercise under the same or similar circumstances. A very full discussion of this class of cases is found in Morris v. Platt, 32 Conn., 84. As this is the oldest and best considered case on the subject to which our attention has been directed, we quote from it liberally as follows: "An accident is an event or occurrence which happens unexpectedly, from the uncontrollable operations of nature alone, and without human agency, as when a house is stricken and burned by lightning, or blown down by tempest, or in an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both; and a classification which will embrace all the cases of any authority may easily be made. In the first class are all those which are inevitable, or absolutely unavoidable, because effected or influenced by the uncontrollable operations of nature; in the second class, those which result from human agency alone, but were unavoidable under the circumstances; and in the third class, those which were avoidable, because the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably required

of one doing such lawful act, or because the accident was the result of actual negligence or folly, and might with reasonable care adapted to the exigency have been avoided. Thus, to illustrate, if A. burn his own house, and thereby the house of B., he is liable to B. for the injury; but if the house of A. is burned by lightning, and thereby the house of B. is burned, A. is not liable; the accident belongs to the first class, and was strictly inevitable and absolutely unavoidable. And if A. should kindle a fire in a long unused flue in his own house, which has become cracked without his knowledge, and the fire should communicate through the crack and burn his house, and thereby the house of B., the accident would be unavoidable under the circumstances, and belong to the second class. But if A., when he kindled the fire had reason to suspect that the flue was cracked, and did not examine it, and so was guilty of negligence, or know that it was cracked and might endanger his house and that of B., and so was guilty of folly, he would be liable although the act of kindling the fire was a lawful one, and he did not expect or intend that the fire should communicate."

The learned writer goes on to say further: "The foundation of that liability in every case of accident, where it is the result of human agency, uninfluenced by the operations of nature, and the act is lawful, is really negligence. This is true of collisions between vessels on the water, or horses and vehicles and persons on land. * * *

So when a man in firing at a mark unintentionally wounds another, the injury is direct, and the form of action is trespass, but the ground of liability is negligence in doing an unnecessary and avoidably though lawful act, without that extraordinary degree of care which the law demands in such circumstances, and which would have prevented the accident."

In Brown v. Kendall, 6 Cushing, 292, which was an action of assault and battery, the defendant accidentally hit the plaintiff, a bystander, while raising a stick to strike and part two dogs which were fighting. Chief Justice Shaw, in his opinion in that case, held that the defendant was not liable, unless the act was done in the want of the exercise of due care adapted to the exigencies of the case, and, therefore, such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. In Paxton v. Boyer, 67 Ill., 131, the action was for an assault and battery. It appeared that defendant and plaintiff's brother were in a conflict. When defendant struck plaintiff with a knife, supposing him to be the brother, plaintiff had, in fact, given no provocation. The jury found for the plaintiff and assessed his damages. The court instructed for that plaintiff that it was no defense, so far as actual damages were concerned, that the defendant had been violently assaulted by persons other than plaintiff, or was then being assaulted by such person, or that he may have honestly believed he was striking the plaintiff's brother when he struck plaintiff; or that he may have honestly believed it was necessary for his self-defense to assault the plaintiff, if the jury found from the evidence that the plaintiff was not a party to such assault upon the defendant; that such evidence of mistake of fact or good intentions on the part of defendant can only be considered by the jury as a defense against the infliction by the jury of vindictive damages, and not as a defense against such actual damages as the evidence showed plaintiff had suffered from such assault, or as nat-

urally resulted from such assault." The instructions were disapproved of in the opinion of the Supreme Court, the court saying: "If a person, doing a lawful act in a lawful manner, with all due care and circumspection, happens to kill another, without any intention of doing so, he is not liable criminally. How, then, can it be said he shall be responsible in a civil case, when, in doing a lawful act with due care, an injury happens, he shall be deemed in fault, and mulcted in damages? It is said by appellee the rule is different in civil cases; that the motive, intent or design of the wrongdoer toward the plaintiff is not the criterion as to the form of remedy, for when the act occasioning the injury is unlawful, the intent of the wrongdoer is immaterial; but appellant here is no wrongdoer, as the jury have said by their special verdict."

The judgment in the case was reversed.

In 1 Joyce on Damages, section 387, page 427, the author says: "Though an assault may be unintentional, yet if it is recklessly committed, the party guilty will be liable in damages therefor, and the injured party may recover such damages as are the natural and direct result of the act of violence, including mental and physical pain and suffering. But one who in the exercise of his rights of self-defense inflicts an unintentional injury upon a third party is not responsible in damages therefor, as where a person was assaulted by another and he struck a third person, mistaking him for the assailant."

Robertson's Criminal Law and Procedure, in section 542, page 752, lays down the rule as follows: "This right of self-defense exists although the danger is not real, but apparent only. A person will not be held responsible, civilly or criminally, if he acts in self-defense from a real and honest conviction induced by reasonable evidence, although he may have been mistaken as to the extent of the actual danger." (Citing a number of Kentucky cases in support of the text.)

When we apply the principles of law announced in these decisions to the case at hand it follows that if the defendant, at the time he struck the plaintiff, believed, and had reasonable grounds to believe, that he was Ollie Noble; and that he further believed that it was necessary, in the exercise of a reasonable judgment, to strike Noble in order to defend himself from a threatened attack about to be made upon him by Noble; and that he used no more force than was necessary, or appeared to him to be necessary, for this purpose, then he is excused on the ground of self-defense and apparent necessity. But it was the duty of the defendant to have exercised the highest degree of care practicable under the circumstances to have ascertained whether the person whom he was about to strike was in fact the one whom he believed him to be, and from whom he apprehended danger to himself. And if he recklessly and wantonly struck plaintiff, he was entitled in addition to compensatory damages to exemplary damages as well.

Whilst the instructions given in the case by the trial court are based upon the proper theory, they are in several important respects technically erroneous. For instance, in the third instruction only "ordinary care and diligence" is required of the defendant in ascertaining whether the person he was about to strike was in fact the person from whom he anticipated injury. This is error; he should have been required to exercise the highest or utmost care practicable under the circumstances by which he was surrounded.

In the fourth and fifth instructions the words due care and diligence are used. While the word due is defined to be "that which is owed," or "that which one has a right to demand or claim," we think it hardly comes up to the requirements of this case. Instruction No. 5 is also objectionable in that it specifically calls the attention of the jury in detail to the facts testified to by the defendant and relied on to excuse his conduct. This error has been frequently pointed out and condemned by this court. The sixth instruction is based upon the plea of contributory negligence, and is, in our opinion, out of place in this case. There is not a particle of evidence to show contributory negligence on the part of the plaintiff. He was at the place, and doing exactly what he had the right to do. The instruction should, therefore, have been omitted altogether.

For reasons indicated the judgment is reversed and cause remanded for a new trial not inconsistent with this opinion.

CITY OF CLINTON v. FRANKLIN.

(Filed November 29, 1904—Not to be reported.)

1. Land—Trespass thereon—Tenant in possession—Title—In an action for injury to real estate which merely affects the present enjoyment of it, the tenant may sue and need not show title in himself, beyond the bare possession, although in this case the evidence shows appellee's possession to have been actual, exclusive and adverse to all others for more than twenty years.

2. Good faith of trespasser—Where a city constructed a side walk upon the land of another against the objection of the owner, it can not be excused for the trespass on the ground that it acted in good faith under the belief that the ground upon which the sidewalk was built was a part of the street.

Bullock & Smith for appellant.

J. M. Brummal & Son for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Settle.

The appellee, J. L. Franklin, sued the appellant, city of Clinton, for $500 damages caused by certain alleged acts of trespass upon the part of its agents and servants, acting under its orders, and committed by illegally, forcibly and without appellee's consent, entering upon a lot of ground of which he is the alleged owner, and was then in the possession, digging up the soil, tearing down the fence, and constructing thereon a plank sidewalk.

The averments of the petition were specifically denied by the answer, and the trial which followed resulted in a verdict and judgment in appellee's behalf for $40. Appellant's motion for a new trial was based upon the single ground that the verdict of the jury was not supported by the evidence, and was contrary to law. The motion for a new trial was overruled, and this appeal followed. It appears from the evidence that most of the acts complained of were committed by appellant's agents and officers in attempting to construct a sidewalk under an ordinance enacted by its council, but in proceeding with that improvement they placed the sidewalk on the

ground claimed by appellee, instead of upon and along the side of the street. We think it was fairly shown by the evidence that the ground upon which the sidewalk was placed is a part of the lot covered by the deed under which appellee established its boundary and the extent of his possession.

The deed is not copied in the record, but it appears from the testimony of at least two of the witnesses, which was uncontradicted, that its boundary calls to run with the old road which formerly occupied the ground now included in the street, and it abundantly appears from the evidence that appellee's possession is co-extensive with the boundary of the deed; and further, that such possession has been actual, continuous and adverse to appellant and all others since 1881, a period of more than twenty years. It also appears from the evidence that the ground covered by the sidewalk was at one time inclosed by appellee, and a remnant of the fence was still visible when the sidewalk was constructed by appellant. We do not overlook the fact that the several witnesses introduced by appellant testified that the ground covered by the sidewalk was never a part of appellee's lot, but we adhere to the conclusion first expressed, that the weight of the evidence was to the effect that it is a part of the lot which has for more than twenty years been in appellee's possession. Furthermore, this fact was also established in another case of the same style and between the same parties, in which appellant admitted appellee's title to ownership of the lot, but denied that the sidewalk had been placed on the lot, and sought to enforce a lien upon the lot for the cost of constructing the sidewalk in question. In that case the lower court refused to enforce the lien claimed by appellant, and dismissed its petition upon the ground that appellee owned the land upon which the sidewalk was made, and as appellant had not acquired the same with appellee's consent, or by a proceeding to condemn it for such use, it had no right to appropriate it for the sidewalk, and upon appeal the judgment of the lower court was affirmed by this court in an opinion handed down with this one.

We do not think there is any ground upon which to rest the claim made by appellant that, in committing the acts of trespass complained of, it acted in good faith for the benefit of the public, and under the belief that the ground upon which it constructed the sidewalk was a part of the street, and not the property of appellee, for it is shown by the evidence that its officers and agents were repeatedly notified by appellee before they began to construct the sidewalk that they were preparing to place it upon his lot, and warned not to do so, to all which they gave no heed, but persisted in putting it upon his land, in doing which they ignored his rights, and neglected every means of informing themselves as to the true location of his boundary line. In our opinion there was no excuse for the illegal acts of appellant's servants. The illegal acts of appellant not only caused some injury to appellee's property, but to the extent that it occupied his lot for the sidewalk it appropriated it to its own use without compensation, and though such appropriation was only temporary, it deprived him of his property while it continued.

"Any injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation. So a partial destruction or diminution of the value of property

by an act of government, which directly and not merely incidentally affects it, is to that extent an appropriation." (Cooley's Const. Lim., 3d edition, page 545.)

Section 242 of the Constitution provides: "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them." * * * (City of Henderson v. McClain, 102 Ky., 402; City v. Jephson, 21 Ky. Law Rep., 1028; City v. Detweiler, 21 Ky. Law Rep., 894; Layman v. Beeler, 24 Ky. Law Rep., 174.)

It is insisted for appellant that there should have been no recovery by appellee because he was not the holder of the legal title to the lot, and that his possession was amicable as to the owners of the legal title. As already stated, the deed under which appellee seems to claim the lot in controversy is not in the record, and we are, therefore, unable in its absence to pass upon the character of his title, but if, as contended by counsel for appellant and stated by one of the witnesses, the deed from the former owner of the lot conveyed it in fee simple to the wife and son of appellee jointly, and it be true, as seems to be conceded, that the wife is dead, as there was issue born alive of their marriage and the marriage occurred, as did the execution of the deed to the wife and son, before the enactment of the present statute regulating the rights of property of husband and wife, appellee was and is entitled to the possession and use for life, as tenant by the curtesy, of that part of the house and lot to which his wife held the title at the time of her death. His possession of the other half, to which it is claimed the son holds the title, can not of course be regarded as adverse to the son, but as the latter testified as a witness in the father's behalf upon the trial of this case, and then made no claim to any part of the lot or to damages sought to be recovered, we are of opinion that his failure to do so would operate as an estoppel to any claim he might attempt by suit to assert against appellant for damages on account of the same acts of trespass for which appellee recovered in this case.

It would seem, however, that appellant is estopped to raise any question here as to appellee's title, that matter having been decided by the judgment in the other case between the same parties. But we think it immaterial whether appellee or another holds the legal title to the lot upon which the acts of trespass complained of were committed. It is apparent that there was no issue between appellee and his son as to the right of the former to the possession of the house and lot, or as to his right to maintain this action, and if appellee were only the tenant of the son and the other heirs at law of the deceased wife, his possession as such tenant under the facts of this case entitled him to maintain the action. Where an injury to real property merely affects, as it did in this case, the present enjoyment of the property, the tenant may sue, and need not show title in himself beyond the bare possession. (Alford v. City of Stanford, 13 Ky. Law Rep., 876.)

The evidence, however, shows appellee's possession to have been more than that of a mere tenant, and sufficient to maintain an action of ejectment, for it was actual, exclusive and adverse to all others for more than twenty years, during the whole of which time neither his title nor right of

possession seemed to have been questioned. We think the evidence sufficient to support the verdict, and the amount thereof is neither unreasonable nor excessive.

Wherefore, the judgment is affirmed.

CITY OF CLINTON v. FRANKLIN.

(Filed November 29, 1904.)

1. Cities—Sidewalks—Construction—Lien—Under Kentucky Statutes, section 3643, authorizing cities of the fifth class to construct sidewalks and giving a lien on the adjoining lot for the cost thereof, no lien attaches where the agents of such city against the objection of the lot owner constructed the sidewalk on the lot instead of on the street, though the agents in good faith believed they were constructing it on the street and though such walk may have added to the value of the lot.

2. Same—Where a city constructs a sidewalk on a lot against the owner's consent and without condemning the lot and paying him therefor, the city can not in equity require the lot owner to pay the cost of the sidewalk, less the value of the strip taken on which the walk is built, although the owner was given an opportunity to construct the sidewalk and refused to do so.

Bullock & Smith for appellant.

J. M. Brummal & Son for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Settle.

By this action in equity the appellant, City of Clinton, sought to enforce a lien against the house and lot of the appellee, J. L. Franklin, for the sum of $11.61, which sum was alleged to be his proportion of the cost of constructing a plank sidewalk ninety-five feet in length on Clay street in front of his property.

It was averred in the petition that the making of the sidewalk was a work of public necessity, and that the council of the city, by ordinance duly enacted, ordered that it be made, notice of which was given appellee, and he having been given the option to do the work himself, and failing to avail himself of that right, it was done by the agents of the city in a proper manner, and at the cost above indicated, which appellee refused to pay. The answer of the appellee traversed the averments of the petition, and in addition charged that the appellant's agents, instead of making the sidewalk upon the street and along the side thereof abutting his lot, placed it wholly upon his lot, without his consent and over his protest, and that fact having been established by the evidence, and it appearing that appellant had failed to take the necessary steps to secure the right to construct the sidewalk on appellee's lot, or to compensate him for the ground taken therefor, the petition was dismissed by the circuit court.

Appellant is a city of the fifth class, and the authority given it to construct and repair the streets and sidewalks within its corporate limits is conferred by section 3643, Kentucky Statutes, which provides: "The city council is hereby authorized and empowered to order any work they deem necessary to be done upon the sidewalks, curbing, sewers, streets, avenues

highways and public places of said city. The cost and expense incurred in constructing or repairing streets, avenues, highways, sewers and public places shall be paid out of the general fund of the city. The expenses incurred in making and repairing sidewalks and curbing shall be paid by the owners of the land fronting and abutting thereon, each lot, or a portion of a lot, being separately assessed for the full value thereof to the entire length of the whole improvement, not exceeding a square sufficient to cover the total expense of the work, but the owners of such property shall have the right to make such improvements, if they prefer doing so, instead of paying for same. Whenever any expense or cost of work shall have been assessed on any lands as herein provided, the amount of said expense shall become a lien upon said lands, which shall take precedence of all other liens, and, which may be enforced by the contractor or city in accordance with the provisions of the Code of Practice."

Counsel for appellant in effect concedes that it constructed the sidewalk on appellee's lot without right, but insists that its council acted in good faith and for the public good in doing so; and furthermore, that the sidewalk added to the value of appellee's lot, and for these reasons appellant was in equity entitled to recover the cost of the improvement, less the value of the ground appropriated therefor, and in any event that appellee can not complain of the appropriation of his ground for the sidewalk as he was given the opportunity to construct it, and could have placed it on the street, but refused to avail himself of the right thus given him

In response to these contentions it may be said that it appears from the record that the appellant and its agents entrusted with the work of making the sidewalk knew before the beginning of the work of the appellee's claim to and ownership of the lot, and that he repeatedly objected to the building of the sidewalk where it was placed, both before the work was begun and during its progress. Appellant, therefore, began and completed the improvement with its eyes open to the situation. Upon the other hand, in acquainting the appellant with his ownership of the lot, and refusing his consent to the placing of the sidewalk thereon, the appellee did all that could have been expected of him, and even more than the law required, as it was the duty of appellant and its agents to know whether the ground upon which the sidewalk was constructed was a part of the street.

If in order to widen the street it was necessary to secure a part of appellee's lot for the sidewalk, and this could not be done by contract or agreement with him, appellant might have acquired it by condemnation proceedings as allowed by section 3653, Kentucky Statutes, which provides: "Whenever property is needed for municipal purposes, and an ordinance is enacted so declaring, the proper authorities of the city or town may, if compensation therefor can not be agreed upon, proceed to condemn the same in the manner provided for the condemnation of land for railroad purposes." (As to mode of procedure, see Kentucky Statutes, sections 835 to 840, inclusive.)

In such proceedings just compensation must be made to the owner of the land condemned before it is taken from him. Not only is it so declared by statute (section 839), but also by the Constitution, section 242, which provides: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just com-

pensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction." * * *

We may in some sort realize the importance attached to this subject by the framers of the Constitution when we find that the same provision was likewise inserted by them in section 13, "Bill of Rights," which declares: * * * "Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

As appellant had not acquired any part of appellee's lot for its sidewalk before constructing it, and had not previously compensated him therefor, its ordinances declaring the improvement necessary and directing that it be done conferred no authority upon its agents to construct the sidewalk upon appellee's lot, and consequently created no charge or lien upon the lot for the cost thereof. Nor did it follow that because appellant might have acquired enough of the lot for the sidewalk under proceedings of condemnation, or that the making of the sidewalk added to the value of appellee's lot, the chancellor was thereby authorized to ignore the mandatory provisions of the Constitution and statutes and deprive him of his property, by some sort of supposed equitable process, whereby he might be charged with the cost of the improvement and appellant with the value of the ground occupied by the sidewalk.

Wherefore, the judgment is affirmed.

KEFAUVER v. KEFAUVER.

(Filed November 29, 1904—Not to be reported.)

1. Appeals—Jurisdiction—Where in an action on a note for $200 the defendant pleads a counterclaim for $73, the amount in controversy as to the defendant is $273, which gives this court jurisdiction of the appeal.

2. Divorced wife—Note on husband—Assignment of note to son—Plea of settlement in divorce proceedings—Where a divorced wife holds a note on her former husband which she assigned to her son, on which the son sued his father and which the defendant claims was settled in the divorce proceedings in which his wife was allowed alimony, Held—That where the evidence is conflicting as to whether the note was settled in such proceedings, or otherwise, the judgment of the chancellor finding against the appellant will not be disturbed.

J. C. Graham and Basil Richardson for appellant.

J. S. Wortham for appellee.

Appeal from Grayson Circuit Court.

Opinion of the court by Judge Nunn.

The appellee sued the appellant, his father, on a note for $200, executed September 5, 1893, to Hardie E. Kefauver, his mother, and by her assigned to appellee.

The appellant answered, and sought to defeat a recovery upon three grounds: First, he claimed that on the 30th of April, 1894, he paid to Hardie E. Kefauver the full amount of this note, with interest; that she then held

the note and promised to destroy it; second, that Hardie E. Kefauver, at the date of the note and time of payment, was his wife, and that this transaction having taken place prior to the passage of what is known as the "Weissenger Act," the same was null and void; third, he alleged that his wife had, in the year 1897, sued him for a divorce, alimony and a restoration of her property received by him during the marriage relation, and in that action the amount of this note was litigated and adjudged to her, it being a part of the amount of $1,100 adjudged against him in her favor in that action. He also made his answer a counterclaim against the appellee, and sought a recovery of him of $65 on a note, and $8 on an account.

The appellee filed a reply, admitting the note and denying the account, and controverted all the other affirmative matter in the answer, and alleged that the $200 for which the note was executed by appellant was his fund; that it was in the possession of his mother as trustee for him, under and by virtue of the will of his grandmother; that it was devised to him by his grandmother, with directions that the sum, with its accumulated interest, be paid over to him upon his arrival at the age of twenty-one years; that this money had been paid over to his mother, a daughter of the devisor, for that purpose, and that appellant knew these facts at the time he borrowed the money, and prior thereto; that for these reasons this matter was not litigated in the divorce proceedings between his father and his mother, and was not a proper subject for litigation therein, and that they both well understood this fact. Appellant filed a rejoinder, putting in issue this matter. The court, upon a trial of the case, found for the appellee the amount of the note, with its interest, subject to the credits of the note for $65 and the account for $8, and the appellant has appealed. Appellee asks for a dismissal of this appeal for the reason that this court has not jurisdiction, the amount being less than $200.

Section 950 of the Kentucky Statutes provides: "No appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property if the value in controversy be less than $200, exclusive of interest and cost."

The principal of the amount for which appellant was sued was $200. He pleaded payment of this sum and asked for a judgment over against appellee for $73. He lost on his plea of payment, but recoverd on his counterclaim. Thus it will be seen that appellant had in controversy $273, for if judgment had gone against him for the amount sued on, and he had also lost on his counterclaim, he would have lost $273. But as he won on his counterclaim, it left the amount he lost in this litigation $200, which sum gives this court jurisdiction of the appeal. If appellee had lost, after admitting the counterclaim of $65, the case would be different if he had appealed, as the amount in controversy on appellee's part would have been only $135.

The proof on the question of payment by appellant was conflicting, and not at all satisfactory. The pleadings in the divorce case referred to are copied into this record, and neither the note nor the sum of money for which it was executed are mentioned therein. The proof is also conflicting upon the question as to whether or not appellant, at the time he borrowed this money from his wife, knew that the money received was a trust fund in

her hands for the appellee. Appellant says that he did not receive cash, but received a check signed by O'Reily, payable to appellant's wife; that the trust fund received by his wife was in cash, and that, therefore, he did not get the trust fund. It was shown in the proof that his wife had received the fund due her son in cash and the fund due her from her mother's estate in this check from O'Reily; that she was using for her benefit the cash and was holding the check as the trust fund, and this fact the appellant was apprised of at the time he borrowed it and executed the note sued on. His wife, the mother of appellee, transferred the note to appellee in compliance with her duty as trustee of her son. The appellant having received this money, knowing that it belonged to the son, he can not now be heard to say that the note was void because it was executed before the passage of the "Weissenger Act," nor to plead the judgment in an action between himself and his wife, in which she recovered alimony, as a bar to the claim of the appellee, the rightful owner of the fund, who was not a party to that action.

While the proof on the questions of fact is not clear and convincing, we are unwilling to disturb the findings of the lower court thereon.

Wherefore, the judgment is affirmed.

STONE, &c. v. BURGE, &c.

(Filed November 29, 1904—Not to be reported.)

Vested estate—Joint owners—Action for sale—Possession—Where the parties to an action for the sale of real estate hold vested interests jointly therein, and there is no adverse holding, the possession of one joint tenant is the possession of all in the meaning of section 490, Civil Code, providing for the sale of land so held.

Mitchell & DuBose for appellants.

Wright & McElroy and John B. Rhodes for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal of this case, the former opinion being in 24 Ky. Law Rep., 2424.

After the filing of the mandate the lower court made an order directing a sale of the fourteen acres of land named in the former opinion, and directed that two-thirds of the purchase price be made payable to appellee, Nannie Burge, and the other third, due infant appellant, Nellie Moore, remain a lien on the land until bond was executed by her guardian as required by law. The commissioner made the sale, when the appellee, W. T. Duke, became the purchaser at the price of $1,630, and executed bond for the purchase price as directed by the judgment. Appellants filed exceptions to the commissioner's report of sale, first, because the pleadings and proof did not authorize a sale of the land, and that Nellie Moore's interest did not require a sale thereof; second, that the sale was not advertised as required by the judgment; third, that the land was sold for an inadequate price; fourth, that the appellant, Nellie Moore, by her next friend, had on the 23d day of

February, 1904, instituted an action in the Warren Circuit Court for the purpose of having the court vacate and set aside the judgment rendered in the action at the June term, 1902, and at the November term, 1903, and filed with and as a part of the exceptions a copy of her petition. The judgment of date June, 1902, was the one affirmed by this court. The other was the one directing a sale of the land. The appellants abandoned the second and third exceptions; there was not any attempt to prove a failure to advertise the sale, nor that the land sold for an inadequate price, but, on the contrary, as appears from the record, the land brought its full value. It was alleged in the petition that the land could not be divided without materially impairing its value, and that the interest of the infant, Nellie Moore, would be benefited by a sale of the property. The proof introduced sustained these allegations, and the acknowledged facts also supported them. The land consisted of only fourteen acres in the country, and can only be used for farm and garden purposes, on which is situated a two-story brick house and various outbuildings. The sale of this land was made under the provisions of section 490 of the Code, which provides that a vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity in an action brought by either of them, * * * if the estate be in possession and the property can not be divided without materially impairing its value or the value of the plaintiff's interest therein. It is contended by appellants that the land was not in their possession in the meaning and intent of the Code, and for this reason the court was not authorized to decree a sale. They cite the following cases as authority to sustain them: Burns v. Ingersol, 6 Ky. Law Rep., 219; Malone v. Conn, 95 Ky., 93, and Swearingin v. Abbott, 99 Ky., 271.

These were cases where there was a life tenant who united with certain remaindermen in a suit to sell the land and divide the proceeds under section 490 of the Civil Code. Such proceedings were void for the reason that the remaindermen were not in the possession of the land, nor did they have the right to the possession; the possession and the right thereto existed in the life tenant; their interests were not joint. In such cases they should have proceeded under section 491 of the Code. In the case at bar there was no life tenant, but the parties held vested interests jointly with unity of possession. The question of one was the possession of all under the provisions of section 490 of the Code, as there was no pretense of any adverse holding by appellant Stone or anyone. Stone only claimed that he had purchased the interest of Ed. Howard, one of the heirs, which, according to his claim, made him a joint tenant with Mrs. Burge and Nellie Moore. But this court in former opinion affirmed the judgment which decided that he was holding that third interest in trust for appellee, Mrs. Burge.

We find in the record what purports to be a copy of the petition of Nellie Moore by her next friend, in which she asks that the judgments of 1902 and 1903 be vacated. But it appears rather to have been prepared with the view to obtain a new trial for appellant Stone, as she states for him that her grandfather, Arch Howard, was indebted to appellant Stone in the sum of $1,000 or more, and that her grandfather, having great confidence in him, turned over to him $1,000 in money and two notes of $400 each, making in all $1,800, and out of this sum was to pay and cancel the debts he held

against Howard, and was also to provide a home and care for his daughter, Nannie, appellee, during her life, or until she married, and also furnish to his granddaughter, Nellie Moore, the petitioner, such things as she might need, and an education, and when Nannie, appellee, married or died the trust property, if any left, should go to Nellie Moore, the petitioner; that appellant Stone accepted the trust, and received the money and property upon these conditions. Stone, in making his defense in this action nowhere sets forth any such state of facts, either in his pleading or his proof, and it is evident that these allegations were made with the view to have those judgments vacated in his interest. It is certain that they are not in the interest of the children and heirs of Arch Howard.

In the former opinion this court, by Judge Paynter, said: "The appellant claims that no estate had come into his hands except about $200, which was to the credit of the decedent in bank, which was used in paying funeral expenses, for a tombstone, etc. The appellee claims that about $2,800 went into his hands for her benefit. On cross-examination he admitted that he had collected two notes due the estate for $400 each. He also admitted that decedent, a short time before his death, assigned the certificate of deposit of $1,000 to him, which he afterwards collected and placed the proceeds to his own credit in bank. The $1,000 certificate was placed in the hands of the appellant for the benefit of the appellee, or it was placed there for the benefit of the decedent. As there is no issue here between the heirs of the decedent on this question, we forbear to express any opinion, except to say that, in either event, a part of it belonged to appellee. The appellant fails to show that he distributed any of the $1,000 and the $800 collected by him, except one hundred and thirty-odd dollars, which he paid appellee. It is true he said that he paid her all her interest in it, but he fails to show how or wherein he did so. Besides, his conduct, as appears in this record, is not calculated to make us accept his statement without vouchers or satisfactory evidence of payment."

The effect of this opinion settles the question as to the liability of the appellant, Stone, for at least $2,000, subject to a credit of one hundred and thirty-odd dollars which he paid to appellee Burge and the $466 which he paid Ed. Howard for the third interest in the land. And he should be compelled to settle his accounts as administrator, and the court should appoint a guardian ad litem for appellant, Nellie Moore, in this action, who will take proper steps to compel appellant Stone and his surety on his administrator's bond to account for and pay over to her that part of the estate to which she is entitled.

Wherefore, the judgment of the lower court confirming the sale is affirmed.

PADUCAH COMMISSION CO. v. BOSWELL.

(Filed November 29, 1904—Not to be reported.)

1. Instructions—In this action against appellant on account of the acts of its agent, Morris, an instruction to the effect that if the jury shall believe from the evidence that Morris was the agent for defendants in the transaction of their business at Mayfield, where he bought and sold upon margins, and that at the time of such sales delivery was not contemplated, the only

rational construction to be given the instruction is that it meant that Morris was the agent and that no delivery was contemplated by all the parties to the purchases previously referred to, and it must have been understood by the jury.

2. Construction of statutes—This action was prosecuted under sections 1955 and 1956, Kentucky Statutes, which have been fully construed in the cases found in 90 Ky., 280, and 24 Ky. Law Rep., 730.

W. A. Berry, Reed & Berry, Robbins & Thomas and W. R. Mizell for appellant.

D. G. Parks for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Nunn.

This is an appeal from a judgment of the Graves Circuit Court, wherein appellee sought to and did recover judgment against W. C. Morris, The Odell Commission Co. and the Paducah Commission Co., the latter firm being composed of George B. Gilbert and H. J. Arenz, appellee claiming that W. C. Morris operated at Mayfield, Ky., a commission house or "bucket shop," as the agent of the Paducah Commission Co., which latter firm was doing business in Paducah, Ky., and which had connection with the Odell Commission Co., at Cincinnati, O., and charged that all three, Morris, Paducah Commission Co. and Odell Commission Co. were acting together in the transaction of the business at Mayfield, Ky., and had mutual arrangements between themselves, and that all were bound to appellee on account of the acts of W. C. Morris as their agent at Mayfield, Ky.

The Odell Commission Co. and W. C. Morris failed to answer. The appellant, the Paducah Commission Co., did answer, and traversed all the allegations of the petition. A jury was empaneled and heard the evidence, and returned a verdict for the amount claimed by the appellee. The Paducah Commission Co. alone appeals from that judgment, and contends, first, that the proof did not show that W. C. Morris was acting in Mayfield as the agent of the appellant; second, that the proof did not show that at the time of the sales and purchases of stocks, etc., that it was mutually agreed and understood by both appellee and Morris that the stock and commodities contracted to be bought and sold were not to be delivered, but that the purchaser or seller should merely receive the differences between the contract price and the market price at the maturity of the contract.

The instruction, No. 1, given by the court is as follows: "The court further instructs the jury that if they believe from the evidence that Walter C. Morris was the agent for the defendants, Arenz & Gilbert, trading as the Paducah Commission Co., in the transaction of business at Mayfield, Ky., in which plaintiff, C. W. Boswell, bought and sold stock, grain, provisions or commodities on a margin, and they further believe, from the evidence, that at the time of any such sales or purchases the delivery of the articles bought or sold was not contemplated by the parties thereto or their agents, they will find for plaintiff as against Arenz & Gilbert, such amount of money as they may believe from the evidence he lost in such transactions with Walter C. Morris while acting as agent for Arenz & Gilbert, trading

as the Paducah Commission Co., if they believe he did act as such agent, etc."

There was no evidence introduced showing that there was ever any delivery or offer of delivery of any of the stocks, bonds, etc., by either of the parties to the contract, and hence the only questions to be submitted to the jury were whether Morris was the agent of Arenz & Gilbert in the transaction of this business, and whether or not it was contemplated by the parties to the contract that there was to be a delivery of the articles bought or sold. The appellant contends that this last proposition was not properly submitted to the jury; that the words "the delivery of the articles bought or sold was not contemplated by parties thereto or their agents" used in the instructions did not express the law of the case; that these words meant that if any party did not contemplate a delivery at the time of entering into same, then the appellant was liable.

The instruction should be construed as a whole. The first part of it required the jury to believe that Morris was the agent of Arenz & Gilbert, and sold stocks, etc., on margin, and the words "parties thereto" so used required the jury to believe that no delivery was contemplated by all the parties to the purchases or sales previously referred to in the instructions. This is the only rational construction of the court's language, and must have been so understood by the jury. This action was prosecuted under sections 1955 and 1956 of the Kentucky Statutes. These sections have been construed by this court in several cases, the two latest being 90 Ky., 280, and the case of Boyd Commission Co. v. Coates, 24 Ky. Law Rep., 730. The facts of this last case and the one at bar are almost identical, and the law as stated in that case so completely covers this case that we deem it a waste of time to refer to authorities to show the liability of appellant under circumstances.

Wherefore, the judgment is affirmed.

PADUCAH COMMISSION CO. v. LONG.

(Filed November 29, 1904—Not to be reported.)

Former appeal—Authority of—This case is affirmed for the reasons stated in the case of Paducah Commission Co. v. Boswell.

W. A. Berry, Reed & Berry, Robbins & Thomas and W. R. Mizell for appellant.

D. G. Parks for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Nunn.

By agreement of parties this case and the case of Paducah Commission Co. v. C. W. Boswell, ante, 1068, this day decided, were considered together. The facts and the legal propositions in that case and this one are exactly alike, and for the reasons stated in that case this one is hereby affirmed.

ICE v. ICE.

(Filed November 29, 1904—Not to be reported.)

Husband and wife—Contracts between relating to separation—Where the husband conveyed to the wife a small tract of land of the value of $500 and some personalty in consideration that she would refrain from instituting a suit against him for alimony and divorce and that she would rear and educate their only child and support herself without cost to him, it was error in the chancellor to set aside the conveyance on the ground of fraud and want of capacity on the part of the husband to make a contract, the evidence not authorizing it, but there was evidence that threats were made by the father and brothers of the wife which resulted in the husband's execution of the deed, and not release appellant from all obligations provided for in the contract and to give her a lien on the land for a small sum which she paid in part satisfaction of the lien reserved by her father on the land, and for expenses incurred upon the death of the child that were paid by her.

Geo. S. & John A. Fulton for appellant.

Halstead & Newell for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Nunn.

On the 28th of November, 1899, appellee and appellant were married in Nelson county, Kentucky, and lived there until their separation on January, 22, 1902. In the year 1901 a boy child was born to them. At the time of separation appellee was the owner of a small survey of land worth about $500, two old horses of but little value, one cow, some little corn, some household and kitchen furniture of but little value, and a few Irish potatoes.

It appears that at the time of the separation the appellee conveyed to his wife this tract of land and the personal property described, in consideration that appellant would refrain from bringing suit against him for alimony and divorce, and the further consideration that she was to take, care for, educate and raise their boy, and support herself, without any cost or expense to appellee, and that he was to be released from all future responsibility therefor. In addition to the considerations named, she agreed to and did pay him $50 in cash. She borrowed this sum from her father, and in the deed a lien was reserved in his behalf for this amount.

In the month of May, 1902, the appellee brought this action against the appellant for the purpose of setting aside this deed conveying the land and the contract and agreement by which she obtained the personal property named, alleging that the deed and the contract were obtained by fraud, false pretenses, covin and by duress, and that they were both obtained from him without any consideration. She answered, denying the allegations of the petition. Her father filed his petition and asked to be made a party to the action, whereby he sought to enforce his lien on the land for the $50 which he had loaned his daughter to make the payment to appellee, less a credit of $10 which had been paid to him by appellant. It appears that the child died, and appellant paid the medical bills and burial expenses. The proof was taken, and upon the trial the court adjudged that the deed referred to be cancelled, set aside and held for naught, and that the article and agreement of separation, in so far as it transferred and conveyed to ap-

pellant the personal property, was cancelled and set aside, and it was adjudged that all the personal property mentioned be delivered and returned to appellee, and that appellant deliver to appellee the real estate; but the court gave the father of appellant, G. M. Newton, a lien on the land to secure the payment of the note for $50, credited by $10, of date February 23, 1903, the amount paid him by his daughter, the appellant.

The appellee and the appellant were allowed to testify without objection. He stated that he was forced to make this deed and sign the article of separation by reason of threats made by the appellant, her father and her brother, to the effect that if he did not sign the papers he would be killed. He was corroborated in this statement, but to a very slight extent. Appellant and her brother controverted these statements in positive terms, but her father, G. M. Newton, when the question was put directly to him with reference to threats, in a manner waived and evaded the questions, but in effect denied that threats or any knowledge of threats to obtain the deed or the article of separation. The appellee also introduced eight or ten witnesses who proved that he had a weak mind, and, in their opinion, was not capable of protecting his interests in a business transaction. Appellant introduced about the same number of witnesses, who testified that, in their opinion, he was capable and competent to transact business and protect himself.

While the evidence is conflicting, we are convinced that appellee has not a strong mind, nor much will power, but he has sufficient of both to protect himself in a business transaction under ordinary circumstances, and we would be unwilling to let the judgment stand directing a cancellation of the deed and a return to appellee of the real estate and personal property but for the fact of appellee's positive statements of the force, threats and duress in obtaining his consent to the execution of the deed and the contract, and for the fact that G. M. Newton, the father of the appellant, evaded and waived the questions put to him upon these points, and failed to deny in a positive manner the use of force, threats and duress in obtaining the deed and contract. There is no evidence in the record showing any conduct on the part of appellant to justify the appellee in abandoning and failing to support the appellant as his wife. When the court cancelled the deed and directed a return to the appellee of the land and personal property mentioned it should have, at the same time, released the appellant from all obligations provided in the contract, and in addition to giving the lien on the land to G. M. Newton for the $40, it should also have been adjudged to appellant a lien on the land for the $10 that she paid her father on this $50 claim, and for the medical bills and burial expenses incurred in the treatment and burial of their son, for the reason that she paid this $10 and incurred this expense on the faith of the contract and deed before she had notice that appellee would undertake to rescind the contract and have the deed set aside. On the return of the case the court should make an order absolving her from all the obligations on her part contained in the articles of separation, and giving her a lien on the land for the matters therein stated, and leave them free to effect a reconciliation, to sue for divorce and alimony, or to take such other steps as they, or either of them, may think proper in the premises.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

DUNCAN v. AMERICAN STANDARD ASHPALT CO.

(Filed November 30, 1904—Not to be reported.)

Leases—Damages—Injunctions—Appellant conveyed the mineral rights in a tract of land to the Logan County Asphalt Co., which company made a mortgage of the property which was foreclosed and the property purchased by appellee, and in defining the rights of the parties the court construed the deed, setting out wherein the company originally acquired certain rights and wherein it acquired no rights to do certain things. Appellant brought this action setting up these facts, and alleged that appellee had wrongfully cut certain timber and converted it to his own use, and sought to enjoin appellee from further trespasses. Held—That the judgment awarded appellant seems sufficient to cover the timber used, and as there was no allegation or proof that appellee was insolvent, and the proof does not warrant the conclusion that it was about to commit other trespasses, it was not improper for the chancellor to deny the injunction.

W. P. Sandidge for appellant.

J. C. Browder, W. F. Browder and H. S. McCutcheon for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Hobson.

On January 27, 1896, appellant, D. D. Duncan, and wife conveyed by deed to the Logan County Asphalt Co. the mineral rights in a tract of land containing 557 acres in consideration of $10,000, the vendee to have the right to go upon any part of the land and dig to any depth for the purpose of mining and quarrying stone therefrom. The deed also contained the following stipulations: "It is further agreed that in the event the party of the second part desires to construct a railroad from the Louisville & Nashville R. R. to the said property hereby conveyed, the party of the second part is hereby given the right of way for such road without cost through the lands from the said railroad to any portion of said land hereby conveyed; but it is understood and agreed that said railroad shall not be run on any line between the dwelling house of the parties of the first part and the tan yard on the river. The parties of the first part hereby further agree to permit the party of the second part, its assigns or successors, to use any timber on the land hereby conveyed for the purpose of erecting, building or constructing other works which may be desired in the development of said mining property; and also to permit the party of the second part, its assigns or successors, to get from said property hereby conveyed cross ties to be used in the construction of said branch road which may be on said land (with the exception of chestnut oak). It is understood that this deed does not convey the cleared land nor the orchard on said land unless it be underlaid with mineral, but in the event it shall be discovered hereafter that said orchard or cleared land shall be underlaid with mineral, then the party of the second part is hereby invested with the right to develop such part of said property, it being understood that in doing so the second party will do as little damage as possible to the surface of that part of the land hereby conveyed. It is further understood that the party of the second part, its assigns and successors, shall have the right to erect any necessary buildings or other works on an part of said property, except upon said cleared land or orchard, and shall h free access

to said land from any direction by roads and other passways or means of exit and entrance. It is further agreed that the second party, as a further consideration for this deed, shall pay to the parties of the first part two and one-half cents on each ton of asphalt mined on said land, after fifty thousand tons shall have been taken therefrom; and all the asphalt taken out since the 9th day of March, 1894, shall be counted as part of said fifty thousand tons."

The Logan County Asphalt Co. made a mortgage on the property conveyed to it; the mortgage was foreclosed, and the property sold under a judgment of the court. Appellee purchased the property at the decretal sale. In the judgment in that action the court, in defining the rights of the parties, construed the deed above quoted as follows: "In order that the purchaser at the sale herein ordered may know the extent of his rights and the limitations on them, it is the opinion of the court, and it is adjudged, that under the deed from D. D. Duncan to the Standard Asphalt Co. said company acquired no right:

"1st. To cut any timber on said land except such as may be necessary to make cross ties sufficient for the original construction of the railroad mentioned (and that all ties cut and not used by said company are to be counted the same as used), and except such timber as may be required for the original construction of such house and structures as may be necessary in the development of the asphalt mines.

"2d. It has no right to cut any timber for fuel, or for repairs, or to clear any land for cultivation, or to cultivate any of it.

"3d. The company acquired no right to cut any timber which it did not in good faith intend to use for the purposes specified in this judgment, and all timber cut without intent to be so used remains the property of said Duncan.

"4th. The company has no right to sell any timber off said land, nor to let to any tenant any part of it, or of any houses erected on it, except to its employes.

"5th. In getting cross ties and other timber for the purposes herein specified as allowed, the part of trees not used or fit to be used for such purposes belongs to said Duncan.

"6th. Said Duncan has a lien on the property conveyed by said deed for his royalty on asphalt taken out in excess of 50,000 tons, and in estimating the amount that which has already been taken out since the —— day of ————, 1894, shall be taken into account."

Duncan brought this suit in equity on January 23, 1902, setting up the foregoing facts, and alleging that appellee had wrongfully cut down on the land and converted to its own use a large quantity of timber standing thereon, no part of which was used by it, or intended to be used by it, for any building or other work in the development of the property or for ties in the construction of the railroad; that it had also converted to its own use a large quantity of timber cut by its vendor on the land which was not used by its vendor, nor intended to be used by it, for building purposes or other work in the development of the property; that it had also wrongfully cut down and converted to its own use a large quantity of chestnut oak, and that all of the above was of value $300. He also alleged that the defendant

was threatening to cut down and convert other timber; that the property has long since been developed and the branch railroad has been constructed, and that a great multiplicity of actions would result if the defendant were not enjoined from further trespasses. The defendant filed an answer, denying the allegations of the petition, and on final hearing the court entered judgment in favor of the plaintiff for $32.15 and costs, but refused to grant an injunction, and from this judgment the plaintiff appeals.

The proof on the trial showed that appellee's vendor had cut and made 555 ties, which it allowed to rot in the woods, and that it had cut down timber sufficient to make 266 more ties, which were not made, and the timber was allowed to rot. But this was done some years ago, and there was a judgment rendered in February, 1901, which covered all damages up to that time. The proof also showed that a branch railroad had been built from the line of the railroad track for two miles; that from this point to the mine, which was a distance of about a mile and a quarter, a tramway had been constructed. The railroad ran to the foot of a cliff, and it not being practicable to run the railroad up the hill to the mine, the tramway was built from the top of the cliff to the mine. The rock was hauled on the tramway to the top of the cliff, and there run down a chute into the cars. The material for the tramway was gotten from the plaintiff's land, the old ties above referred to being in part used and in part the slabs made in getting out the railroad ties. The rest were gotten from the right of way cleared for the tramway. One chestnut tree was blown up at the time in developing it, and one was cut on the right of way. Logs sufficient to make 1,665 feet of lumber were cut on Duncan's land and sawed up into plank, which was used in the construction of a mill at the mine in connection with other lumber bought by the company. In addition to this, thirty or forty trees were cut and used in making the foundation upon which the crusher rested and the chute at the incline. Some of the wood cut from the right of way was used for fuel and perhaps some of the other wood, but the company in the main bought its wood and required its tenants to furnish their own fuel, notifying them that they must not get it off of Duncan's land.

Appellee derives its rights, under the judgment in the foreclosure suit. It has only such interest in the property as was sold in that case, for the purchaser at the judicial sale buys only what is sold. It is, therefore, bound by the judgment in that case above quoted construing the deed, and can not exercise any right under the deed which was then determined not to be conveyed by it. By the terms of the deed the parties of the first part agreed to permit the party of the second part, its assigns or successors, to use any timber on the land conveyed for the purpose of erecting or constructing other works which might be desired in the development of the mining property. Under the proof the tramway was a work necessary in the development of the property, for it was not practicable to build a railroad over the hill. For the same reason the chute was also necessary, and appellee is not liable for the timber used by it in constructing the tramway or the chute. The rest of the lumber and logs which it used from the land was used in building a platform for the crusher, and in the mill house which it erected. This seems to have been original construction, and was included in the "other works" which might be desired in the development of the mining

property. Appellee had no right to use for fuel the wood cut from the right of way or the chestnut trees referred to, but the judgment for $32.15 seems sufficient to cover these things.

There was no allegation or proof that the defendant was insolvent, and the proof does not warrant the conclusion that the defendant is about to commit other trespasses, or that an injunction is necessary to prevent a multiplicity of actions, and on the whole case we see no reason for disturbing the conclusion of the chancellor on the facts.

Judgment affirmed.

THE WASHINGTON LIFE INSURANCE CO. v. LYNE, &c.

(Filed November 30, 1904—Not to be reported.)

Insurance—Paid-up policy—Time in which demand may be made—Limitation—In an action to recover the amount of paid-up insurance and to have a paid-up policy issued, demand must be made within five years from the date of the last payment upon the policy, where it has lapsed, and where demand is made within this time the insured has, under the express language of the statutes, fifteen years from the time his cause of action accrued to institute suit for relief.

Hazelrigg, Chenault & Hazelrigg for appellant.

Shanklin & Worthington for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 14th day of April, 1884, the appellant, the Washington Life Insurance Co., insured the life of the appellee, Santford C. Lyne in the amount of $3,000 for the sole use and benefit of his wife and surviving children, with participation in profits. In this policy "the company agrees to pay one-half the amount of said insurance, to wit, $1,5 0, at their office in the city of New York to said assured, share and share alike, on the 14th of April, 1904, or should he die before that time to pay in like manner in sixty days after due notice and satisfactory proof of his death the sum of $3,000, share and share alike to the assured if alive, if not alive, to the executors or administrators of the said Santford C. Lyne."

In consideration for this policy Santford C. Lyne agreed to pay semi-annually $43.68 upon the 14th days of October and April of each year. Item second of the conditions and agreements on the back of the policy, referred to and forming part of the policy, provides as follows: "Notwithstanding this policy shall lapse and became forfeited for the nonpayment of any premium upon the day upon which the same shall fall due according to the terms thereof as hereinbefore contained, yet after the payment of three annual premiums, and plaintiff's demand with surrender of this policy within six months after such lapse by such nonpayment, this company will issue a nonparticipating paid-up policy for as many twenty parts of the original amount hereby insured as there shall have been complete annual premiums paid, and the paid-up insurance purchased by such surrender of this policy shall be payable at the same time and under the same conditions, except as to the payment of premiums, as the original policy."

On the 4th of March, 1904, the appellee, Santford C. Lyne, brought this suit in equity against the insurance company, in which he recited the facts detailed above and alleged that he paid the semiannual premiums provided for in the policy, and in compliance with the terms thereof for twelve years, and demanded that the defendant should issue to him a paid-up nonparticipating policy for $1,800, payable at his death to the beneficiaries named therein in accordance with item second of the policy; and that notwithstanding such demand the insurance company had failed and refused to issue and deliver the policy, and prayed that they should be required to do so. The insurance company in their answer alleged that the policy became forfeited on the 14th day of April, 1896, for the nonpayment of premium, and that defendant on that day, and for six months thereafter, might have made demand, accompanied by a surrender of the policy, for a nonparticipating policy for twelve-twentieths of the original amount of the policy, and if same was refused, might have enforced his demand by suit, but alleged that more than five years had elapsed from the 4th of April, 1896, when such demand might have been made and suit brought, before the institution of this action, and plead and relied upon the statute of limitations in bar of recovery. On the 2d of May, 1904, the plaintiff amended his original petition, joining with him as parties plaintiff his wife and surviving children, and alleged that Santford C. Lyne had survived the 14th of April, 1904, and prayed as in their original petition for a paid-up policy on the life of Lyne for $1,800 for the beneficiaries, or if the court should so construe the policy, for a judgment for $900, with interest from the 14th of April, 1904, until paid. By an amended answer, subsequently filed, the appellant withdrew so much of its original answer as admitted that under the conditions therein described the plaintiff and the beneficiaries of the policy were entitled to the nonparticipating policy for twelve-twentieths of the original amount of insurance, and averred that under the terms of the policy and contract sued on it agreed to pay one-half the amount of the insurance, to-wit, $1,500, to the assured, namely, the wife and surviving children of Santford C. Lyne, on the 14th of April, 1904, provided he should pay the semiannual premiums on the day they became due; and alleged that he had failed to pay any premiums on the policy after the 14th of April, 1896, and in consequence thereof it became forfeited, null and void after October 19, 1896, and alleged that thereafter it owed the assured, to wit, the wife and children of the insured, no right or duty except to issue a nonparticipating paid-up policy for as many twentieth parts of the original amount of the insurance as there should have been completed annual payments, to wit, twelve-twentieths, provided the assured after the payment of three annual premiums demanded such paid-up policy and accompanied such demand with surrender of the policy within six months after lapse for nonpayment of premium; and further alleged that the assured did make application by letter of their attorney in March, 1901, for such policy, but made no surrender, or offer of surrender, of the old policy, and subsequently abandoned such application, or had at any rate failed to institute suit to enforce any rights thereunder until the present action was brought, which was nearly eight years after the time when they might first have demanded and sued for such policy, and plead and rely upon the lapse of time in bar of recovery. A

general demurrer was interposed to each paragraph of the amended answer by the plaintiff, and the case being submitted thereon, and also upon the defendant's demurrer to the plaintiff's petition as amended, plaintiff's demurrer to the answer was sustained, and defendant's demurrer to the petition overruled, and defendant declining to plead further, it was adjudged by the court that the plaintiff recover of the defendant, the Washington Life Insurance Co., $900, with interest from 14th of October, 1904, and they have appealed.

The chief question to be decided upon the appeal is within what time a suit can be brought for a paid-up policy after forfeiture for nonpayment of premium. It is admitted that the demand for the paid-up policy was made within five years. The insurance company claims that unless suit was brought within five years after the time when it might first have been brought, the action is barred, not because no demand was made, but because action was not begun. On the other hand, it is contended for the plaintiff, under the express terms of the policy and repeated decisions of this court, that if demand was made during the first five years after the lapse and before the 14th of April, 1901, the provision of the policy was complied with, and suit could have been brought at any time within fifteen years from the 14th of April, 1896. This question has been before the court in one form or another in many cases, beginning with Montgomery v. Phœnix Mutual Life Insurance Co., 77 Ky., 51, and was followed by Jackson v. Southern Mutual Life Ins. Co., 79 Ky., 407, and Southern Mut. Ins. Co. v. Montague, 84 Ky., 654, in all of which it was held that "time in making demand" for the paid-up policy was not of the essence of the contract. These decisions were disregarded in Hexter v. U. S. Mutual Life Ins. Co., 91 Ky., 356, and Northwestern Life Ins. Co. v. Barbour, 92 Ky., 427; but in Mutual Life Ins. Co. v. Jarboe, 102 Ky., 80, these two last cases were overruled, and the doctrine of the original cases, that time was not of the essence of the contract, re-affirmed. In Manhattan Life Ins. Co. v. Patterson, 22 Ky. Law Rep., 1287, all the preceding cases were carefully reviewed in an elaborate opinion by Judge DuRelle. In that case the insured obtained a policy on the twenty payment life plan in November, 1887, he paid five annual premiums, and nearly five years after making default in the payment of the sixth premium applied to the company for a nonparticipating paid-up policy as the net reserve on the policy at the time of the lapse would purchase as a single premium at the company's established rate. The company, by way of defense, plead the provision of the policy that no action could be maintained for the reason that demand for the paid-up policy was not made within twelve months after default in payment of premium. It was decided that the insured was entitled to a paid-up policy, as time of making demand was not of the essence of the contract. This holding was adhered to until Washington Life Ins. Co. v. Miles, 23 Ky. Law Rep., 1705, was before the court. In that case, at the earnest demand of the insurance company that the court should establish some time at which the right to demand and receive a paid-up policy should terminate, the court said: "Taking into consideration the nature of life insurance, and all the facts and circumstances involved therein, we are of the opinion that the insured should, within five years from the time he was entitled to demand a paid-

up policy, make demand, or that his laches in so doing should bar his right to demand and receive same."

This rule has been followed in New York Life Ins. Co. v. Warren Deposit Bank, 25 Ky. Law Rep., 825, and Equitable Life Ins. Co. v. Warren Deposit Bank, 25 Ky. Law Rep., 839; Mutual Life Ins. Co. v. O'Neal, 25 Ky. Law Rep., 988, and the Washington Life Ins. Co. v. Glover, 25 Ky. Law Rep., 1327. It is contended for the insurance company that in the two cases against the Warren Deposit Bank it was decided not only that demand must be made, but it must also be accompanied by suit to enforce the demand within five years. But the opinion in both cases shows that no demand was made within the five years; and that for this reason relief was denied. In both cases the decision in the Miles case is referred to and approved. In the case of the Mutual Life Ins. Co. v. O'Neal, 25 Ky. Law Rep., 938, it was held that no recovery could be had in a suit brought seventeen years after the lapse of the policy, but in that case no demand was proven until seven years after the lapse of the policy. Whilst we adhere to the rule laid down in the Miles case, that there can be no recovery upon policies of this sort unless demand is made within five years after the forfeiture for nonpayment of premium for paid-up policy, accompanied by surrender or offer to surrender the old policy, we decline to extend this doctrine further, and to require that in addition to demand, suit to enforce compliance therewith must be actually instituted. On the contrary, we hold that demand having been made within the prescribed time, the insured had, under the express language of the statute, fifteen years from the time when his cause of action accrued to institute suit for relief therefor.

For reasons indicated the judgment is affirmed.

FLOORE, EX'OR, &c. v. GREEN, &c.

(Filed November 30, 1904—Not to be reported.)

1. Wills—The refusal of the lower court to permit an attesting witness to a will to testify as to the declarations of the testatrix at the time to him as to why she disposed of her property in such manner, is not ground for reversal, the bill of exceptions not showing what reasons she gave for thus disposing of her property.

2. Same—Verdict of jury—Where several wills were in issue and the jury found in favor of a certain one, the appellants were not prejudiced by the introduction of one made elsewhere, it being competent to show that the testatrix had for some time contemplated such disposition of her property as she made in the will which was upheld by the jury.

N. W. Halstead, Morgan Yewell, John D. Wickliffe and Eli H. Brown, Jr., for appellants.

John S. Kelly for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Hobson.

Fannie B. Floore, the wife of appellant, J. H. Floore, was by her maiden name Fannie Lewis. She first married John W. Berkley, who died about the year 1857, leaving her a widow without children. In the year 1891 she

married appellant Floore. In the year 1898 she made a will by which, in substance, she devised to her husband, J. H. Floore, the farm she had inherited from her father and devised to the nephews and niece of her first husband the property which she had received from him. This was before the statute authorizing a married woman to make a will, and so she and her husband executed a deed to a third person for her property and the third person deeded it back to her, with power to dispose of it by will. She was a woman of fine natural sense and above the average in intelligence. There is no question as to her capacity at the time this will was made and there is no evidence of undue influence. But subsequently, in April, 1899, while in Florida, she made another will by which, in substance, she gave her husband for life the property she had previously devised to him in fee simple, making some minor changes in the disposition of her other property. After this, on September 28, 1900, while on a visit to Martinsville, Ind., she made a third will, which is in substance the same as the Florida will, except that it makes some minor changes in the devises to her first husband's kindred; but in this the devise to her husband is for life as in the Florida will. After her death in 1902 all three of these wills were offered for probate. The county judge probated the will made in 1898, but on appeal to the circuit court the jury found in favor of the last will, made in Indiana.

If this court had authority to determine both the law and the facts in will cases, as under the former statute, we should be inclined to concur in the conclusion of the county judge. But this has been changed, and now a verdict in a will case, where the evidence is conflicting, stands as a verdict in any other case tried by a jury and can not be set aside by this court, except upon such grounds as a verdict of a jury in any other case may be set aside. (Howatt v. Howatt, 19 Ky. Law Rep., 756; Lischy v. Schrader, 104 Ky., 657.)

The proof for appellant shows that Mrs. Floore's health failed in the year 1895, and that after this, and before either the Florida or the Indiana will was made, she was afflicted with heart trouble and hysteria, and had become addicted to certain drugs, impairing her mind, and making her an easy prey to any one who might be interested in influencing her. It also shows conduct on the part of the devisees in the last two wills from which undue influence might well be inferred. On the contrary, the proof for the appellees is to the effect that the testatrix was always a woman of good sense; that she managed and controlled her estate herself as long as she lived, and that she wrote out, with her own hand, the memoranda from which both these wills were drawn. These memoranda are produced, and are shown to be in her handwriting. They are intelligently written, and confirm the evidence by several witnesses, to the effect that her mind was all right when these wills were made. She was about sixty years old when she died, and in view of all the facts, we can not say that the verdict of the jury is so palpably against the evidence as to warrant us in disturbing it.

There was nothing in the evidence warranting an instruction on insane aversion. The proof does not show that the testatrix labored under any delusion in regard to her husband, or that she had any aversion to him. They lived together until her death as husband and wife, and she seems to have appreciated keenly his kindness and attention to her in her sickness. The

record shows that he was a kind and affectionate husband, and that his wife recognized this. There was no substantial error in allowing the will of her first husband to be read to the jury or the proof to be made as to what estate the testatrix received from him. The testatrix had devised to the appellant only the property that she inherited from her father. In her two last wills she gave him only a life estate in this property. The proof as to how she came by her property was admissible to show the circumstances under which she was placed and the probable motive which actuated her. For the same reason it was competent to show that three of the devisees under the two last wills had lived in her house after their mother's death and were called by her her boys, as this also showed a motive why she should want to provide for them when she had no children of her own and no near relations.

The refusal of the court to permit John D. Wickliffe, an attesting witness to the will of 1893, to testify as to the declarations of the testatrix at the time to him as to why she thus disposed of her property is not ground for reversal; for the bill of exceptions does not show what reasons the testatrix gave him for thus disposing of her property. The avowal is not sufficiently specific to show that this testimony would have been material on the trial. It was admitted that the testatrix was of sound mind when she made the will of 1893, and that it was made without undue influence. The only question in the case was whether that will had been revoked by the later will.

The court allowed A. Dan Rose, husband of appellee, Linnie Rose, to testify as a witness. Under section 606 of the Code, where the wife is interested, either the husband or the wife may testify. Linnie Rose was interested, and when she did not testify on the trial her husband, under the Code, was a competent witness for her. The fact that her deposition had been taken was not material as it was not read on the trial or offered to be read. Section 4836, Kentucky Statutes, provides: "And if a will is attested by a person to whom, or to whose wife or husband, any beneficial interest in any estate is hereby devised or bequeathed, if the will may not be otherwise proved, such person shall be deemed a competent witness; but such devise or bequest shall be void."

It will be observed that the statute provides that the witness shall be competent, but that the devise shall be void. Whether it applies to the case before us we need not determine, for if the statute applies to the case it does not follow that A. Dan Rose was not a competent witness for the will, but only that as he testified, the devise to his wife is void. There was then no error in the circuit court in allowing the witness to testify, and, as appellant is not interested in the estate devised to Linnie Rose, he can not raise the question whether the devise to her is void. The only question to be decided here is whether the paper shall be probated. The rule of the common law, as well as of the Code, forbids the husband or wife to testify concerning any confidential communication between them. Appellant was, therefore, properly not allowed to testify as to private communications between him and his wife.

The Florida will was properly admitted in evidence, for the issue in the case was will or no will, and if the jury found that the Indiana will was not valid, they might have found that the Florida will was valid. The case

is tried anew in the circuit court under the statute. But aside from this, the jury found in favor of the Indiana will, and, therefore, appellants were not prejudiced by the introduction of the Florida paper. It was at least competent in evidence to show that the testatrix had contemplated for some time the disposition of her property which she in substance made by the Indiana will. The instruction of the court as to undue influence was substantially in the language several times approved by this court, and was not prejudicial. On the cross appeal complaint is made that the court did not adjudge costs against appellant. He was the executor in the will of 1893. As executor of that will he offered it for probate, and undertook to show that it had not been revoked. It was his duty as executor to probate the will under which he was appointed, if he could do so, and he is entitled to his costs as executor expended in his good faith effort to sustain that will. On the whole case we see no substantial error to the prejudice of appellant or appellees on the original or the cross appeal.

The judgment complained of is affirmed.

BOBLETT, &c. v. BARLOW.

(Filed November 30, 1904—Not to be reported.)

Advancements—Settling estate—In determining the advancements made by the intestate in the settlement of his estate, where there were only two children, it appearing that their father had advanced to the son $2,116.25 in money, and had permitted his daughter and her family to reside on a tract of land worth about $1,250 for over twenty years without paying any rent therefor, and that he declared to a number of witnesses that the rent of the land which the daughter enjoyed was equal to the money the son had received, there being no evidence to the contrary, the conclusion of the father in this case will not be disturbed.

W. C. Mohord and W. F. Grigsby for appellants.

I. H. Thurman and J. W. S. Clements for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Hobson.

Peter G. Barlow died intestate a resident of Washington county in April, 1900, and this suit was brought to settle his estate. He had two children, Richard Barlow and Mary P. Boblett. The only controversy is as to advancements made to the two children.

The facts are about as follows: About the year 1866 the father gave the son $400. He then went security for the son on some notes and on September 9, 1875, paid $300 on one of these notes and about the same time $330 on another. Shortly after that he gave him $700 to make the last payment on his land, and in September, 1886, gave him $200 more. In the year 1888 the son's wife sued him for a divorce and alimony, and a number of his creditors attached his property. In these suits, which were consolidated, the father filed a note executed to him by the son for $2,116, setting it up as a debt against the son, but the court held that the money had been really given to the son and refused to allow it to come in against the other creditors, although a personal judgment was rendered against the son on the note by default, he

making no defense. On the margin of this judgment the father, on June 4, 1898, made the following release: "In order to and with the intention of and for the purpose of equalizing my children, my daughter, Mrs. Boblett, having received as much, I hereby now release and declare satisfied and cancelled this judgment in my favor for the sum of $2,116 25, with interest at the rate of 6 per centum per year from October 6, 1886, against my son, Richard Barlow. This June 4, 1898."

The daughter, Mary Boblett, was married about the year 1850. Not long after her marriage she moved upon a tract of land belonging to her father and lived there for something over twenty years, and when she moved out her married daughter remained there and held the land until her father's death. The tract contained eighty-seven acres, and sold after his death for about $14.50 an acre. The proof shows that no rent was regularly paid for the land, but only occasional payments which the father declared did not more than amount to the taxes. While the value of the rent of the place is a matter on which the witnesses differ, we are not inclined to disturb the judgment of the father in the matter. He declared to a number of witnesses that the rent of the land which the daughter enjoyed amounted to as much as the money the son had received This statement he seems to have made to all his friends and neighbors, and he declared that he made the release on the judgment because he wanted no fuss about it after he was dead, and felt that this was right.

The son was then living in Nebraska, and there is no reason to suspect undue influence. Though advanced in years, the father was a man of force and capacity, and seems to have acted in this matter after careful deliberation for several months. He was advised by one of his neighbors to make a will, and afterwards put the memorandum on the judgment evidently intending it to operate to settle the matter as though he had made a will. While the intention of the parent can not control and would be disregarded by the court if it was shown that he was mistaken, still in a case like this, where the facts were within the personal knowledge of the father, and there was no interference with his judgment or attempt to influence it, some weight must be given to his conclusion, and under all the evidence we are not prepared to say that he was mistaken. It is well settled that the use of land which is enjoyed must be accounted for as an advancement. It is also well settled that if money is given as an advancement it can not afterwards be made a debt. The note of $2,116.25 was really without any consideration, for, from all the evidence, it is perfectly clear that the father intended to give his son the money when he paid it. He declared to one witness that the son got the money to trade on to keep even with Boblett for living on his place for about twenty years, till between the two they had about ruined him. It is true the father, in the attachment suits, undertook to set up his note and give his deposition in that case to sustain it, but his own deposition was sufficient to show that the note was an afterthought and that the money was really an advancement.

Judgment affirmed.

CHENAULT, &c. v. EASTERN KENTUCKY TIMBER AND LUMBER CO.

(Filed November 30, 1904.)

1. Equitable action for land—Defense—Right to jury trial—Motion to transfer—In an action to quiet title to land brought in equity under section 11, Kentucky Statutes, where defendant in his answer denies plaintiffs' title or possession, and alleges ownership in himself and also pleads adverse possession and champerty, the defendant is entitled under Civil Code, section 12, to have the case transferred to the ordinary docket and a trial before a jury, provided his motion for such transfer is made within a reasonable time.

2. Delay—Waiver—Discretion of court—Where an action for land was brought in equity and the issues formed and a large number of depositions taken, a delay by the defendant of two and one-half years to demand a jury trial and transfer to the ordinary docket is a waiver of his right to such transfer and jury trial. The fact as to whether there has been an unreasonable delay in making the motion to transfer is a question to be decided by the circuit court in the exercise of a sound discretion.

3. Locating boundary—Weight of evidence—Finding of chancellor—In a controversy involving the location of the boundary lines and corners of the land in dispute the evidence considered, and Held—That the weight of evidence sustains the chancellor's finding and conclusions.

J. B. White and J. H. Hazelrigg for appellants.

B. R. Jouett and Beckner & Jouett for appellee.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Hobson.

Appellee brought this action by petition in equity under section 11, Kentucky Statutes, alleging that it had both the legal title and possession of the land in controversy, and that appellants were setting up claim thereto. The defendants answered, denying plaintiff's title or possession, and alleging that the defendants owned the land. They also pleaded adverse possession for many years and champerty. The suit was filed on February 19, 1900, and an injunction was then granted restraining the defendants from trespassing on the land. At the next term of the court in April, 1900, the defendants filed their anwer, which was also made a counterclaim. At the September term the venue of the case was by consent changed to the Powell Circuit Court, and at the November term, 1901, the plaintiff filed reply. At the November term, 1902, the defendants entered a motion to transfer the action to the ordinary docket for trial and for an issue out of chancery. The court overruled the motion, and this is the first ground of complaint on the appeal.

Section 12 of the Code of Practice provides: "In an equitable action, properly commenced as such, either party may, by motion, have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial; but either party may require every equitable issue to be disposed of before such transfer."

The issues made in this case were undoubtedly of ordinary cognizance. The action was properly brought in equity, but the issues made by the defendants were that the plaintiff was not the owner or in possession of the land, but that they and those under whom they claimed had been in adverse

possession of it over thirty years, and were in such possession when the deed to plaintiff was made. They also denied that plaintiff's title included the land. The purpose of the provision of the Code is to allow a transfer to the ordinary docket of ordinary issues in an equity action. The issues made by the defendants were essentially the same as they would have been had the action been brought on the ordinary side of the docket to recover the land as in ejectment. If the action had been brought on the ordinary side of the docket undoubtedly the defendants would have been entitled to a jury trial. The section of the Code above quoted was designed to prevent the plaintiff from affecting this right of the defendant by bringing the action in equity.

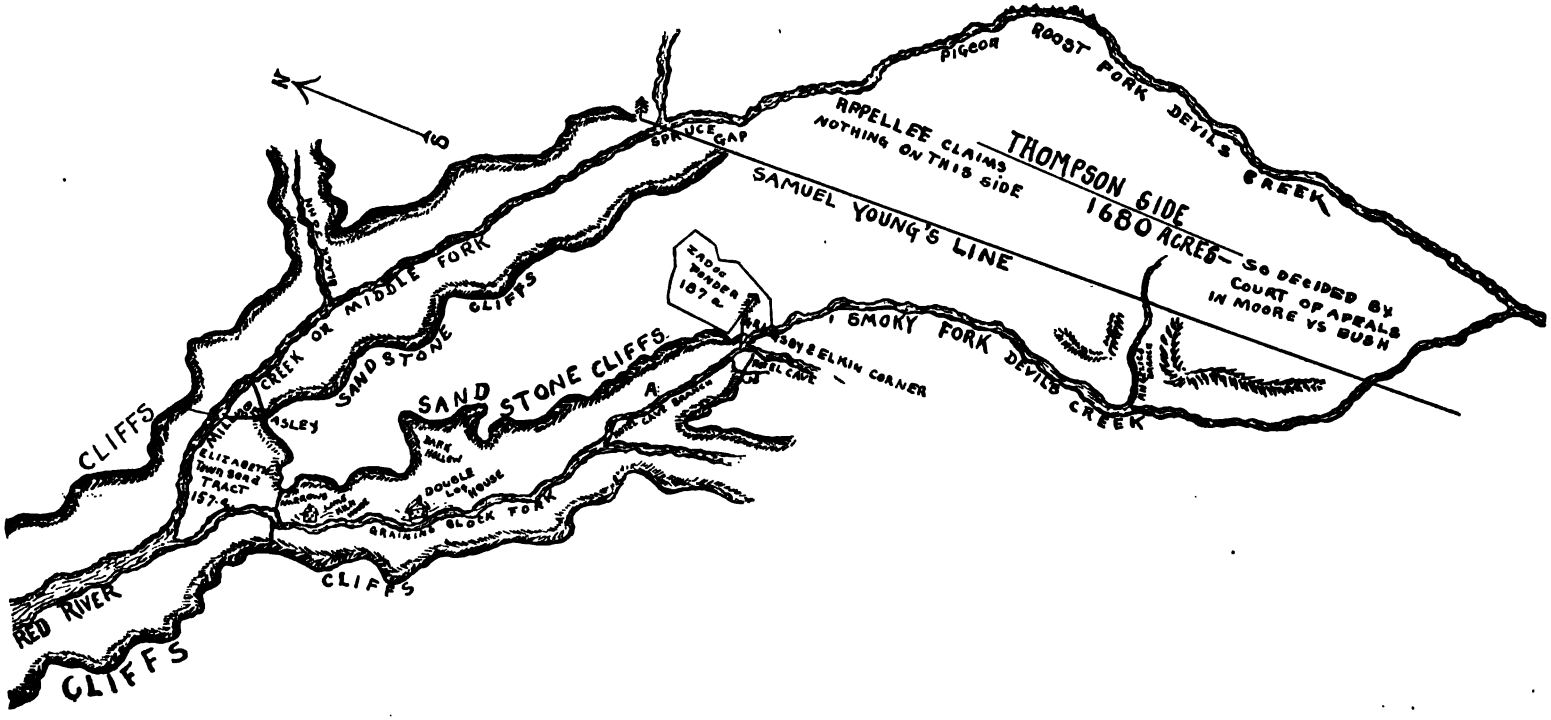
But it will be seen that the motion to transfer the action to the ordinary docket was not made for something like two years and a half after the answer was filed, and, as shown by the record, the parties had in the meantime, at a considerable expense, substantially prepared the case for trial as an equitable action. Although the defendants were entitled to demand a jury trial, this right, like any other, must be seasonably demanded, and might be waived, not only by express consent to try the case in equity, but by conduct from which such consent may be implied. The action having been properly brought in equity might be tried there, unless a jury trial was demanded. A failure to make this demand within a reasonable time was an acquiescence in the action's being on the equity docket, and a waiver of the right to demand a jury trial. This principle is applied throughout legal proceedings. Where a person has an election as to one or two things, his failure to make an election in a reasonable time is held a waiver of his right where the other party will be prejudiced. Thus, in those cases where the plaintiff was required to give a bond for costs, if the bond was not demanded by the defendant the right to it was deemed waived, and the action would not for this cause be dismissed. So where there is a misjoinder of parties plaintiff, if the defendant does not object to the misjoinder before pleading to the merits, he is held to have waived the irregularity; or if the court has no jurisdiction over the defendant, he waives this if he does not make the objection promptly. The rule at common law was that all dilatory pleas and motions were waived if not made in due time. (Stephens on Pleading, 430.) The same principle applies under the Code. If causes of action which can not properly be joined are sued on in the same petition the error is waived if not made before issue on the merits, and appearance and plea in the court to which the case is removed by change of venue is a waiver of objection to the change of venue, and where a jury is composed of more or less than twelve men, this is waived if not objected to. A party will not be allowed at any stage of the proceeding to sleep upon his rights, and afterwards to withdraw a consent which was necessarily implied from his conduct. In the case at bar both sides went on and took a large mass of testimony, evidently contemplating a trial in equity. If after two years and a half the defendants could be allowed to withdraw the consent which they had by necessary implication given to the trial of the case in equity, then not only would they be allowed in this way to delay the trial, but they would seriously prejudice the plaintiff, for, if the case is transferred to the ordinary docket under section 12 of the Code, it stands on the ordinary docket for trial as any other case, and each party is entitled to have on the

trial the personal attendance of the witnesses as though the case had originally been brought in ordinary. The right to a jury trial under the section of the Code quoted is necessarily a right to a jury trial according to the forms of law, and, therefore, the depositions which had been taken could not be read except by consent where the presence of the witnesses would have been necessary if the case had been originally brought on the ordinary docket. To have transferred the case to the ordinary docket would, therefore, have been to have set at naught substantially the greater part of the work that had been done in two years in preparing the case for trial. Under such circumstances the court did not abuse his sound discretion in overruling the motion to transfer the case to the ordinary docket. For the same reason he did not abuse his discretion in refusing to order an issue out of chancery, for this is always a matter of discretion with the circuit judge, and the verdict of the jury on an issue out of chancery is only advisory, and may be disregarded by the chancellor in his discretion.

We do not mean to lay down the rule that under section 12 of the Code the motion for the transfer of an action to the ordinary docket must be made when the answer is filed. We only mean that it must be made within a reasonable time, and that where it is not made within a reasonable time, and the party has, by his conduct, impliedly consented to the trial of the case on the equity docket, he should not thereafter be allowed to withdraw this consent to the prejudice of the adverse party. Whether there has been an unreasonable delay in making the motion is a question to be decided by the circuit court in his sound discretion, and his judgment will not be disturbed here unless there is an abuse of discretion. In the case before us we think the circuit court properly overruled the motion.

Whether the plaintiff's title covers the land in dispute depends upon the proper construction of the following words in the deed made by Thomas Duckham to Bush and Quisenberry: "Beginning at Grigsby and Elkin's corner on the cliff of the Smoky fork of Devil's creek, and running thence to the Hotel Cave; thence down the Hotel Cave branch to the Graining Block Fork of Red river; thence down the meanderings of said fork to the mouth of the Middle Fork of Red river so as not to go over the cliffs to interfere with any lands or sugar tree on Red river; thence up the Middle Fork opposite the Spruce Gap, crossing the dividing ridge; thence down the Pigeon Fork of Devil's creek to the mouth of Smoky Fork of said Devil's creek; thence up with the meanderings of said fork to the beginning."

The controversy is illustrated by the following plat:


N
S
PIGEON
ROOST FORK DEVILS CREEK
APPELLEE CLAIMS NOTHING ON THIS SIDE
THOMPSON SIDE
1680 ACRES — SO DECIDED BY COURT OF APEALS IN MOORE VS BUSH
SPRUCE GAP
SAMUEL YOUNG'S LINE
ZADOC PONDER 187 a
SMOKY FORK DEVILS CREEK
ELKIN CORNER
CLIFFS
CREEK OR MIDDLE FORK
SANDSTONE CLIFFS
SAND STONE CLIFFS
ASLEY
ELIZABETH TOWN SEAT TRACT 157 a
DARK HOLLOW
DOUBLE LOG HOUSE
GRAINING BLOCK FORK
CLIFFS
RED RIVER
CLIFFS

The beginning corner is at 1, and is undisputed. The second corner, Hotel Cave, is at 2 on the plat, if the cave is the corner. But it is insisted for appellants that the cliff running above the cave is known as Hotel Cave, and that the call is really for the cliff. Graining Block Fork and the Middle Fork at their junction form Red river. Along Graining Block Fork are precipitous sandstone cliffs some three hundred feet high, and between the cliffs and the stream there is bottom land varying in width, but in all comprising a valuable body of land of several hundred acres. It is insisted for appellants that the deed runs to the cliffs at Hotel Cave and follows the cliffs around to the mouth of Red river. It is insisted for appellee that the line runs to the cave at 2, and follows the meanders of Hotel Cave branch to Graining Block Fork and its meanders to the line of Elizabeth Townsend's tract near the junction of Gaining Block Fork and Middle Fork. The question turns on these words in the deed: "So as not to go over the cliffs or interfere with any lands or sugar tree on Red river."

The Hotel Cave branch is seven-tenths of a mile long, and Graining Block Fork from the point where Hotel Cave branch strikes it to its junction with Middle Fork is nearly two miles long. On February 27, 1837, or about six weeks before the deed to Bush & Quisenberry was made, Thomas Duckham conveyed to Elizabeth Townsend the tract of land lying at the junction between Middle Fork and Graining Block Fork, and it is reasonable to conclude that in the deed to Bush & Quisenberry he did not intend to include the land which he had previously conveyed to Mrs. Townsend. The weight of the evidence clearly shows that the place known as Hotel Cave is the cave at figure 2. If the first line of the deed is run to the figure 2, we are at the source of Hotel Cave branch, and the next call of the deed must follow the meanders of the branch to the Graining Block Fork, and then the next call will follow the meanders of that fork to the mouth of the Middle Fork. The cave is under the cliff, and as shown on the map on the far side of the little valley from the point 1. In addition to this it would seem reasonable that if the grantor intended to convey only to the top of the cliff he would have called in the deed to run to the top of the cliff, and thence running with the top of the cliff, for the valley is at some places of considerable width. Graining Block Fork is not Red river. Red river is formed by the union of Graining Block Fork and Middle Fork. The grantor nowhere designates Graining Block Fork as Red river, and the reservation is only of any lands or sugar tree on Red river. The Elizabeth Townsend land might, with some propriety, be designated as on Red river, as it lies just at the junction of the two streams and under the cliffs; but to apply this term to land extending all the way up to Hotel Cave would be to violate well-settled rules of construction. The grantor in making a deed chooses his own language, and where it is ambiguous it must be construed against him. It was incumbent on the grantor to express what was reserved out of the deed with reasonable clearness. The operation of the grant as between the grantor and the grantee will not be restricted upon doubtful inference. But the appellants do not claim under Thomas Duckham, and although this deed was made something like sixty years ago, neither he nor any one claiming under him has set up claim to the land in dispute. We regard this a strong circumstance to show what he understood was conveyed by the deed, and the

object in the construction of all instruments is to effectuate the intention of the parties in making it. The circuit court, therefore, properly held that only the tract of Elizabeth Townsend was excluded from the operation of the deed.

Appellants showed no record title to the land. They claim under Alex. Spencer, who made a settlement in the valley near the mouth of Hotel Cave branch, and under Patterson Ponder, who made a settlement lower down and near the point marked "Dark Hollow." We think it reasonably clear from the evidence that Patterson Ponder had sold in writing his rights to those under whom the appellee claims years before he made the bond under which appellants claim, and while the proof is conflicting as to Spencer's possession, we must give some force to the chancellor's finding on the question of fact, and, under all the evidence, we have reached the conclusion that his finding that Spencer was not in continuous, adverse possession of any of the land for fifteen years should not be disturbed. While the testimony as to whether appellee's title was champertous was conflicting, we think the decided weight of the evidence sustains the chancellor's opinion.

Judgment affirmed.

Whole court sitting.

Judges Nunn and Paynter dissent from so much of the opinion as holds appellants had waived their right to have the case transferred to the ordinary docket for trial.

CARROLL v. COMMONWEALTH.

(Filed November 30, 1904—Not to be reported.)

1. Criminal law—Homicide—Instructions—Where the defense of appellant was that he killed deceased in defense of his nephew, an instruction to the jury upon the trial to the effect that if Begley (deceased) "was then and there about to inflict upon Powell Carroll death or great bodily harm," appellant had the right to use such force as was necessary, and no more, to avert the real or apparent danger, even to the extent of taking the life of Begley, was erroneous because it required appellant to measure the exact force necessary to be used to protect Carroll, and no one is capable, under such circumstances, of measuring the exact force necessary to avert danger. If he exercises reasonable judgment and uses only such force as is apparently necessary to avert the danger, he does all that the law requires of him.

2. Conduct of Commonwealth's attorney in argument—Exhibiting clothes of deceased to jury—The defendant can not complain because the Commonwealth's attorney exhibited the clothes of deceased to the jury and commented upon the holes in them which were made by the knife of defendant. The clothes were part of the evidence.

E. N. Ingram, D. B. Logan and J. L. Reeder for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, Matt Carroll, was indicted and convicted for the murder of William Begley. The homicide took place at the house of one Jones. Powell Carroll, a boy nineteen years of age, is the nephew of the appellant.

Whilst Jones and his family and others were sitting around the room the decedent, William Begley, without any provocation, struck Powell Carroll and knocked him off of a chair; he then picked up a chair and struck him again without any cause whatever. As to these facts there is no conflict in the testimony. The appellant, Matt Carroll, claims that he was in the room at the time of the assault, and that he stabbed and killed Begley in defense of his nephew. Evidence was introduced by the Commonwealth tending to show that the appellant did not enter the room until after the deceased had made the assault upon Powell Carroll, and that the appellant under these circumstances committed the homicide.

Among other instructions the court told the jury that if Begley "was then and there about to inflict upon Powell Carroll death or great bodily harm, he (appellant) had the right to use such force at his command as was necessary, and no more, to avert the real or apparent danger to Powell Carroll, even to the extent of taking the life of said Begley." This instruction required the appellant to measure the force necessary to be used to protect Powell Carroll with as much exactness as an apothecary would drugs on his scales. If, in the opinion of the jury, the accused used more force than was necessary to protect Powell Carroll from death or great bodily harm at the hands of Begley, he could not be acquitted, although he may have, in the exercise of reasonable judgment, concluded that there was an apparent necessity for using just the amount of force employed by him. If the facts justified the appellant in striking Begley in defense of his nephew, he had the right to use such force as was apparently necessary to have averted the impending peril to him. No one is capable under such circumstances of measuring the exact force that is necessary to avert such a danger. If he exercises a reasonable judgment and uses only such force as is apparently necessary to avert such danger, he has done all the law demands of him. We are of the opinion that the instruction was erroneous in not containing the idea herein expressed.

The clothes worn by the deceased were introduced as evidence with the view of showing the location of the wounds inflicted. They had been soiled with the blood of the deceased. It was proper to introduce them as evidence, but it is urged that the Commonwealth's attorney erred to the prejudice of the appellant, because during his argument he held them before the jury. We do not think the defendant can complain of that act, because the Commonwealth's attorney had the right to comment on the holes which had been produced by the knife in the hands of the appellant, for the purpose of showing the jury that they sustained other testimony in the case. The clothes were part of the evidence.

There were some leading questions propounded to witnesses by the Commonwealth's attorney. These should be avoided upon subsequent trial. There was evidence introduced tending to show that about a year previous to the homicide the appellant and the deceased had some difficulty. The court allowed the witnesses to go too much into the details as to that occurrence, and this should be avoided on the next trial.

The judgment is reversed for proceedings consistent with this opinion.

GIBSON v. THOMPSON.

(Filed November 30, 1904—Not to be reported.)

Lands—Conveyances—Defeasible fee—A conveyance to Fanny Goodwin by her grandmother, Fanny Gibson, subject to a life estate, with the provision that if the vendee died without issue then the estate should descend to another, created a defeasible fee, which upon the death of the life tenant ripened into a fee simple, the vendee not dying without issue during the life of the grandmother, the vendor.

Robert L. Stout for appellant.

D. L. Thornton for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Barker.

In January, 1861, Mrs. Fanny Gibson, being the owner in fee, conveyed to her son, William Gibson, and to her granddaughter, Fanny Goodwin, in consideration of $1 and of the love and affection she bore them, an undivided one-third each in certain lands in Woodford county, Ky The following excerpt from the deed contains the legal proposition which is presented for adjudication in this record: "And it is distinctly understood that she reserves to herself a life estate in both the aforesaid tracts of land. To have and to hold said undivided two-thirds (that is to say, the undivided one-third to each of them) to the said William Gibson and the said Fanny Goodwin and their heirs and assigns forever after the death of the party of the first part, and not before. It is hereby understood that in the event that the said Fanny Goodwin, her said granddaughter, dies without children, then the interest of said Fanny Goodwin shall vest in the survivors, that is to say, one-half of the undivided one-third of the said tracts of land hereby conveyed to said Fanny Goodwin shall vest in the said Wm Gibson and his heirs, and the other half of the said one-third shall vest in my grandchildren, Fanny Gaines and Bernard Gaines, and their heirs."

Fanny Goodwin afterwards intermarried with Dr. B. W. Thompson, and is now the appellee, Fanny G. Thompson. By written agreement, dated March 15, 1904, she sold to the appellant, P. L. Gibson, ninety-one acres of the land received from her grandmother under the deed before mentioned, for the sum of $3,651.75, the land to be conveyed with good and unencumbered title. Gibson being doubtful of the title, refused to accept the conveyance, or perform his part of the contract, whereupon appellee instituted this action in the Woodford Circuit Court for the recovery of the purchase price of the land in question. The issues were properly made up in the action, and having been submitted to the court, it was adjudged that appellee had a good title to the land, and she was awarded a judgment for the purchase price.

The question presented is, what title did appellee take to the land conveyed to her by her grandmother upon the death of the latter? The rule is that, if a vested remainder be limited by deed or will on a particular estate, with condition that if the remainder man die without heirs (or other words of like import), then his estate shall vest in a third person or class, such remainderman takes a defeasible fee, conditioned upon his dying with man out heirs during the continuance of the particular estate; and after the

falling in of the latter, he surviving, his defeasible fee ripens into a fee-simple title.

Mrs. Thompson did not die without heirs during the life of her grandmother, who reserved to herself a life estate in the land conveyed. This was the condition in the deed, and upon the death of the life tenant that which had been a defeasible fee ripened into a fee simple. There is no difference in principle in a case where the life estate is reserved to the grantor and those in which the life estate is conveyed or devised. This rule of construction is now too well established to admit of question. (Ferguson, &c. v. Thomasson, &c., 87 Ky., 519; Pruitt v. Holland, 92 Ky., 641; Lee, &c. v. Mumford, &c., 19 Ky. Law Rep., 1585; Forsythe v. Lansing, 23 Ky. Law Rep., 1034; Aultman Co. v. Gibson's Guardian, 23 Ky. Law Rep., 2296; Lewis v. Shropshire's Trustee, 24 Ky. Law Rep., 332; Baxter, &c. v. Isaac, &c., 24 Ky. Law Rep., 1618; Clements v. Reese, 25 Ky. Law Rep., 221; Roach v. Dance, 26 Ky. Law Rep, 157; Harvey, &c. v. Bell, &c., Id., 381.)

The cases relied upon by counsel for appellant do not militate against the principle enunciated. Davis v. Davis, 23 Ky. Law Rep., 1132, involved a deed conveying land direct to the grantees with no outstanding particular estate, and, therefore, does not come within the principle announced. The facts in McGennis v. McGennis, 16 Ky. Law Rep., 598, were similar to those in Davis v. Davis, supra. Brann v. Elzey, 83 Ky., 440, has no application whatever to the question under discussion. The case of Louisville Trust Co., Guardian v. Erdman, 22 Ky. Law Rep., 729, went off on the question of an estate tail being converted into fee simple under section 2343 of the Kentucky Statutes, and the real question decided there is not involved here.

The judgment of the circuit court being in harmony with the views herein expressed, it is affirmed.

TUCKER v. RUSSELL.

(Filed November 30, 1904—Not to be reported.)

Transfer of action to ordinary docket—Where the claim sued on was one at law and the issue a purely legal one under the provisions of section 12, Civil Code, there should be a transfer from the equity to the ordinary docket.

Hugh P. Cooper for appellant.

S. T. Spalding for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

This action was instituted by the appellee, S. A. Russell, to recover $750 for alleged services rendered the appellant as an attorney at law. The plaintiff obtained an order of attachment with the view of subjecting to the payment of his claim money in the hands of the master commissioner. The case was brought in equity, and the defendant moved to transfer it to the ordinary docket for the purpose of having the issues tried by a jury.

The claim was one at law and the defendant denied the services were rendered, and the issue was purely a legal one.

Section 12, Civil Code of Practice, reads as follows: "In an equitable action, properly commenced as such, either party may, by motion, have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial; but either party may require every equitable issue to be disposed of before such transfer." The court erred in not transferring the case to the ordinary docket, because the defendant was entitled to a trial of the case by a jury if he so desired. (Meek v. McCall, 80 Ky., 371.) In view of the fact that we have reached the conclusion that the court erred to the prejudice of the appellant in refusing to transfer the case to the ordinary docket, we deem it improper to enter into a discussion of the facts of the case and as to the effect of the appellant's discharge in bankruptcy on the claim in controversy.

The judgment is reversed for proceedings consistent with this opinion.

DOWLER, &c. v. RODES' ADM'R, &c.

(Filed December 1, 1904—Not to be reported.)

Wills—Construction of—By the third clause of the will of Mary H. Rodes she devised property as follows: "I give and bequeath to each of my beloved sisters named, who may survive me, $200 apiece, except Cornelia M. Dowler, shall have $500, and my beloved niece, Annie M. Dowler, I give $1,000, my diamonds; wish she shall never part from them. My sisters, Annie E. Norris, Belle Piggue, Cornelia M. Dowler, Louise A. Frasee, and I give $100 to my niece, Hettie L. Frasee, and give Hettie M. Frasee $200 more." By the ninth clause she bequeathed "all the plated silver, cut glass and portrait of the family, if she desires them, to my niece, Mary Higgins Rodes, wife of Dr. William Rodes, and I give to my tried and true friend, Rosa Nelm, my cut glass pickle stand and student lamp." By a codicil, as follows, she provided that "the third bequest of this my last will I do hereby revoke and the ninth to the same extent. My sisters, Mrs. Bain and Annie E. Norris, who have been helped so much, can not be included in my will, except $1, if the law required, and $1 to each of my brothers. The ninth clause is hereby revoked except in regard to Rosa Lee Nelm, which shall be carried out as I will." Held—That the effect of the codicil is to revoke in toto the third clause of the will, and also to exclude Mrs. Bain and Mrs Norris from any shares of the estate in the event of a residuum after paying special devises provided for in other clauses in the will.

Stoll & Bush for appellants.

Forman & Forman for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Burnam.

We are asked upon this appeal to decide to what extent the third and ninth clauses of the will of Mary H. Rodes are affected by the first codicil thereto. The clauses of the will in controversy are as follows:

"3d. I give and bequeath to each of my beloved sisters named, who may survive me, $200 apiece, except Cornelia M. Dowler shall have $500, and my beloved niece, Annie N. Dowler, I give $1,000, my diamonds; wish she shall never part with them. My sisters, Annie E. Norris, Belle Piggue, Cornelia

M. Dowler, Louise A. Frazee, and I give $100 to my niece, Hettie M. Frazee, and give Hettie M. Frazee $200 more.

"9th. I give and bequeath all the plated silver, cut glass and portrait of the family, if she desires them, to my niece, Mary Higgens Rodes, wife of Dr. Wm. Rodes. And I give to my tried and true friend, Rosa Nelm, my cut glass pickle stand and student lamp."

The separate codicils were added to the will by testatrix. The first reads as follows: "The third bequest of this my will I do hereby revoke, and the ninth to the same extent. My sisters, Mrs. Bain and Annie E. Norris, who have been helped so much, can not be included in my will except $1, if the law required, and $1 to each of my brothers. The ninth bequest is hereby revoked except in regard to Rosa Lee Nelm, which shall be carried out as I will." The chancellor decided that the effect of the codicil was to revoke the entire third clause of the will and also the ninth clause, except as to the devise to Rosa Lee Nelms of her cut glass pickle stand and student lamp, and the devisees named in the third clause have appealed, and make the contention that the only effect of the codicil upon the third clause of the will is to revoke the legacies to Mrs. Norris and Mrs. Bain. The will under consideration was written by testatrix. At her death she had five living sisters, Mrs. Bain, Mrs. Norris, Mrs. Dowler, Mrs. Piggue, Mrs. Frazee, and two brothers, Wm. U. and Thos. L. Martin; she was also survived by the descendants of her deceased brothers, Luther and Shreve Martin, and by the descendants of a sister, Mrs. McMillen. It appears from the record that at the date of the original will testatrix owned property valued approximately at about $8,000; that subsequently thereto it developed that two notes owned by her, one on the Taylor Mfg. Co., for $2,200, and one on her sister, Mrs. Norris, for $1,800, aggregating $4,000, became of doubtful value. The bequests in the third clause of her will aggregate $2 400. Whilst the bequests in the other clauses of the will, with probable cost of administration, amount to approximately $5,500. It is, therefore, manifest that if the construction contended for by appellant is to prevail that the estate of testatrix will be insufficient to pay all the bequests made by her. We recite these facts for the purpose of showing what was probably in the mind of testatrix when she added the codicil under consideration to the will. It is also worthy of note that the name of Mrs. Bain does not appear as a devisee in the third clause of the will, and that neither Mrs. Norris nor Mrs. Bain are mentioned in the ninth clause thereof. And it is not controverted that the bequest in the ninth clause to Mrs. Rodes is revoked; and that to Rosa Lee Nelm remains in force. After a careful consideration, we have concluded that the effect of the codicil is to revoke in toto the third clause of the will, and also to exclude Mrs. Bain and Mrs. Norris from any share of her estate in the event of a residuum after the payment of special devises provided for in the other clauses of the will.

For reasons indicated the judgment is affirmed.

JANNEY MANUFACTURING CO. v. BANTA, &c.

(Filed December 1, 1904—Not to be reported.)

Contracts—In this action to recover the purchase price of a cornhusker and shredder, the defense being that it was a part of the contract that supplies for repairs were to be furnished from Louisville or Indianapolis, from either of which points such supplies would be furnished within twenty-four hours, the evidence showing that this part of the contract was violated, the jury were authorized to find for appellees, and the judgment will not be disturbed, there being but little conflict as to the question of damages, and the instructions fairly expressing all the law needed for the guidance of the jury.

W. L. Whittinghill for appellant.

E. H. Gaither for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Settle.

On November 15, 1901, the appellant, Janney Manufacturing Co., of Ottumwa, Ia., through its agent, one Curry, sold and delivered to the appellees, C. G. Banta, B. M. Banta and G. E. Banta, one "No. 1 Janney Common Sense Corn Husker and Fodder Shredder, Eight Rolls and Blower attachment" for $525, of which sum $175 was paid on the day of the delivery of the machine to appellees, and for the remainder of the consideration they executed to appellant two promissory notes of $175 each, due January 1, 1902, and January 1, 1903, respectively, each to bear interest from its date until maturity at the rate of 6 per cent. per annum, and if not paid at maturity to bear interest from that time until paid at the rate of 8 per cent. per annum.

The appellees also executed to appellant a mortgage upon the corn husker and fodder shredder and appliances to secure the payment of the two notes, which mortgage was duly recorded in the proper office. Appellees failed to pay the first note upon or after its maturity, and appellant thereupon instituted suit against them in the quarterly court to recover personal judgment for the amount thereof. The appellees filed in the quarterly court an answer and counterclaim wherein the purchase of the machine and execution of the notes were admitted, but averred that appellant's agent, Curry, before and at the time of their purchase of the machine, represented to them that all material for repairs that would be needed for the same would be kept by appellant at Louisville, Ky., and that it likewise maintained at Indianapolis, Ind., a general deposit of supplies, where all parts of the machine in question were kept in stock, and that if the machine should break in any part while being operated by appellees, the part or material needed to repair it would be furnished by appellant from Louisville or Indianapolis within twenty-four hours of the giving by appellee of the order thereof.

It was also averred that this representation of appellant's agent was a part of the contract and a warranty, intended and made to induce the appellees to purchase the machine, and that they were induced thereby to purchase it; that shortly after the delivery of the machine, and while it was in use by appellees, it broke down, and they at once, and as stipulated in the contract of sale, telegraphed the appellant for the piece necessary to repair it, but instead of shipping the same from Louisville or Indianapolis within

twenty-four hours, as it had contracted to do, appellant, after a delay of fifteen days from the time of receiving the order of appellees, shipped it to them from its factory at Ottumwa, Iowa, because it did not in fact keep such supplies either in Louisville or Indianapolis, and had never done so.

It was further averred in the answer and counterclaim that in thus failing to keep in Louisville or Indianapolis supplies for making such repairs as were needed by appellees, and in failing to furnish appellee the material ordered within twenty-four hours, and delaying its delivery for fifteen days, appellant violated its contract and warranty, whereby appellees were damaged in the sum of $300; that is to say, the corn husker and fodder shredder could not be operated without the part for repairing it ordered of appellant, consequently it remained idle during the fifteen days referred to, and by reason thereof appellees lost the opportunity of shucking divers crops of corn and the shredding of the fodder belonging to same, which they had been employed by the owners to shuck and shred with their machine, and could have shucked and shredded in the fifteen days, but not after the repairing of the machine on account of the bad weather which then set in and continued until it was too late to do the work; that for the work of which they were thus deprived they would have received $300, and for this sum judgment was asked upon the counterclaim against the appellant.

The reply of appellant traversed the material allegations of the answer and counterclaim and set up a writing between it and appellees, executed in September before the delivery of the machine in controversy, which it was averred in the reply contained all the terms of the contract for the sale of the machine, except as to the number and size thereof, the amount of the consideration and denomination of the notes. This writing was filed with the reply and contains all the specific and rigid stipulations usually found in such instruments, but does not contain the alleged agreement as to the keeping of repairs at Louisville and Indianapolis, and the furnishing of the same within twenty-four hours, as set forth in the answer and counterclaim.

The reply further avers that the alleged contract as to repairs pleaded by appellees, if made with its agent, was in parol, and is contradictory of and can not be allowed to vary the terms of the writing entered into by the parties, and is, besides, within the statute of frauds, because not to be performed within a year. Appellees demurred to the plea of the statute of frauds contained in the reply, and also filed a rejoinder controverting its averments as to other matters of avoidance pleaded therein.

The demurrer was sustained upon the ground, doubtless, that the undertaking by appellant as to repairs was a feature of the contract of sale that might have been performed within a year, and was in fact partly performed within that time, as the piece of machinery with which the break in the husker and shredder was repaired was furnished appellee by appellant within the year following its purchase by the former. We think the demurrer was properly sustained.

After the filing of the reply appellant, by amended petition, set up the maturity and nonpayment of the second and last note of $175, executed to it by the appellees for the husker and shredder, and asked a personal judgment against appellees for the amount thereof; also set up the mortgage given to secure the payment of the two notes, and asked that both notes be paid out

of the proceeds of the sale of the husker and shredder under the mortgage lien. After the filing of the answer and counterclaim, and before the filing of the amended petition setting up the maturity of the second note, the case was transferred from the quarterly to the circuit court, because the sum sought to be recovered on the counterclaim exceeded the amount of which the quarterly court had jurisdiction. The case was placed upon the ordinary docket of the circuit court; the trial which followed was by jury, and resulted in a verdict in appellant's favor for $350, the amount of the two notes sued on, with interest from November 15, 1901, to be credited as of the date of the verdict by the sum of $200, allowed appellees upon their counterclaim. After the return of the verdict, which disposed of all the legal issues involved, the cause was transferred by the court to the equity docket, and judgment then entered in accordance with the verdict, and also directing the sale of the husker and shredder under the mortgage lien in satisfaction of appellant's judgment debt and costs, appellant objecting to so much of the verdict and judgment as allowed appellees $200 of their counterclaim, asked a new trial of the lower court, which was refused, and this appeal presents for our consideration such questions appearing in the record as were ruled upon by the lower court and excepted to by appellant. It was contended upon the motion for a new trial in the court below, and is now insisted for appellant, that the verdict of the jury is unsupported by, and is contrary to, the evidence.

The contention of appellant in the court below was that the writing filed with its reply contained the only contract between it and appellees in regard to the sale of the husker and shredder, and that there was no warranty or undertaking upon its part to furnish repairs from Louisville or Indianapolis, or to furnish the same within twenty-four hours. This contention was supported by the testimony of its agent, Curry, an employe of appellant from the factory, who helped to set up and start the machine, and George Bohon, a merchant of Harrodsburg, who seemed to have assisted Curry in making the sale to appellees. The testimony of Curry also tended to show that the husker and shredder was delivered to and accepted by appellees in Harrodsburg, and before it was carried out to the farm of Hughes, where it was to be set up and put to work; and further, that the notes and mortgage were executed by appellees in Harrodsburg on the day and before the machine was taken to Hughes' farm. Upon the other hand, it was contended by appellees, and their testimony conduced to prove, that the writing filed with the reply was entered into in September before their purchase of the husker and shredder received by them and contained the contract for "one No. 0 Janney Common Sense Corn Husker and Shredder, with Ten Husking Rolls and Blower Attachment," which appellant was to furnish them at the price of $625, which, as recited in the writing, was to be paid as follows: Cash on delivery of the machine, $208.33; one note due January 1, 1902, for $208.33, and a second note due January 1, 1903, for $208.33, the notes to bear interest from date at 6 per cent., and to be secured by a chattel mortgage on the husker and shredder.

That the machine described in the writing was not delivered to them by appellant and for the reason, as they were advised by its agent, that it did not have that machine on hand; upon ascertaining which fact, appellees, at

the instance of appellant's agent, Curry, and by another and independent verbal contract containing the warranty as to repairs, agreed to and did purchase of it another machine known as "One No. 1 Janney Common Sense Corn Husker and Fodder Shredder, with Eight Husking Rolls and Blower Attachment," at the price of $525, and that upon the delivery to them of this machine they paid the $175 in cash, and gave to appellant the notes and mortgage sued upon.

The testimony of appellees further conduced to prove that their purchase of the second machine was without regard to the writing evidencing the first and that the second contract was never reduced to writing, but was wholly in parol. They admitted that the notes and mortgage for the second machine were executed before it was taken to the farm of Hughes, but testified that it was done as a matter of convenience, and with the understanding that the trade was not to be closed until the machine was put in operation, and accepted by Hughes and Kyle, who were to furnish appellees the money to make the cash payment thereon. The testimony of appellees also conduced to prove that in Harrodsburg, at the time of their inspection of the machine, and also on the farm of Hughes, where the machine was set up and tested, but before it was accepted by Hughes and Kyle, and before the cash payment of $175 was made to Curry, he represented to appellees that all material and parts of machinery that might be needed in making repairs upon the machine purchased by them could be obtained within twenty-four hours of appellant at Louisville or Indianapolis, and that it kept at the latter place a depot of supplies and material for making repairs upon huskers and shredders sold by them; that they, Hughes and Kyle, were induced by these representations to accept and pay for the husker and shredder.

Hughes and Kyle testified that the contract of sale was conditioned upon their acceptance of the husker and shredder, and that they did not furnish appellees the $175 with which to make the cash payment until they accepted the machine. They further testify that appellant's agent, Curry, in their presence, and before their acceptance of the machine for appellees, represented that all material that might be needed by appellees for making repairs on the one purchased by them would be furnished them from Louisville or Indianapolis, within twenty-four hours after giving orders therefor. It will be seen that the evidence was conflicting, but much of it went to sustain appellees' version of the contract, and if the jury thought it sufficient to establish the contract as claimed by them, they had the right to find that the writing relied on by appellant does not contain the contract under which appellees bought and accepted the husker and shredder, but that the contract bound appellant to furnish what was necessary to repair appellees' husker and shredder within twenty-four hours of its receiving orders therefor.

As to the question of damages there is little conflict in the evidence. It was clearly shown that the material for repairing the husker and shredder was not sent to appellees by appellant until fifteen days had passed. In view of its undertaking to deliver it within twenty-four hours of the receipt of the order therefor, the delay was so unreasonable that the jury could have had little doubt of appellant's negligence. The appellees' proof further showed that appellees had contracted with different persons to husk their

corn and shred their fodder at 22 cents per shock, and that it was an easy matter to operate their machine at a profit of $20 per day. It was also proved that the crops of corn and fodder upon which appellees were employed to use their husker and shredder would have kept it in operation each of the fifteen days during which appellant kept it awaiting the necessary repairs, and as the state of the weather after the husker and shredder was repaired and made ready for use was such as to prevent it from doing further work that season, it was impossible for appellees to repair the loss resulting to them from appellant's violation of its contract. In view of these facts we are unable to agree with counsel for appellant that the amount of the verdict is excessive or even unreasonable.

We find no error in the instructions given by the court. They seem to contain and fairly express all the law needed for the guidance of the jury, and if so, it was not improper for the court to refuse the instructions asked by appellant.

Judgment affirmed.

AMERICAN BENEVOLENT ASSOCIATION v. STOUGH.

(Filed December 2, 1904—Not to be reported.)

1. Insurance—Suicide—Action to recover on policy—Stough was insured by appellant, the policy providing that it should not extend to death by suicide, sane or insane, or from intentional injury inflicted by insured or another person, burglars or highwaymen excepted. After leaving a saloon, sober, he was found dead near a water closet in the rear of the saloon, a bullet wound in his head and a pistol at his feet. He was apparently sane and full of life when he left the saloon. The instructions in this action to recover on the policy were to the effect that the jury should find for the plaintiff unless they should believe from the evidence that Stough came to his death from a gun shot wound inflicted by himself, or by another than a burglar or highwayman, and they should find for defendant if the converse of this was found to be true. Held—It may be reasonably inferred from the evidence that the insured died by his own hand, but whether it was accident can only be determined by circumstances. It may be that he dropped his pistol before going into the water closet, for it was found on the ground at his feet, and there was no proof that his face was burned by powder.

2. Same—Under the evidence the deceased either died from a wound inflicted by his own hand, or the shot was accidental, and the finding of the jury is in effect that it was not inflicted with suicidal intent. To have left the word "intentionally" out would have been misleading, because the jury in such case would have been authorized to find against plaintiff if the wound had been inflicted by himself, although it may have been accidental.

Furber & Jackson for appellant.

B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

Appellant, on November 22, 1900, issued to E. B. Stough a life benefit certificate, by which, among other things, it agreed to pay his wife, Jessie

Stough, $500 on his death. Stough died on September 17, 1901, and this suit was filed by his widow to recover on the policy.

Among the stipulations of the policy it was agreed, among other things, that the benefits payable under it should not extend to or cover death resulting from suicide, sane or insane, or from intentional injury inflicted by the insured or by any other person (burglars or highwaymen excepted). The defendant relied on this provision of the policy, and pleaded that the deceased departed this life by his own hand by inflicting upon himself a gun-shot wound, with the intent and for the purpose of ending his life, from which wound he then and there died. This was denied by the reply, and on the trial the following agreement was made: "It is agreed between the parties that the one issue in the case is whether or not the decedent committed suicide, the plaintiff claiming that he did not, and that the company is liable, and the company admitting its liability if he did not commit suicide, but claiming it is not liable because he did commit suicide."

The proof on the trial showed that about seven o'clock in the morning the deceased, with two other men, were in a bar room where he frequently stopped as he went to work. They were standing in front of the bar talking, and one of the others treated to cigars. The deceased was a railroad engineer. They were talking about railroading in a pleasant, ordinary way, with no sign of excitement or anything to attract attention, and the deceased was sober. After some minutes' talk the deceased left the saloon and went through the hall into the back yard, where there was a water closet, and just after he reached the yard a pistol shot was heard, and when those in the saloon went out he was found lying on the brick walk with his head resting on his right shoulder, and with one hand up and about a foot from his head, and pointed towards his head. A pistol was lying near his feet, and there was a pistol wound in his head from which he died. No one else was in the back yard when the saloon man went out and found him. He was apparently in good spirits and happy when he left the saloon. The other two people in the saloon with him were railroad men. He was of a jolly, happy disposition, about thirty six years of age, and seemed to be perfectly sane, and as full of life as usual when he left the saloon. He had a wife and one child, his domestic relations were pleasant, and there is no assignable cause for his killing himself except the statement of one witness, that he looked like he was a little flighty a day or two before his death; that some days he was all right and other days he did not seem to be all right for a month there. But no other witness confirms this statement. The other witnesses testify that he was always genial and in good spirits, and that they noticed no change of any kind; that he seemed to be a sound and sensible man. On this proof the court instructed the jury as follows:

"1st. The jury will find for the plaintiff in the sum of $500 and interest from December 17, 1901, unless you shall find from the evidence that E. B. Stough died from the effects of a gun shot wound intentionally inflicted by himself, or by some other person other than a burglar or highwayman.

"2d. If the jury believe from the evidence that E. B. Stough died from the effects of a gun-shot wound intentionally inflicted by himself, or by some other person, other than a burglar or highwayman, you will find for the defendant."

The jury found a verdict for the plaintiff, and the defendant appeals.

We think it may reasonably be inferred from the evidence that the deceased died by his own hand, but whether it was accident or suicide can only be determined from the circumstances. The proof by all of the witnesses in the saloon as to his conduct and appearance there is inconsistent with the idea that he then contemplated taking his own life, and the pistol shot was fired so soon after he left the saloon that it is fair to presume that he was then in the same mood as when he left his friends, for he had not gone perhaps over thirty feet before the shot was heard. While the proof is only circumstantial, there does not seem to have been any other reason for his going out the back way except to get to the water closet. It may be that he dropped his pistol in removing it from his pocket before going into the water closet, for it was found on the ground at his feet, and there is no proof that he was powder burned.

In Ætna Life Insurance Co. v. Kaiser, 24 Ky. Law Rep., 2454; Union Casualty and Surety Co. v. Goddard, 25 Ky. Law Rep., 1035, and Ætna Life Insurance Co. v. Milward, 26 Ky. Law Rep., 59), the rule was laid down that when the dead body of the insured is found under such circumstances as to indicate that his death may have resulted from negligence, accident or suicide, the presumption of the law is against suicide as contrary to the general conduct of mankind, and where the evidence is circumstantial only and admits of more than one reasonable conclusion, the question is for the jury. The circuit court properly followed this rule, and under all the evidence we can not say that the verdict of the jury is palpably against the evidence.

There is a line of cases holding that under a policy like this there may be a recovery where the insured shoots himself intentionally while so insane as not to know that to so shoot himself would result in self-destruction. (Mutual Benefit Life Insurance Co. v. Daviess' Ex'or, 87 Ky., 541.) But there was no proof here to warrant an instruction on this subject, and the appellant was not prejudiced by the instructions given by the court. Under the evidence the deceased either died from a gun-shot wound inflicted by his own hand, for the purpose of ending his life, or the shot which killed him was accidental. The evidence before the jury did not warrant any other finding. The finding of the jury is, in substance, that the wound was not inflicted by him with the intent of ending his life. To have left the word "intentionally" out of the instruction would have been to make it misleading, for then the jury would have been authorized to find against the plaintiff if the wound was inflicted by himself, although it was done accidentally. Appellant was not prejudiced by the rulings of the court in allowing the amended reply to be filed. The case was narrowed down finally to the single issue of suicide, and if there was too great a liberality on the part of the court in allowing amendments, it was not prejudicial to appellant.

Appellant asked and received the burden of proof. It, therefore, introduced its evidence first, introducing on its behalf the keeper of the saloon, who testified to the death of the deceased as above stated. On cross examination the plaintiff asked him this question in regard to the pistol:

"Q. But the pistol might have dropped at his feet and might have shot him, mightn't it?"

"A. It maybe; maybe somebody might have killed him and throwed the pistol there; I don't know."

The defendant objected to this question and answer, and its objection being overruled, excepted. The plaintiff had a right to show by the witness that he did not know how the deceased came to be shot, and that for all he knew the shooting was an accident. The statement of the witness that somebody might have killed him and thrown the pistol there, while not directly responsive to the question, illustrated the fact that the witness did not know how the deceased came to be shot. The evidence was proper to show the jury the limits of the witness' knowledge. The proofs of loss made out by the plaintiff and forwarded to appellant were not competent as substantive evidence on the trial. If any of the affiants had been introduced as witnesses and their testimony had been inconsistent with their affidavits, they might have been used in the proper way for the purposes of impeachment, but none of the affiants were introduced on the trial. While it is true an admission of the plaintiff may be given in evidence against him, there was no statement of fact made in appellee's affidavit that was material here, and the affidavits of the other persons constituting the proof of loss were incompetent on the trial either for or against her. (Ætna Life Insurance Co. v. Kaiser, 24 Ky. Law Rep., 2454.)

Judgment affirmed.

HARRIS v. LANGFORD.

(Filed December 2, 1904—Not to be reported.)

1. Dower—Right of passway—Where appellant owned the dower right to a tract of land the right of a passway to it was appurtenant to the land allotted as dower

2. Pleading—Where an amended petition was filed, but improperly designated as "reply amended petition," it should not have been stricken from the record where it did not set up a new cause of action, but set up facts which, if true, showed that appellant was entitled to the passway claimed by her.

Grant E. Lilly for appellant.

J. Tevis Cobb for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, Nannie Harris, is the surviving widow of Robert E. Harris, who had been the owner of a certain parcel of land in Madison county. She never joined in any conveyance of the property, hence was entitled to be assigned her dower interest in it. The appellee acquired the legal title to the property. The appellant prayed to have her dower allotted to her, with the right of egress and ingress to and from the land. The defendant in his answer averred that in the division of the land of Sallie Ann Harris one hundred acres was allotted and deeded to Robert E. Harris, the appellant's husband, and that certain other parcels were allotted to others. And

he admitted that the plaintiff was entitled to a passway wherever necessity required and equity permitted over the original tract to the public highway, but he further averred that he owned the land that surrounded the land partitioned, and that the plaintiff did not have the right to a passway over his other lands. At the January term, 1901, the court adjudged that the appellant was entitled to dower in the land, and directed certain persons as commissioners to allot it to her. At the April term, 1901, the commissioners made their report, which was confirmed. Neither in the judgment of the court appointing the commissioners nor in their report was any reference made to the right of egress and ingress to and from the land. The court properly refused a writ ad quod damnum, and thus the matter stood until April, 1903, when a pleading was filed by the plaintiff, denominated a "reply amended petition," in which the plaintiff averred that she was entitled to a passway or road leading to the Richmond and Lexington turnpike; that such road or passway had existed for more than fifty years; that the defendant refused to allow her to use it in connection with the land assigned to her as dower. The court sustained a motion to strike this pleading from the record. This action of the court was evidently based upon the idea that the appellant did not properly designate the pleading, or because it was not filed until after the dower interest had been allotted to her and the report confirmed.

The appellant misnamed the pleading which she filed, as there is no such pleading known to the practice as a "reply amended petition." It was an amended petition, setting up facts, which if true, showed that she was entitled to a passway from her land over the land of appellee to the Richmond and Lexington turnpike. It may be possible that the court regarded it as setting up a new cause of action, not germane to the one stated in the petition. If this be true, the court was in error. The right to the use of the passway was appurtenant to the land assigned her as dower. If the averments of the petition are true, she has as much right to the use of the passway as she had to the land allotted as dower. The defendant owned all the land subject to the dower interest, and it was entirely proper in this action to have the question determined as to her right to the alleged appurtenance to her dower interest. The court had jurisdiction of the parties and the subject of the action, and it was eminently proper to consider the entire controversy in the same action. The appellant was not seeking to acquire a passway, which she did not have the right to use, but to establish the right which she alleged already existed thereto.

In the judgment allotting dower the court did not dispose of the question as to the right of egress and ingress to and from the land, hence it had not been adjudicated when the amended petition was filed. The case remained upon the docket, and the plaintiff had the right to have it disposed of. The amended petition did not set up a new cause of action, but contained averments which made the plaintiff's claim more definite and certain with reference to her right to the passway claimed on the original petition.

The judgment is reversed for proceedings consistent with this opinion.

EVERSOLE v. BULLOCK, &c.

(Filed December 2, 1904—Not to be reported.)

Husband and wife—Conveyance to the wife—Where the wife purchased a house and lot for $800, paying $200 of the purchase price with her own money and $100 in money furnished by her husband, there can be no question of the right of the wife to acquire the property, and the fact that she performed the household duties and nursed her husband, who was sick, with a view to saving that expense, he being under the legal obligation to support the wife and provide a home for her, the $100 which he paid on the house did not exceed the amount he should have paid for the support of the family.

E. E. Hogg for appellant.

W. S. Pryor and James M. Sebastian for appellees.

Appeal from Owsley Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, W. B. Bullock, was indebted to plaintiff, S. P. Hogg, evidenced by a promissory note. Hogg assigned the note to the appellant and she instituted this action on it, and sought to subject to the payment of it a small house and lot worth $500 or $600. After the debt was contracted the property was purchased by Mrs. Bullock, wife of W. B. Bullock, and the deed was taken to her. The contract price was $800, and she paid $200 of it and her husband paid $100 out of his small salary which he earned as county attorney of Owsley county. After the property was purchased a new chimney was added to the house, a smoke house was built out of some old timber, a crib was torn down and rebuilt, a hen house was built of old lumber and the fences around the lot were repaired. On this state of facts the appellant claims that the conveyance to the wife was fraudulent, and, therefore, seeks to subject the property to the payment of her debt.

There can be no question but what the wife had the right to acquire the property by purchase, and, therefore, it was not fraudulent to use her money in the payment of it. Her husband was poor and in bad health. His wife performed the necessary household duties and nursed him with the view of saving him that expense. He was under legal and moral obligations to support his wife and provide a home for her. The $100 which he paid out of his salary and the repairs which he made upon the house did not exceed the amounts which he should have paid for the support of his family. Out of his small salary these small sums were contributed to aid in procuring a home for his wife, which he was under an obligation to furnish. It is evident that the sums which he furnished were not greater than the sums he would have been required to pay as rent for another place, therefore, the conveyance can not be regarded as voluntary or in any sense fraudulent. This conclusion is supported by Greene v. Buckler, 19 Ky. Law Rep., 286. The improvements were such as were necessary for the preservation of the buildings and for the comfort of the family. (O'Gorman v. Madden, &c., 19 Ky. Law Rep., 567.) We reach the conclusion that the conveyance to the wife was not fraudulent, and, therefore, the property is not subject to the payment of the plaintiff's debt.

The judgment is affirmed.

HYDEN v. PERKINS.

(Filed December 2, 1904.)

1. Sale of real estate—Writing—Description of property—Identification—Parol evidence—Competency—On October 15, 1900, S. V. Perkins executed to Henry Hyden the following writing: "Received of Henry Hyden $20, the first cash payment on farm of about twenty acres, known as the Vaught farm. I hereby agree to deed to said Hyden said land on payment of an additional $105, payable as follows: $25 in six, twelve months and $30 in eighteen months, and $25 in twenty-four months from this date, with interest at 6 per cent. When said sum of $125 and interest has been paid I hereby agree to transfer to said Hyden, by deed of general warranty, said Vaught land, consisting of about twenty acres, and agree to give possession by January 1, 1901. S. V. PERKINS."

In an action by Hyden to enforce this contract, alleging the payment of the $20, and tendering the remainder with interest, Held—That the fact that the writing does not show in what county the Vaught farm is situated is immaterial, if it can be shown that there was a property known as the Vaught farm, consisting of about twenty acres. But if there were two farms to which this description would apply equally, then parol proof would be incompetent to show which of the two the parties intended to designate. But where the property is designated by a general name, parol proof may be given to show what property was known by this name.

O. H. Waddle for appellant.

W. A. Morrow and J. W. Colgan for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Hobson.

On October 15, 1900, appellee, S. V. Perkins, executed to appellant, Henry Hyden, the following writing:

"Received of Henry Hyden $20, first cash payment on farm of about twenty acres, known as the Vaught farm. I hereby agree to deed to said Hyden said land on payment of an additional $105, payable as follows: $25 in six, twelve months, and $30 in eighteen months, and $25 in twenty-four months from this date, with interest at 6 per cent. When said sum of $125 and interest has been paid I hereby agree to transfer to said Hyden, by deed of general warranty, said Vaught land, consisting of about twenty acres, and agree to give possession by January 1, 1901.

"S. V. PERKINS."

On February 10, 1903, Hyden filed this action, setting up the writing, alleging that he had paid the $20 on the day it was executed and agreed to pay her the additional sum of $105, payable in six, twelve, eighteen and twenty-four months, as set out in the writing, and in consideration of this she had executed to him the writing; that he afterwards tendered her the $105, with interest, and demanded of her that she should convey him the land and put him in possession of it, and this she refused to do, though she retained the $20 he had paid her; that after his purchase of the land, in violation of her contract, she had sold and conveyed the land to appellee, Sol Turpin, and that Turpin had full notice of his purchase and of the writing executed to him. He prayed a specific performance of the contract, alleging that he was ready, willing and able to pay the balance of the purchase

money. The court sustained a demurrer to the petition, and the plaintiff declining to plead further, dismissed the action.

In sustaining the demurrer to the petition the court proceeded on the idea that there was no sufficient description of the property to identify it without resorting to parol evidence, and in support of this view we are referred to Linville v. Langford, 20 Ky. Law Rep., 590; Jones v. Tye, 93 Ky., 390; Wortham v. Stith, 23 Ky. Law Rep., 1882.

In Linville v. Langford the action was brought against the widow and heirs at law of Solomon Langford upon two receipts signed by Reuben Langford, and by him alone. The writings were held insufficient because they did not purport to be contracts on behalf of the widow and heirs at law of Solomon Langford, but only the individual contract of Reuben Langford. After so stating, the court concludes its opinion with these words: "There being no written evidence of any contract for sale of the lands in controversy by or on behalf of the widow and heirs at law of Solomon Langford, appellant has stated no cause of action against them, and the demurrer to his petition was properly sustained."

In Jones v. Tye it was held that a receipt for purchase money, describing the land as "adjoining the McKibley land," was insufficient. In that case appellant insisted that the land referred to was one tract, and appellee that it was a different tract. It was held that there was not enough in the writing to identify the land sold. Here the description in the writing was insufficient to identify the tract sold, and left it a matter of doubt which of two tracts owned by the vendor was referred to. In Wortham v. Stith the only description of the land contained in the writing was that it was "one hundred and fifteen acres of land which I have this day sold him." Here there was nothing to describe what land was sold by the vendor except that it was one hundred and fifteen acres. There was nothing to identify the one hundred and fifteen acres that was included in the sale.

In the case before us the contract was signed by S. V. Perkins, who owned the land, and, therefore, Linville v. Langford has no application. The tract which was agreed to be conveyed is described as a "farm of about twenty acres, known as the Vaught farm." This is a very different description from a bare statement that the land sold adjoins another tract or that it consists of a certain number of acres. The general rule as to the sufficiency of description is thus stated in Browne on the Statute of Frauds, section 385: "But the subject-matter may in any case be identified by reference to an external standard, and need not be in terms explained. Thus to describe it as the vendor's right in a particular estate, or as the property which the vendor had at a previous time purchased from another party, is sufficient. And it is very common to identify the debt of a third person, for which the defendant has made himself responsible, as the debt then owing, or to become owing, by such third person to the plaintiff, without further description. Where the memorandum described the land as the estate owned by the seller on a certain street, and it appeared that he owned two estates on that street, to either of which the description might apply, the memorandum was held insufficient."

So in Wood on Statute of Frauds, section 353, it is said: "But where the writing, within itself or by reference to other writings, contains sufficient data so that by the aid of parol evidence no question as to the intention of

the party can arise, it is sufficient. Thus, a memorandum describing the property as 'my estates' located in certain towns, is sufficient, if it is shown that the party owned no other estates in the towns named, because the writing can be definitely applied to the subject-matter, by the aid of parol evidence, without raising any question as to the real intention of the party, except such as is apparent from the writing itself. So such descriptions as 'the land bought of Mr. Peters,' 'Mr. Ogilvie's house,' 'the property in Cable street,' or 'a house on Church street,' or 'the house in Newport,' 'my house,' 'the intended new public house at Putney,' 'the mill property, including cottages in Esher village,' have been held to be sufficient."

In Meade v. Parker, 16 Am. Rep., 110, the writing describes the land as a house on Church street. Holding this to be sufficient, the court said: "The most specific and precise description of the property intended requires some parol proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership, situation of the parties, and their relation to each other and to the property, as they were when the negotiations took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement.

That parol evidence is competent to furnish these means of interpreting and applying written agreements is settled by the uniform current of authorities." (Hurley v. Brown, 98 Mass., 545; Smith v. Freeman, 75 Ala., 285.)

In Greenleaf on Evidence, section 287, it is said: "In the simplest case that can be put, namely, that of an instrument appearing on the face of it to be perfectly intelligible, inquiry must be made for a subject-matter to satisfy the description. If, in the conveyance of an estate, it is designated as Blackacre, parol evidence must be admitted to show what field is known by that name. Upon the same principle, where there is a devise of an estate purchase of A., or of a farm in the occupation of B., it must be shown by extrinsic evidence what estate it was that was purchased of A., or what farm was in the occupation of B., before it can be known what is devised."

The decisions of this court are in accord with these principles. A number of decisions on this subject are collected in Moayon v. Moayon, 114 Ky., 855. In Ellis v. Deadman, 4 Bibb., 466, the writing was merely a receipt, and was held insufficient because it failed to specify the terms of the agreement. In Tyler v. Onzts, 93 Ky., 335, the court said: "The test of the validity of a contract under that statute uniformly applied by this court is that the memorandum or note thereof should be so complete and full the meaning thereof may be ascertained and enforced without aid of extrinsic verbal testimony."

Similar expressions occur in other cases. But in saying this the court had in mind only what was held in Ellis v. Deadman and the subsequent cases that the writing must contain the terms of the agreement. It did not mean to intimate that the property sold might not be indicated in the writing by a general designation, if sufficient to identify it by the aid of parol evidence showing to what property this designation or name applied, for in Tyler v. Onzts the writing was held sufficient, and the property was

there designated as "lot 4, block 9, N. E., in Middlesboro, Ky.," and the court quote with approval Fugate v. Hansford, 8 Litt., 262, where a writing was held sufficient describing the property as lot 33 in Carlisle, Ky. In Winn v. Henry, 84 Ky., 48, the property was described in the writing as "Silver Lake place, near Washington, Ky., containing fifty-two acres, more or less." This was held sufficient; so in Henderson v. Perkins, 94 Ky., 207, where the property was described as "my home place and storehouse," the writing showing that both the parties were of Rocky Hill, Ky.

It is not necessary that the purchaser sign the writing. (Fugate v. Hansford, 8 Litt., 262; Lewis v. Grimes, 7 J. J. M., 336.) The fact that the writing does not show in what county the Vaught farm is situated is immaterial, if it can be shown that there was a property known as the Vaught farm, consisting of about twenty acres. That is certain which may be made certain; but if there were two farms to which this description would equally apply, then parol proof would be incompetent to show which of the two the parties intended to designate. In other words, when the description given in the writing is so uncertain that parol proof must be admitted to show what the parties meant as between two or more things to which the description given in the writing would equally apply, then the contract is within the statute. But when the property is designated by a general name, parol proof may be given to show what property was known by this name.

Judgment reversed and cause remanded, with directions to overrule the demurrer to the petition.

RAMSEY, &c. v. CITY OF SHELBYVILLE.

(Filed December 2, 1904.)

1. Ordinance—Creating debt—Future effect—Taxpayers—Right to test validity—An ordinance of a city passed in March, 1902, to take effect January 1, 1903, if valid, created a liability on the city, and if it was beyond the power of the council to pass the ordinance, taxpayers of the city may maintain an action to have it declared invalid, although no levy has been made thereunder.

2. Local public library—Taxation to maintain—Under Kentucky Statutes, section 3490, subsection 22, conferring upon the city council, among other things, the power to "establish, maintain and regulate a local public library, "a city of the fourth class may provide and maintain a local public library by taxation, by complying with section 184 of the Constitution.

3. Assent of voters—Under Constitution, section 184, providing that "no sum shall be raised or collected for education otherwise than in common schools until the question of taxation is submitted to the legal voters, and the majority of the votes cast at such election shall be in favor of such taxation," an ordinance of a city appropriating $1,000 per year for the maintenance of a local public library, and an annual levy on the property of the citizens thereof for its payment, without the assent of the voters as provided in the Constitution, is void.

Gilbert & Gilbert and J. C Beckham & Son for appellants.

Willis & Todd and P. J. Beard for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Hobson.

On March 20, 1902, the board of council of the city of Shelbyville enacted the following ordinance:

"Be it ordained by the board of council of the city of Shelbyville, Ky.:

"Section 1. That the board of council of the city of Shelbyville, Ky., for and on behalf of said city, accepts the proposition of Andrew Carnegie made to said city, namely, that he, Andrew Carnegie, will give $10,000 for the purpose of erecting a free public library building on the condition that a suitable site be provided, and the city of Shelbyville guarantees by ordinance the sum of $1,000 annually for the support and maintenance thereof.

"Sec. 2. That there be and now is appropriated to the support and maintenance of the Shelbyville Free Public Library the sum of $1,000 per annum, same to be paid in quarterly payments of $250 each to the treasurer as long as said library is in existence, to be used only for the purpose of maintaining and supporting said free public library.

"Sec. 3. That there be levied annually on all the property in the city of Shelbyville subject to taxation for city and county a tax sufficient to provide each year for the aforesaid sum of $1,000.

"Sec. 4. This ordinance shall take effect and be in force on and after the 1st day of January, 1903."

Appellants, who are taxpayers of the city, filed this suit to test the validity of the ordinance, and the circuit court having dismissed their petition they appeal. It is insisted for the city that as no levy has been made under the ordinance we have only a moot case, and there is no real issue before the court. While no levy has been made, the ordinance accepts on behalf of the city the proposition of Mr. Carnegie made to the city, and guarantees the sum of $1,000 annually for the support and maintenance of the library. Though the ordinance did not take effect until January 1, 1903, it created, if valid, an obligation on the city, and if it was beyond the power of the council to pass the ordinance, taxpayers of the city may maintain an action to have it declared invalid. (Roberts v. Louisville, 92 Ky., 97; Keith v. Johnson, 109 Ky., 491.)

The authority of the council to legislate on the question is found in section 3490, subsection 22, Kentucky Statutes, which, among other things, confers on the board of council the following powers: "To erect a workhouse, poorhouse, stationhouse and house of correction, or all or either of them, and to provide for the maintenance, regulation and government thereof, and of the persons confined therein, and to provide, maintain and regulate a public burial ground; to establish, maintain and regulate a local public library, and raise subscriptions, donations and gifts thereto."

It is insisted for appellants that the power to establish, maintain and regulate a local public library is limited to the raising of subscriptions, donations and gifts thereto, and that the council has no power to levy a tax for this purpose. But undoubtedly the council may levy a tax to erect a workhouse, stationhouse, or house of correction, or to provide a public burial ground, and the power to maintain a local public library is as broad as its power to do the other things. The power to raise subscriptions, donations and gifts is simply an additional power, and these words are not a limitation on the preceding part of the sentence. By the act of March 21, 1902 (section 3480a, Kentucky Statutes), the legislature has further regu-

lated the subject. But independently of that act, and before its passage, the council had power to establish and maintain a local public library by taxation.

Section 184 of the Constitution, among other things, provides: "No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation: Provided, The tax now imposed for educational purposes, and for the endowment and maintenance of the Agricutural and Mechanical College, shall remain until changed by law."

It is urged that taxes may only be levied for public purposes, and if the tax under the ordinance is for a public purpose it must be because a public library is for an educational purpose, and, therefore, the ordinance is void because the question of taxation was not submitted to the legal voters. While a public library is in one sense an educational agency, a tax to maintain a public library is not a tax for education within the meaning of section 184. That section refers to education other than in the common schools, and means a tax in aid of a school, as shown by the concluding words above quoted. (Board of Education of Covington v. Board of Trustees of Public Library, 24 Ky. Law Rep., 98.)

Section 157 of the Constitution, among other things, provides: "No county, city, town, taxing district or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void."

It is insisted that the ordinance is invalid under this section because it creates an indebtedness exceeding the income and revenue provided for each year. On the other hand, it is insisted that the ordinance creates no indebtedness; that the library is maintained by the city just as it maintains its fire department or police force, and that the cost of maintaining the library is simply a part of its annual running expenses. It is also insisted that it can not be now determined how long the library will run or remain in existence, and, therefore, it can not be told that any indebtedness beyond the first year's levy will be incurred. If the ordinance is valid, it obligates the city to appropriate to the library $1,000 a year. To fail to do so would be bad faith to Mr. Carnegie, who is to pay $10,000 on the faith of this agreement of the city. The case, therefore, does not stand like the fire department or the police, for, as to these, each council may make such levy as in its judgment the best interests of the city require. But, as to the library, under the ordinance, the $1,000 must be raised each year, although the council, when it comes to make the levy, might find it entirely unnecessary to levy so much. Nor do we see that it can be maintained that the ordinance does not create an indebtedness within the meaning of the Constitution. It creates an obligation beyond the reveune provided for the year by the act of the municipal authorities without the assent of the voters. The ordinance creates an obligation in advance upon the treasury of the city for each year of its existence after the year 1902. By this act of the council it proposes to

bind all subsequent councils to levy a tax sufficient to raise $1,000 to support a library. If the council can do this, it can contract other obligations in advance, and thus entirely defeat the purpose of the constitutional provision, which is to require that the municipal authorities shall not in one year create obligations beyond the revenues provided for that year. (Beard v. Hopkinsville, 95 Ky., 289; Richmond v. Powell, 16 Ky. Law Rep., 174; Shelbyville v Shelbyville Water Co., 16 Ky. Law Rep., 176.)

The language of the Constitution is very broad—"become indebted in any manner or for any purpose." An obligation payable in future is no less a debt within the meaning of this provision than if payable at once. An obligation to pay which may be defeated by the happening of some contingency, as in this case the library ceasing to exist, is certainly an obligation until the contingency happens. Such an obligation must fall within the words "indebted in any manner or for any purpose." The contingency upon which the city is to be released from the obligation may never happen, and it is plain that the contemplation of the parties is a permanent public library to be maintained permanently by taxation. If such an obligation is not within the interdiction of the constitutional provision, it is hard to understand what practical effect would be given to it, for there are few obligations that might not be so framed as thus to avoid its operation.

The city council may submit the matter to a vote of the people, and, with the assent of the voters as provided in the Constitution, may incur the obligation and levy a tax to maintain the library; but the present ordinance is void.

Judgment reversed and cause remanded for a judgment as herein indicated.

THE H. B. PHILLIPS CO. v. PRUITT.

(Filed December 2, 1904—Not to be reported.)

J. D. Atchison and C. S. Walker for appellant.

W. T. Owens and Geo. W. Jolly for appellee.

Appeal from Daviess Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

On another trial if the evidence is the same the court will modify instruction 1 so as to make it read as follows: "The court instructs the jury that it was the duty of the defendant, in the operation and management of its elevator, to exercise the highest degree of care and skill usually exercised by prudent persons in the same business in the management and operation of elevators, and if the jury believe from the evidence that the plaintiff entered the storehouse of defendant, and in the exercise of ordinary care attempted to enter the elevator cage in the storehouse to go to the second story by invitation of defendant's servant, or when the acts of the servant were such that a person of ordinary prudence would reasonably infer such an invitation, and the plaintiff, in the exercise of ordinary care, when she attempted to enter the elevator, failed to discover that the elevator cage was not in the proper position, and by reason of the negligence of the defendant the plain-

tiff fell down into the elevator well, injuring herself by the fall, the law is for the plaintiff, and the jury should so find."

It was the duty of the cashier, under the evidence, to see that the door of the elevator was kept shut when not in use, and it would seem that the evidence warranted a finding that it was not expected that she should leave her desk and go and shut the elevator door herself, but that she was simply to see after the door's being kept shut. If this was the case she had the right to direct Homer Bradley to shut the door, and, in this event, the evidence warranted a finding that his act in pulling down the elevator before shutting the door was within the apparent scope of his authority in obeying her order. If, on another trial, the evidence is the same and the defendant desires an instruction on the question whether the cashier, in the scope of her authority, should have shut the door herself instead of sending Homer Bradley to shut it, or whether the act of Bradley was within the apparent scope of the order given him by the cashier, the court gave an instruction submitting the question to the jury.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. v. COMMONWEALTH, BY, &c.

(Filed December 2, 1904.)

1. Foreign corporations—Organization tax—Under Kentucky Statutes, section 4225, providing for the payment by all corporations organized under the laws of this State of an organization tax of one-tenth of one per cent. on the face value of its capital stock, a foreign corporation organized under the laws of another State, or country, by filing in the office of the secretary of state, and in the office of the railroad commission of this State, a copy of the charter or articles of incorporation, properly authenticated, as required by Kentucky Statutes, section 841, does not thereby become liable to pay the organization tax required by said section 4225 of corporations organized in this State.

2. Same—Kentucky Statutes, section 841, does not deal with the creation of corporations, but provides the mode required by this State to naturalize railroad corporations created by a foreign jurisdiction. Section 763, Kentucky Statutes, provides how a corporation shall be created in this State, and these latter only are required by section 4225, Kentucky Statutes, to pay an organization tax in this State.

Galvin & Galvin and Ira Julian for appellant.

Kohn, Baird & Spindle and John W. Ray for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Barker.

This was a proceeding in the Franklin Circuit Court by the auditor's agent, under section 4241 of the Kentucky Statutes, to collect from the appellant an organization tax of one-tenth of one per cent. of the face value of its authorized capital stock. The case was submitted on the pleadings to the circuit judge for an adjudication as to the merits of the claim, with the result that a judgment was rendered in favor of the Commonwealth against appellant for the sum of $3,000 and, in addition, the penalty allowed by law to the auditor's agent in such cases, amounting to $600.

There is, of course, no controversy as to the facts, the question being one purely of law, and must be solved by a proper construction of the statutes bearing on the subject. For convenience, we deem it advisable to insert herein so much of the statutes of the State as appear necessary for the solution of the question before us.

Kentucky Statutes, section 763: "Any number of persons, not less than seven, may associate to form a corporation for the purpose of constructing, operating and maintaining a railroad. Such persons shall execute articles of incorporation, which shall specify the name of the proposed railroad, the number of years the corporation is to continue, the amount of its capital stock, and the number of shares into which the same shall be divided; the number of directors, which shall not be less than five nor more than fifteen, and their names; the places from and to which, and the name of each county into or through which it is intended to be constructed, and its length as near as may be. Each subscriber to such articles shall set opposite his name his place of residence and the number of shares subscribed by him. Whenever $250 per mile has in good faith been subscribed, and 20 per cent. thereof paid in in cash to the persons named in the articles as directors, and an affidavit made to that effect by two of said named directors and attached thereto, a copy of said articles and affidavit shall be filed in the office of the railroad commission, and in the office of the secretary of state; and when a certificate of such fact is delivered by the said officers to the incorporators, the persons who have subscribed such articles shall be a body-corporate by the name specified in the articles, and as such may sue and be sued, contract and be contracted with, have a seal, and change the same at pleasure; may elect or appoint directors, who shall choose from their number such officers as may be necessary; may require from any officer or employe a bond for the faithful discharge of his duties, and prescribe such by laws for its government, and exercise such powers as are necessary to the conduct of its business not inconsistent with law.

"Section 765. No railroad corporation, organized or created by or under the laws of any other State, shall have the right to condemn land for, or acquire the right of way for, or purchase or hold land for its depots, tracks or other purposes until it shall have first filed in the office of the secretary of state of this State, in the manner provided in the first article of this chapter, its acceptance of the Constitution of this State, and shall have become organized as a corporation under the laws of this State, which it may do by filing in the offices of the secretary of state and the railroad commission articles of incorporation in the manner and form provided in section 763 of this article.

"Section 841. No company, association or corporation created by, or organized under, the laws or authority of any State or country other than this State, shall possess, control, maintain or operate any railway, or part thereof, in this State until, by incorporation under the laws of this State, the same shall have become a corporaton, citizen and resident of this State. Any such company, association or corporation may, for the purpose of possessing, controlling, maintaining or operating a railway or part thereof in this State, become a corporation, citizen and resident of this State by being incorporated in the manner following, namely: By filing in the office of the

secretary of state and in the office of the railroad commission a copy of the charter or articles of incorporation of such company, association or corporation, authenticated by its seal and by the attestation of its president and secretary, and thereupon, and by virtue thereof, such company, association or corporation shall at once become and be a corporation, citizen and resident of this State. The secretary of state shall issue to such corporation a certificate of such incorporation.

"Section 842. Any company, association or corporation that, after the first day of August, 1893, possesses, controls, maintains or operates any railway, or part thereof, in this State, without becoming incorporated as a corporation, citizen and resident of this State, as permitted by section 841, shall be guilty of a misdemeanor, punishable by a fine of not less than $1,000 for each day, or part thereof, that any railway, or part thereof, in this State is possessed, controlled, maintained or operated by it; any person that in anywise aids or assigns, either as officer, agent, servant or employe, in so possessing, controling, maintaining or operating any railway, or part thereof, in this State, shall be guilty of a misdemeanor, punishable by a fine of not less than $100 for each day or part thereof that he so assists or aids.

"Section 4225. Every corporation which may be incorporated by or under the laws of this State, having a capital stock divided into shares, shall pay into the State treasury one-tenth of one per centum upon the amount of capital stock which such corporation is authorized to have, and a like tax upon any subsequent increase thereof. Such tax shall be due and payable on the incorporation of the company and on the increase of the capital thereof; and no such corporation shall have or exercise any corporate powers until the tax shall have been paid; and upon payment, they shall file a statement thereof with the secretary of state."

Appellant is a foreign corporation, organized under the laws of Ohio, operating, as lessee, a railroad through the State of Kentucky, known as the "Cincinnati Southern," under a contract made in 1881, the road so operated having been constructed under an act of the general assembly of the Commonwealth of Kentucky, entitled "An act to authorize the trustees of the Cincinnati Southern Railway to acquire the right of way, and extend a line of railway through certain counties in this Commonwealth," approved February 13, 1872, and contained in the acts of 1871-2, volume 1, page 25. By this act certain-named trustees were authorized to extend, construct and maintain a line of railroad within the Commonwealth of Kentucky, with single or double tracks, with all the usual appendages, including a line of telegraph, and to exercise such powers vested in them under and by virtue of an act of the general assembly of the State of Ohio, subject to the provisions and restrictions this act provides. These trustees were given the power to acquire rights of way by gift, grant or purchase, or proceedings by ad quod damnum, to be exercised in the mode pointed out in the act; and also to lease its railroad, for the purpose of being operated to other persons or companies. The trustees and their lessees were prohibited by the terms of the grant from instituting any action in the Federal courts against a citizen of this State, or of removing any action instituted against them to the Federal courts.

No question is made as to the regularity of the organization of either the

lessor or lessee company, or as to the latter being in lawful possession of the franchises leased by it from the former, the sole question being as to whether the latter is subject to pay the organization tax under section 4225 because it complied with the provisions of 841 and 842 of the statutes.

After the enactment of these last sections the appellant filed in the offices of the secretary of state and the railroad commission a copy of its charter, or articles of incorporation, as prescribed in section 841, and thereupon the secretary of state issued to it the certificate of incorporation authorized by that section. The organization tax required by section 4225 was not exacted by the secretary of state, it being both his opinion and that of appellant that it was not liable therefor. The auditor's agent, however, was of a different opinion; he regarded the act of appellant in filing a copy of its articles of incorporation with the secretary of state and railroad commission as an act of incorporation under the laws of Kentucky within the purview of section 4225, and instituted this proceeding to recover the organization tax. If he is correct in this construction, then the judgment of the circuit court should be affirmed; if not, it should be reversed, there being no question of the correctness of the judgment if appellant is liable at all.

An inspection of section 4225 will show that, by its very terms, it applies only to such corporations as have been incorporated by, or under, the laws of this State, having a capital stock divided into shares, while section 841 applies only to companies, associations or corporations created by, or organized under, the laws or authority of any State or country other than this State, and without regard to whether they are, or not, stock corporations. Section 763 provides exactly how many number of persons, not less than seven, may associate to form a corporation for the purpose of constructing, operating and maintaining a railroad. A comparison of the terms of section 763 with those of 841 will show the vast difference between what is required by the former to create railroad corporations by the laws of this State, and what is required by the latter to naturalize railroad corporations created by a foreign jurisdiction. Section 841 does not deal with the creation of corporations. Section 763 shows how a railroad corporation may be created, and vitality breathed into it by the power of the laws of our own Commonwealth. Each person desiring to be a constituent member of the proposed new corporation shall execute the articles of incorporation, and these shall specify the name of the proposed railroad, the number of years the corporation is to continue, the amount of its capital stock, and the number of shares in which the same shall be divided; the number of directors which it shall have, their names, and the places from and to which, and the name of each county into or through which the proposed railroad is to be constructed, and its length, as near as may be, given. Each subscriber is required to set opposite his name in the articles of incorporation his place of residence and the number of shares subscribed by him, and these articles of incorporation are required to be filed in the offices of the secretary of state and railroad commission, and when a certificate of such fact is delivered by these officers to the incorporators, the persons who have subscribed such articles shall be a body-corporate by the name specified in the articles, and as such may sue and be sued, contract and be contracted with, have a

seal, which they may change at pleasure, may elect or appoint directors, and prescribe by-laws for the government of the new corporation, and may exercise such powers as are necessary to the conduct of its business not inconsistent with law. Section 841 was not enacted for the purpose of creating corporations, but assumes them to have been already created. The language is: "Any such company, association or corporation may, for the purpose of possessing, controlling, maintaining or operating a railway, or part thereof, in this State, become a corporation, citizen and resident of this State by being incorporated in the manner following, namely:" * * * This section has nothing to do with shares of stock of corporations, and has nothing to say on that subject. It is equally applicable to those which are joint stock corporations, and those which are not. Section 4225 only applies to joint stock corporations, and section 763 only provides for the creation of joint stock corporations. If section 4225 applies to foreign corporations operating their roads through Kentucky, which have complied with the terms of section 841, then it is immaterial whether the given corporation has paid an organization tax to its native State or not, for there is no exception in the terms of the section last named in favor of a foreign corporation which has not so paid; and it would follow that if some great transcontinental railroad with a capital stock perhaps of $100,000,000 should run through only one county of our State, it would be required, by the penalties denounced in section 842, to comply with the terms of section 841, and then by the construction sought to be maintained by appellee it would instantly owe the State an organization tax of one-tenth of one per cent. of the capital, or $100,000; and if the various States through which it passed on the road from the Atlantic to the Pacific had laws similar to ours, such a construction would lead to consequences prohibitory of the building of the road. We are not questioning the right of the State to prescribe any terms it pleases as a condition precedent to the exercise of business by foreign corporations within its boundary. The question is not what the State may do, but what it has done; and while the argument of hardship is not always decisive as to the proper construction of a statute, and should never be allowed to overturn its plain letter, yet it is often worthy to be weighed as a constituent in the problem; and we think, where two constructions of a statute are admissible by its terms to place the matter as favorable to the appellee as possible, the one leading to consequences of unusual hardship and disaster, and the other resulting only in fairness and equity, the latter should be adopted. We are strengthened in the conclusion we have reached by a consideration of sections 555 and 556 of the Kentucky Statutes. Section 555 provides that any two or more corporations organized under the laws of Kentucky, or the laws of this and any other State, may consolidate into a single corporation. Section 556, in regulating the organization tax of the new corporation so created, contains this proviso: "That no consolidated company formed under this chapter, or the laws of this State, shall be required to pay any organization tax, except that if in the consolidation the capital stock of the consolidated company be increased, or be hereafter increased to an amount exceeding the aggregate capital stock of the constituent companies at the time of the consolidation, then in that event the consolidated company shall not have or exercise any corporate powers until it

shall have paid into the State treasury one-tenth of one per centum upon the amount of said increase, and upon such payment shall have filed a statement thereof with the secretary of state; if, however, any corporation hereafter formed in another State where no organization tax was required to be paid by it shall be consolidated with one formed in this State, then the organization tax required by the laws of this State shall be paid upon so much of the capital stock of the consolidated corporation as shall be equal to the capital stock of the foreign constituent corporation; or if such foreign corporation hereafter formed may have been required by the laws of its State to pay an organization tax less than that required to be paid in this State, then upon such consolidation with a corporation of this State an organization tax shall be paid equal to the difference between that required of such foreign corporation in the State of its creation and that which would have been required had it been formed in this State."

This provision in section 556 was enacted in 1902, and is a legislative construction against the blind and undiscriminating policy sought to be maintained by appellee, of requiring every foreign corporation which does business in the State to pay an organization tax without regard to the fact that it has already paid one at home. Under section 556, although that which had been a foreign corporation, by being consolidated and recreated, has been really and in truth organized under the laws of this State, yet so tender was the legislature on the subject of double taxation that it in express terms declined to require so much of the constituent element of the new corporation as may have paid an organization tax to its native State when it was originally created, to pay again to this State. If the construction contended for by appellee had been the policy of the State the proviso in section 556 would not have been enacted. Section 763 relates to the creation of corporations, and these latter only are required by section 4225 to pay an organization tax.

For the reasons indicated the judgment is reversed, with directions to dismiss the proceedings against the appellant.

POWERS v. COMMONWEALTH.

(Filed December 6, 1904—Not to be reported.)

1. Criminal law—Prejudicial error—Upon the trial of appellant for murder and after the hearing of the evidence was concluded, C., who was of counsel for the prosecution, in his argument to the jury in commenting upon the trial of H., who was charged with being a co-conspirator of appellant in the murder of William Goebel, said: "Howard was not hung, but eleven of the twelve jurors who tried him were in favor of hanging him, and one was for life imprisonment, and the eleven had to come to one." Held—That the court erred in not sustaining the motion to exclude this statement from the jury; the failure to so exclude it stamped it with the approval of the judge. There was not and could not have been, legally, any evidence in the case warranting the obnoxious statement, and it in substance conveyed incompetent evidence to the jury, and was highly prejudicial to appellant.

2. Grounds for new trial—Time of filing—Pronouncing sentence—On the

same day upon which the verdict was rendered the appellant was required, over his protest, to file his motion and grounds for a new trial. They were required to be immediately argued and were at once overruled. At the same time appellant asked for time to file additional grounds, and insisted that judgment should not be pronounced against him in pursuance of the verdict of the jury. These motions were overruled and judgment pronounced upon the same day the verdict was rendered. Held—Section 283 of the Criminal Code, providing that "upon verdicts of conviction in cases of felony the court shall not pronounce judgment until two days after the judgment is rendered unless the court be about to adjourn for the term," and this trial having been had at a special term, it can not be said within the meaning of the Code that the term was about to end, because having been called to try the case, it could not of necessity end until the trial was concluded. It was, therefore, error for the court to pronounce judgment upon appellant until the expiration of the time provided for by the Code.

J. R. Morton, James C. Sims, R. D. Hill, H. Clay Howard, R. C. Kinkead, S. N. Wilson, J. A. Violett and A. T. Wood for appellant.

N. B. Hays, Loraine Mix, R. B. Franklin, B. G. Williams, T. C. Campbell, V. F. Bradley, John K. Hendricks and Dennis Dundon for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Barker.

This case is here for the third time. The opinion on the first appeal is to be found in 110 Ky., 586, and that of the second in 24 Ky. Law Rep., 1007.

When so important a case as this comes to the appellate court for the third time, when the evidence has been practically the same on each trial, and when both the State and the accused have been represented by counsel eminent for their learning, their industry and their loyalty to the trust committed to their keeping, it will be found that the substantial questions raised have, in large measure, at least, already been adjudicated.

The record before us affords no exception to the rule as stated. We find that now, as upon both of the former hearings, the validity of the pardon issued by W. S. Taylor to the accused, for the offense with which he stands charged, is urged in bar of the prosecution against him; that it is again insisted that the Commonwealth's evidence was not sufficient to authorize a submission of the case to the jury, and that a peremptory instruction should have been awarded at its close; that those witnesses, who are called accomplices of the accused, should not have been permitted to testify against him without first extending judicial amnesty to them by dismissing the indictments; and that the court erred in the instructions which were given to the jury. All of these questions were directly passed upon on the former appeals, as were most of the questions of the admission and rejection of testimony. We shall not extend this opinion, either by a restatement of the facts so amply set forth in the opinions upon the former appeals, nor shall we examine in detail the multitude of questions of mere practice, which find ready elucidation by a reference to the principles established by those opinions. But there are two questions presented which are new, and we think substantial.

It is hardly necessary to recall the fact that the accused was jointly indicted by the grand jury of Franklin county with James B. Howard and others for a conspiracy to murder William Goebel; that a separate trial was demanded and awarded these two, and that a change of venue was granted the accused, whereby the case against him was transferred for trial to the Scott Circuit Court; that the trial of James B. Howard in Franklin county, just prior to the last trial of this case, resulted in his conviction, and his penalty fixed at confinement in the penitentiary for life; that it was the theory of the Commonwealth, which its officers undertook to establish by evidence, that Howard fired the shot by which Geobel was murdered; that in the main, if not altogether, the same counsel represented the Commonwealth upon the trial both of Howard and Powers.

Upon the last trial of the case in the circuit court, after the evidence was heard, T. C. Campbell, who had assisted the Commonwealth's attorney in the trial of Howard and also in the trial of the case at bar, made the following statement in his argument to the jury: "Howard was not hung, but eleven of the twelve jurors who tried him were in favor of hanging him and one was for life imprisonment, and the eleven had to come to one." This language was objected to by counsel for appellant, and the court was requested to exclude it from the consideration of the jury. This motion was overruled, and the statement of the counsel allowed to remain with the jury, thus stamped with the approval of the judge.

We are of opinion that, under all the circumstances of this case, the court erred in not sustaining the motion in regard to this statement of counsel.

No case was ever tried in Kentucky springing from more exciting causes, or arousing more party passion, than did those of James B. Howard and Caleb Powers. We venture to say that there is scarcely a citizen within the confines of the State who does not know, in a general way, the evidence for and against these men, and who has not some sort of opinion of their guilt or innocence. On the theory of the State, Howard actually committed the murder of a man then claiming to be, and afterwards adjudicated to be, the governor elect of the Commonwealth of Kentucky. Howard had been sentenced only to life imprisonment. The accused, on the theory of the Commonwealth, was merely an accessory before the fact of this murder. It could not be overlooked that the jury, who were to fix his sentence if he was found guilty, knew what verdict the jury had rendered in the Howard case, and it was not unnatural that a specially employed representative of the Commonwealth, ardently desiring to impose the death penalty in this case, should seek to weaken the effect on the jury's mind of a less penalty having been meted out to the chief offender. The counsel in question (since dead) had a national reputation as a criminal lawyer, and it is said of him that his appeals to the jury were made with passionate eloquence and great dramatic power. There was not, and could not have been, legally, any evidence in the case warranting the obnoxious statement; it was a gratuitious declaration, without lawful foundation, in substance and effect conveying incompetent evidence to the jury.

The attorney-general concedes in his brief, as he did upon the argument at bar, that the statement was improper and unwarranted. His only contention in regard to it is that it was not prejudicial. This position is un-

tenable. We can conceive no statement which counsel could have made more certainly fraught with danger to the accused, or which was more likely to arouse passion or prejudice in the minds of the jurors, than that under consideration. The very air was surcharged with the excitement of a political struggle which had convulsed the State, and threatened its foundations with the strain of revolution. The statement undertook to reveal to the jury the secrets of the jury room in the Howard case, and to inform them that of the twelve, eleven were for inflicting the death penalty; that one stood out for life imprisonment, and, by his stubbornness, had forced the eleven to come to him. It was a statement not only improper in itself, but one which, of necessity, the counsel for the accused were powerless to meet; it purported, on its face, to be a secret, and was not, therefore, subject to open investigation or contradiction.

Unless we have reached a point in criminal procedure where unauthorized and improper statements of counsel for the State will never be held to prejudice the substantial rights of the accused, it is impossible for us to allow this verdict to stand, based, as it is, in part, at least, upon improper testimony, not even buttressed about by the sanctity of an oath, and which the accused could neither meet, contradict nor explain.

In the case of James B. Howard v. Commonwealth, 22 Ky. Law Rep., 1845, it appeared that Robert B. Franklin, the regular Commonwealth's attorney, did not participate in the prosecution because of illness, and his place was supplied by the appointment of a pro tempore attorney, who, in his closing argument to the jury, said: "I am commissioned by Robert Franklin to say to the jury that he is in thorough accord and sympathy with the prosecution, and that he thinks the defendant guilty and hopes the jury will hang him higher than Haman." The court held that this was a reversible error, and it was the only question of law presented by the record upon which all of the members of the court agreed. In the case of Howard v. Commonwealth, 24 Ky. Law Rep., 93, it was said: "It also appears from the bill of exceptions that the Commonwealth's attorney, in course of his argument to the jury, stated to them that defendant's attorney, who had just addressed the jury in behalf of the defendant, 'was a high-priced lawyer, and was never employed unless in bad cases, and that whenever he was employed by a defendant it was understood that the defendant had a bad case,' which was excepted to by the defendant and overruled by the court. The law secures to a defendant charged with crime the right to be represented by counsel, and a Commonwealth's attorney is not justified in his closing argument to the jury to travel outside of the record of the case, and attempt in any way to prejudice the minds of the jury against his counsel. The Commonwealth only wants convictions when the testimony and the law warrant them, and the comments of the Commonwealth's attorney were improper, and should not have been indulged in."

There are many of the cases which were reversed by this court for improper conduct of the Commonwealth's attorney in their closing argument, where the obnoxious statements were not near so prejudicial as that under discussion, among which are the following: Wilson v. Commonwealth, 21 Ky. Law Rep., 1333; Rhodes v. Commonwealth, 107 Ky., 354; Cook v. Commonwealth, 86 Ky., 668; Rankin v. Commonwealth, 82 Ky., 424; Clint v.

Commonwealth, 81 Ky., 186; Parrott v. Commonwealth, 20 Ky. Law Rep., 761; Gilbert v. Commonwealth, 21 Ky. Law Rep., 544; Redmon v. Commonwealth, 21 Ky. Law Rep., 831; Johnson v. Commonwealth, 23 Ky. Law Rep., 1885; Bennyfield v. Commonwealth, 18 Ky. Law Rep., 446; Cupp v. Commonwealth, 87 Ky., 85; Howard v. Commonwealth, 110 Ky., 857, and Darrall v. Commonwealth, 26 Ky. Law Rep., 541.)

On the same day upon which the verdict was rendered, the appellant was required, over his protest, to file his motion and grounds for a new trial; they were required to be immediately argued by counsel, and were at once overruled by the court. At the time of filing his grounds and motion the appellant asked for additional time in which to file further grounds. This request was based upon the fact that his counsel had just finished a long and tedious trial, during which the sittings of the court had been held both night and day; that they were wearied by their prolonged labors, and that a few days' time would enable them to produce additional grounds, which they did not then possess, in support of his motion.

The accused especially insisted that the court should not pronounce judgment upon him in pursuance of the verdict of the jury until after the expiration of the time provided by the Code. These motions were overruled, and the judgment pronounced upon the same day the verdict was rendered.

The Criminal Code, section 283, provides: "Upon verdicts of conviction in cases of felony the court shall not pronounce judgment until two days after the judgment is rendered, unless the court be about to adjourn for the term."

Unless we are to hold that section 283 was enacted for no useful purpose, it contains a most solemn and vital right of the accused; its meaning is upon the surface; it requires no reflection to understand it; it was enacted for the express purpose of giving the accused time in which to show cause against the sentence about to be passed upon him. This trial was had during a special term of the court, and it can not be said that, within the meaning of the Code, the term was about to end, because, having been called for the purpose of the trial of this case alone, it, of necessity, would not end until that was completed. The jury were through with their labors, and were finally discharged, and there were no other juries to be kept waiting by the delay asked for the accused. The right of a defendant to the two days elapsing after his conviction, and before the infliction of the judgment, is fully recognized in the cases of O'Brien v. Commonwealth, 89 Ky., 369, and Bush v. Commonwealth, 80 Ky., 244. While the court declined to reverse either of these cases for the reason under consideration, this ruling was based upon the fact that no injury was shown to have accrued to the defendant by the refusal of the trial court to stay the judgment. In the case at bar, however, the accused claims to have discovered that the jury who tried him were terrorized while they were in the custody of the sheriff by the information that the house in which they were confined during the trial had been set on fire four times, and that if he had been given the time allowed by law he could have shown this to the court in support of his motion for a new trial. If this is true, it was especially important to the accused, because the overruling of his motion for a new trial is not ground for a reversal of the judgment by this court. We do not think it necessary,

however, to go into an extended argument on this branch of the case, as it is to be reversed for the reason already given, and this question will not occur again.

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

Whole court sitting.

Judges Paynter, Hobson and Nunn dissenting.

Judge Barker delivered the following separate opinion:

Having written the opinion of the court in this case on the only theory upon which a majority of the members could agree, the deep conviction I have on the Federal question contained in the record constrains me to express, in a separate opinion, my personal views on that subject.

The trial of this case, by a change of venue from Franklin county, where the indictment was found, took place in Scott county; but for reasons no doubt entirely valid, the jury was secured from Bourbon. When the officers were about to proceed to summon the jurors the appellant moved the court to instruct them to summon persons without regard to political affiliation. This was objected to by the Commonwealth, and the motion overruled, the court saying that he had instructed the officers as to their duty in the premises, and he had no reason to assume they would not perform their duty. Two venires of one hundred persons each were ordered. Upon the appearance of the first, composed of ninety-five men, the appellant moved that they be discharged. He filed his own, and the affidavits of two others, to the purport that the officers had, by a prearranged system of "exclusion" and "elimination," failed and refused to summon any person for jury duty who was a Republican in politics, no matter how well qualified he might be otherwise; that, on the other hand, they had only summoned those who were what are called "Goebel Democrats," or partisan followers of the late William Goebel, for whose murder the appellant was being tried; that this killing grew out of, and was the result of, a bitter political contest for the office of governor of the State between W. S. Taylor and William Goebel, which was being tried at the time the latter was killed; that these partisans of Goebel were exceedingly bitter against appellant, and that with a jury composed entirely of them he could not have a fair and impartial trial, and would thereby be deprived of the equal protection of the laws within the meaning of the 14th Amendment of the Federal Constitution.

The Commonwealth objected to this motion, and filed the affidavits of the officers, denying all of the material allegations of the affidavits for the appellant, and affirmatively alleging that they had no prejudice against him, but, on the contrary, desired to see him have a fair and impartial trial; that the Republican party of Bourbon county was composed mostly of negroes who were not qualified for jury service, and of the whites nearly all were Federal office holders, and thereby disqualified as jurors.

The court overruled the motion, the order reciting: "Thereupon the court overruled the motion without any reference to the said affidavits, and the court holds that it is not claimed in the grounds of said motion that said jurors are not sensible, discreet and sober men and housekeepers of Bourbon county, over the age of twenty-one years, to all of which defendant excepts."

The proceedings with reference to the second venire was in all substantial respects similar to those regarding the first, except that no reason was given in the second order for overruling the motion to quash. After the panel of twelve was selected the defendant moved the court to discharge them for the same reasons, with a like result as before. It is clear that the trial judge was of opinion that it was not an offense against the 14th Amendment, or a denial of the equal protection of the laws to the defendant, to exclude Republicans from the jury solely because they were Republicans, provided the selected Democrats were possessed of the statutory qualifications required for jury service. There was no decision upon the evidence offered as to whether or not, in fact, there had been the discrimination complained of, it being necessarily assumed that this was, if true, an immaterial circumstance.

To this I can not agree; it is in contrevention of our State, as well as of the Federal Constitution. So much of the 14th Amendment as is pertinent to the discussion in hand is as follows: * * * "Nor shall (any State) deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court of the United States, the final arbiter in all matters involving the Federal Constitution, has uniformly held that the exclusion from juries, grand or petit, of persons belonging to a class, for the sole reason that they belonged to such class, is, as to a member of the excluded class being tried under a charge of crime, a deprivation of the equal protection of the laws. This question has generally arisen in cases involving the exclusion and trial of negroes. This might well be expected in the confusion of adjusting the rights of this race from their former condition of slavery to that of citizens under the 13th, 14th and 15th Amendments. But the application of the principle under discussion is not confined to the rights of negroes; it extends to every person, whatever his race, color or political affiliation, if his legal rights have been denied solely because thereof. Nor is it confined to laws which on their face involve invidious distinctions in providing legal protection, but extends to, and forbids, such unjust discrimination by the executive and administrative officers of the State.

It is said in Carter v. Texas, 177 U. S., 443: "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied him contrary to the 14th Amendment of the Constitution of the United States." (Strauder v. West Virginia, 100 U. S., 303; Virginia v. Rives, 100 U. S., 313; Neal v. Delaware, 103 U. S., 370; Bush v. Kentucky, 107 U. S., 110; Yick Wo v. Hopkins, 118 U. S., 356; Torrence v. Florida, 188 U. S., 519; Rogers v. Alabama, 192 U. S., 226.)

In the case of the County of Santa Clara v. Southern Pacific R. R. Co., 18 F.R., 385, Justice Field, adopting in part the speech of Senator Edmunds delivered in the United States Senate when the amendment was under discussion, said: "There is no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned, and intended to mean the full and beneficial thing that it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in

hand which was not considered. And the purpose of this long and anxious consideration was that protection against injustice and oppression should be made forever secure, to use his language, 'secure, not according to the passion of Vermont, or of Rhode Island, or of California, depending upon their local tribunals for its efficient exercise, but secure as the right of a Roman was secure in every province and in every place, and secure by the judicial power, the legislative power, and the executive power of the whole body of the States and the whole body of the people.' This protection attends every one everywhere, whatever be his position in society or his association with others, either for profit, improvement or pleasure. It does not leave him because of any social or official position which he may hold, nor because he may belong to a political body, or a religious society, or be a member of a commercial, manufacturing or transportation company. It is the shield which the arm of our blessed government holds at all times over every one, man, woman and child, in all its broad domain, wherever they may go, and in whatever relations they may be placed."

In Yick Wo v. Hopkins, supra, the court said: "These provisions of the 14th Amendment are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, or color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

The provision of the equal protection of the laws is only a rule of justice and fairness; it creates no new system of procedure, but enforces equally that which it finds in force; it furnishes one charged with crime no shield for his protection not furnished to all, but it does require justice to bear her sword with equal hand, and hold her scales in equal balance.

To the proposition that, by section 281 of the Code, we are without jurisdiction to pass upon this question, because it forbids an exception to the ruling of the trial court on the organization of the jury, I reply that, if the section is in the path of the full, free and fair enforcement of the constitutional provision in question, then it is to that extent void Section 281 is as follows: "The decisions of the court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception."

It may be conceded that many utterances of this court are to the effect that we have not jurisdiction to reverse a judgment in a criminal case because of a ruling of the trial court as to the empaneling of the jury; but we have never yet had before us, so far as I know, any case where the question involved the provision of the Federal Constitution under consideration; nor have we ever said that, if the decision of the trial judge on the qualification of jurors, or the organizing of the panel, was in violation of that instrument, we would not revise and correct it. To fail to do so would, in my opinion, be in contravention of the very letter of the Constitution. Article 6 of that instrument provides as follows: * * * "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges

in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

It might have been supposed that the words I have italicized were unnecessary; that if the Constitution was the supreme law of the land it would necessarily be binding on the judges of the States; but the framers of the instrument deemed it best to place the matter beyond the realm of dispute, or argument, and provided specifically the duty of the State judges in the matter of its enforcement. But we are not without decisive authority both upon our jurisdiction and our duty on this branch of the case. The case of Bush v. Kentucky, 107 U. S., 110, bears especially upon this phase of the question. Section 281 of the Criminal Code was contained verbatim in the old Code of Practice, and the case went up to the Supreme Court on writ of error to our court, and was reversed because it appeared that negroes, as such, had been excluded from the grand jury who returned the indictment under which the plaintiff in error, a negro, had been tried and convicted. This case completely answers the contention that we can not take jurisdiction of the question as to the proper organization of the jury when the error complained of is a violation of the Federal Constitution, unless we are to occupy the anomalous position that we will refuse to reverse the judgment of the circuit court for an error when this refusal will furnish ground for a reversal of this court by the Supreme Court of the United States.

In the case of Great Western Telegraph Co. v. Burnham, 162 U. S., 339, it was held: "This court has no jurisdiction upon a writ of error to review a judgment of a State court unless it was a final judgment by the highest court of the State in which a decision in the suit could be had, and against a right set up under the Constitution or laws of the United States." (Revised Statutes U. S., 709.)

We can not, therefore, divest ourselves of the duty of enforcing the right of the accused to "the equal protection of the laws;" we can not concede to the Federal judiciary a monopoly of this provision of the National Constitution. But the appellant is not forced to resort to the Federal Constitution for the right to a fair and impartial trial; this is guaranteed to him by the Constitution of the State of Kentucky. Section 11 of that instrument is as follows: "In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property unless by the judgment of his peers or the laws of the land; and in prosecutions by indictment or information he shall have a speedy public trial by an impartial jury of the vicinage; but the general assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained."

The provision, that the accused "shall have a speedy public trial by an impartial jury of the vicinage," is found in every Constitution adopted by the people of Kentucky; they are no idle words; they constitute one of our

most sacred possessions, and have justly been regarded as a tower of strength in the foundation of our liberty

The provision "but the general assembly may provide for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained," is of itself an answer to the contention that a jury, who possess the ordinary statutory requirements, is all to which the defendant is entitled. Why change the venue unless prejudice and passion are recognized impediments to a fair and impartial trial? Surely the framers of the Constitution did not suppose that there was a county in the State in which a jury could not be obtained possessing all of the statutory qualifications. Therefore, it must be assumed that prejudice and passion, whether it be political prejudice and party passion, or prejudice and passion of any other sort, being impediments to a fair and impartial trial in the sense that would authorize a change of venue, also constitute impediments thereto in making up the trial panel, the object in both cases being to secure to the accused the constitutional guaranty of a trial by an impartial jury.

I do not insist that, in ordinary criminal trials, there is any necessity for watchfulness to keep politics out of the jury box. When, ordinarily, one is arraigned for crime, it is immaterial whether the jurors are of the same or an opposing political party. Usually this is a question which excites neither the interest of the accused nor that of his counsel; but when the offense springs from an intense political contest, all becomes different. Then the political complexion of the jury is all-important. The administration of even handed justice has no more insidious enemy than political prejudice; it enters unseen and unsuspected into the human mind, corrodes the reason, and undermines the judgment; neither purity of heart, nor exaltation of character, affords an antidote for this deadly poison; indeed, these virtues may well magnify the evil; for the mind thus possessed is all the more ready to enforce the oblique judgment when it has no cause to suspect its own integrity. The pages of history are eloquent with the evils of this passion. It is recorded that the ferocious soldiery sent to harry the inhabitants of Somersetshire after the rebellion of 1685, although disciplined in the rapine of Tangier, inspired the followers of unhappy Monmouth with less terror than did Lord Jeffries with his "forms of law" and courtly juries; that when the English government established the common law in India the native who found himself entangled in its meshes, though schooled by fatalism to smile in the face of death, was frozen with terror in the presence of a mysterious system whose procedure was in an unknown tongue, and whose verdicts were rendered by unsympathetic strangers from across the sea.

Those conversant with current history have seen a highly civilized and generous people under stress of racial passion condemn without proof a soldier charged with a political crime, and sentence him without mercy to a punishment worse than death; and yet when the storm had spent its force that judgment was annulled, the victim released, and all the world now knows his innocence. To prevent such miscarriage of justice the Constitution of the nation prohibits a denial of the equal protection of the laws, and the common law, since Runnymede, guarantees a trial by an impartial jury of the vicinage.

I do not believe that any man charged with a political offense, or with an offense originating in a political contest, who is tried by a jury composed wholly of his political opponents, can have a fair and impartial trial within the meaning of the law. Nor do I believe that it is a valid excuse to say there are no qualified jurors of the party of the accused in the county where the jury is summoned, when there are other counties in which this adverse circumstance does not exist. The securing of a fair trial under all circumstances is of more importance to the Commonwealth than the punishment of any particular defendant, no matter what his guilt.

Nothing so surely tends to enhance the respect men owe to the law than a fairly-rooted conviction that its judgments are the offspring of even-handed justice; and of its temple, an impartial jury is the chief cornerstone. On the other hand, nothing is so certainly productive of distrust and fear, out of which springs anarchy, as a well-grounded suspicion that judicial procedure is tainted with partiality and indirection; that conviction forms the basis for the love of the citizen of his State in return for "the equal protection of the laws;" and this suspicion engenders the scorn and hatred which all good men entertain for that oriental system of judicature with whose decrees the chance of the dicer's box is honest by comparison; and of this suspicion a partisan jury is the most effective promoter.

In conclusion, I am of opinion that the trial judge should have passed upon the question of fact presented by the appellant as to the summoning of the jurors, and if there was even a well-grounded suspicion that unfairness had prevailed, the jury should have been discharged, and others summoned under such safeguards as would preclude indulgence in partisan methods.

Chief Justice Burnam and Judge O'Rear concurring.

Judge O'Rear delivered the following separate concurring opinion:

I concur in the majority opinion of the court delivered by Judge Barker.

I also concur in the conclusion reached by Judge Barker in his separate opinion filed, that appellant in his trial has not had an equal protection of the laws.

Judge Paynter delivered the following dissenting opinion:

The court reverses this case on three grounds: First, the court's refusal to give the defendant time in which to discover and file additional grounds for a new trial; second, sentence was pronounced on the same day the verdict was returned; third, because of the remarks of an attorney representing the Commonwealth. The court in its opinion seems to consider the first two grounds as one, but they are, more properly speaking, separate grounds, and for that reason I have designated them as two grounds. Yet the same facts are so interwoven as to be pertinent in the consideration of each.

After a trial lasting several weeks a verdict was returned on the 29th of August, 1903. The appellant made a motion for a new trial on that day, and in the grounds for a new trial specified nineteen errors which he claims were committed during the trial. Upon the motion to extend the time for filing additional grounds the appellant's affidavit was filed, in which he says: "He is advised by his counsel that there are other valid and material grounds he should rely upon for a new trial, but that the information relative to such grounds is not with them in such form as admits at this time

of a proper presentation to the court, but the affiant believes such information can be reduced to a proper form in the next five or six days."

It will be observed that the reasons given in the affidavit for extending the time was to enable the defendant to discover and file grounds for a new trial. There is no suggestion as to what such new grounds were. It was a special term of court, convened alone for the purpose of trying the defendant. The business of the court was at an end, except to pass upon such grounds for a new trial as were presented by the defendant, and to pronounce judgment. It is the first time that it has ever been called to my attention that a complaint was made against a trial court because it did not extend the time of the defendant to make a discovery of grounds for a new trial and present them. The appellant had an opportunity to and did file grounds for a new trial specifying the errors occurring during the progress of the trial. But if the court had erred in this matter, this court has no jurisdiction to review the action of the court. The error was committed in passing upon the motion for a new trial.

Section 281, Criminal Code of Practice, reads as follows: "The decisions of the court upon challenges to the panel, and for cause, upon motions to set aside indictments, and upon motions for a new trial, shall not be subject to exception."

Since the opinion in Terrell v. Commonwealth, 13 Bush, 246, it is safe to say that in not less than one hundred cases it has been held by this court that it has no jurisdiction to review the action of the trial court for errors occurring in the consideration of motions for new trials. It will be observed that by the terms of section 281 that decisions of courts upon challenges to the panel and for cause are the same as decisions on motions for a new trial, and are not subject to exception. The court on the former appeal in this case (24 Ky. Law Rep., 1007) upheld this section of the Code, and held that no exception could be taken to the ruling of the court on objections to the jury, and that this court was without jurisdiction to review the action of the court. Each member of this court is perfectly familiar with section 281 of the Code, and has written opinions holding that the court has no jurisdiction to review the decisions of courts in passing upon motions for new trials. After the court has passed upon the grounds for a new trial and entered judgment, it is without jurisdiction at the next term of the court to review its action. Notwithstanding this, the court, in order to show that the defendant might have been prejudiced by the court's failure to extend the time for filing new grounds, seriously considers grounds for a new trial, which were not filed until long after the power of the court to grant it had ceased.

It is insisted that the court erred in pronouncing sentence before the expiration of two days after the verdict. Section 288, Criminal Code of Practice, reads as follows: "Upon verdicts in cases of misdemeanor, and verdicts of acquittal in cases of felony, and upon trials by the court, and upon a plea of guilty, the court may immediately render judgment; but upon verdicts of conviction in cases of felony the court shall not pronounce judgment until two days after the verdict is rendered, unless the court be about to adjourn for the term."

The court had overruled the motion for a new trial, and was about to ad-

journ. It had no further business except to pronounce the sentence upon the appellant. Under the express provisions of section 283 of the Code the court is not required to wait until two days after the verdict to pronouce judgment if the court "be about to adjourn for the term." The court exercised the power expressly given. Yet the trial court is severely arraigned by counsel for appellant because it did not wait five or six days to give the appellant an opportunity to discover additional grounds for a new trial.

In Holley v. Commonwealth, 18 Ky. Law Rep., 433, the court said: "It is insisted that the court erred because he passed judgment on defendant in less than two days after he was convicted. The orders do not show when the court adjourned, but they do show that the day following the judgment sentencing the defendant to confinement in the penitentiary grounds for a new trial were filed, and —— extended the time for preparing and filing a bill of exceptions. The record does not show that the court remained in session two days after the verdict, and it can not be said that the court was not about to adjourn when the judgment was rendered, as the only order made thereafter may have been the one entering motion for a new trial and filing grounds therefor. Besides, it does not appear that the defendant had been prejudiced by the judgment being entered on the day of the verdict."

In the case of O'Brien v. Commonwealth, 89 Ky., 365, the court had under consideration the action of the lower court in pronouncing judgment before the expiration of two days after the verdict. The court said: "The appellant's motion in arrest of judgment and for a new trial had, however, been made and overruled before judgment was pronounced, and further delay could in no way have been beneficial to him. It was not, therefore, a prejudicial error."

In that case the court was not about to adjourn, but pronounced the judgment before the expiration of the two days after the verdict. Notwithstanding the disregard of the Code the court refused to reverse the case because it did not appear that defendant had been prejudiced thereby. In this case the Code was not disregarded, as it allowed judgment to be pronounced at any time after the verdict, as the court was about to adjourn. In the O'Brien case the court gave as a reason for saying that the defendant was not prejudiced, was that the motion in an arrest of judgment and for a new trial had been overruled. In this case the motion for a new trial had been overruled. In this, as in the O'Brien case, the death penalty had been inflicted. However, it differs from the case at bar in the fact that judgment was pronounced before the time fixed by the Code, while in this case the judgment was pronounced at a time authorized by the Code.

In the course of the argument Hon. T. C. Campbell, one of the counsel for the Commonwealth, said: "Howard was not hung, but eleven of the twelve jurors who tried him were in favor of hanging him, and one was for life imprisonment, and the eleven had to come to one."

It is said in the brief for appellant that this was an appeal "to the brutal instincts of the jury for unanimity in the taking of the life of Caleb Powers." Most of the American States authorize juries to inflict the death penalty on those who commit murder. Thus we have the stamp of approval of some of the most highly civilized Commonwealths in the world. How it can be said that it is an appeal to the brutal instincts of the jury to inflict

the death penalty when the law of the land imposes such a penalty is beyond my comprehension. It should strike a good citizen with horror when one waylays and assassinates another, whether he be influenced by a feeling of revenge, a desire to commit robbery, or for the purpose of holding onto a public office. Murder is crime, regardless of the motive which prompted it. There are cases where none, except the death penalty, suits the crime committed. In a trial of a case counsel has the right to use legitimate argument to convince the jury of the guilt of the accused, and to have the penalty imposed to suit the crime. It certainly would not have been improper for counsel for the prosecution to have referred to the penalty inflicted upon the assassin of the lamented McKinley, or upon the slayer of the brilliant Garfield, nor upon those who were found guilty as conspirators in taking the life of the patriotic Lincoln. It certainly would not have been objectionable to refer to the penalties imposed upon the "Mollie McGuires." The remark, if objectionable, had a two-fold effect which neutralized each other. If that part of the statement was objectionable wherein it told them that eleven of the jurors who tried James Howard were in favor of the death penalty, the balance of the statement was calculated to benefit the appellant, because it called the attention of the jury sharply to the fact that one juror had controlled the rest of the jury, and that only life imprisonment was inflicted upon James Howard for firing the shot which killed William Goebel. The objectionable language used by one of the attorneys for the Commonwealth in arguing the James Howard case was entirely different from that here complained of. In that case the attorney in effect introduced Robert Franklin, the Commonwealth's attorney, to testify as to the guilt of the accused. In this case it does not appear from the bill of exceptions the connection in which the words complained of were used. They may have been used as an answer to some argument of appellant's counsel. This court refused to reverse the case of Parrott v. Commonwealth, 20 Ky. Law Rep., 764, because of words spoken by the counsel for the Commonwealth in the argument of the case, and said: "The bill of exceptions does not contain the connection in which these words were spoken. It may have been in reply to some argument of counsel for appellant, and, if so, it might have been proper."

Even if the words used by the attorney were objectionable and the court erred in not excluding them, the action of the court did not prejudice the substantial rights of the appellant; that William Goebel was assassinated by some one concealed in the private office of the appellant is no longer a matter of dispute. The record shows that the appellant was, if not the chief one, in the conspiracy which resulted in the assassination of William Goebel. This is shown by the evidence of co conspirators, by the evidence of political friends, by letters written by him both before and after the assassination, and by facts and circumstances too numerous to mention. Upon such a state of case the court should in this, as it has done in many other cases, in obedience to the provisions of the Criminal Code, refuse to reverse a case for errors which could not have and did not prejudice the appellant's substantial rights. Nearly five years have elapsed since the fatal shot was fired in the hearing of three members of this court which caused William Goebel to sleep in his grave. The Commonwealth has strenuously endeavored to

bring to justice those who were guilty of his murder. This is the third time this case has been reversed. It is to be regretted that it is reversed for two reasons which this court time and again has held were not grounds for a reversal. In doing so, it has failed to regard two sections of the Criminal Code of Practice, and many of the court's previous decisions.

For the foregoing reasons I dissent.

Judge Nunn concurring.

OLIVER v. THE LOUISVILLE RAILWAY CO.

(Filed December 6, 1904—Not to be reported.)

Reversing on authority of former opinion—Because of the reasons stated in the case of Houghton v. The Louisville Railway Co., 26 Ky. Law Rep., 593, this case is reversed.

Bradley & Batson for appellant.

Fairleigh, Straus & Fairleigh for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Barker.

The appellant, Cynthia H. Oliver, instituted this action against the appellee, the Louisville Railway Co., to recover damages for injuries sustained, as she alleges, by being thrown to the street by the negligence of the employes of appellee, while she was attempting to alight from one of its cars, on which she was a passenger, near the intersection of Fourth and Jefferson streets in Louisville, Ky.

The facts in this case, and the instructions given by the court, are substantially the same as in the case of Houghton v. The Louisville Railway Co., 26 Ky. Law Rep., 303, and the judgment in this case is reversed for the reasons given in the opinion in that for proceedings consistent with the principles therein announced.

CITY OF LATONIA v. HALL.

(Filed December 6, 1904—Not to be reported.)

Grading of street—Evidence as to location—In this action to determine the location of a certain street the finding of the trial court, to the effect that appellant had improperly attempted to change the location of the street, being warranted by the evidence, will not be disturbed.

L. L. Manson, L. T. Applegate and A. L. Vickers for appellant.

Hall & McLean for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted against the city of Latonia by the appellee, Walker C. Hall. He alleges in substance that he is the owner of lot number 168 in Seehon's addition to South Covington, which is located at the

intersection of Boone and Graff streets; that Hamlin street runs parallel to Boone street; and that Graff street runs from Boone street along the west line of the lot in question to Hamlin street; that the city council of Latonia has caused Hamlin street to be graded, curbed and guttered, and the curbing turned in so as to indicate that Graff street is located on and over his lot, and about thirty-three feet further west than its true location as shown by the original plat of the subdivision by which the lot in question was sold, and asks that the court determine the proper location of Graff street and the city be enjoined from departing from its true and original location. The defendants in their answer say that they have not sufficient information to form a belief as to whether the averments of the plaintiff's petition are true or not. The depositions of the appellee, Walker C. Hall, and W. W. Stewart, the official city engineer, are to the effect that Graff street has been turned in thirty-three feet eight inches east of the place where it should be as indicated in the original map of the subdivision and the stones placed to mark the corners thereto. On this evidence the trial court found appellee to be the owner and in possession of lot number 168 in Seehon's subdivision, and that the city had improperly attempted to change the location of Graff street by turning in the curbing on Hamlin street thirty-three feet eight inches further than it should be.

As the judgment of the trial court seems to be in accord with the pleadings and proof, it is affirmed.

McLAUGHLIN, &c. v. BOARD OF EDUCATION CITY OF COVINGTON.

(Filed December 6, 1904—Not to be reported.)

Board of education—Salary as clerk—Bond by to indemnify—Where M. executed bond to appellee to indemnify it against loss upon the payment to him of salary claimed by him as clerk of its board of education, and another was held to be the officer and the salary paid to him, a judgment against M. in favor of appellee upon the bond was proper.

Byrne & Reed and R. C. Simmons for appellants.

Frank M. Tracey for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

W. P. McLaughlin was clerk of the board of education of the city of Covington in January, 1898. He and Matt E. Heyker were candidates for the office for the ensuing term of two years. At a regular meeting of the board Heyker received seven votes and McLaughlin five, but the president of the board refused to declare Heyker elected because the board had previously adopted a rule that a two-thirds vote was necessary to an election. An appeal was taken from the decisions of the chair and the board sustained the ruling of the president. Heyker, however, qualified as clerk and continued to attend the meetings of the board, offering to act as such, but McLaughlin refused to surrender to him the books and papers. After some two months Heyker filed suit against McLaughlin and the board to recover the office

and the salary for the time since his election. His petition was dismissed, but on appeal to this court it was held that the resolution of the board requiring a two thirds vote in order to an election was void, and that it was the duty of the president to declare him elected, and that he was entitled to the office and the salary attached thereto. (Heyker v. McLaughlin, &c., 20 Ky. Law Rep , 1988.)

In May, 1898, after the suit was filed and before it was tried, when the board was refusing to pay either Heyker or McLaughlin and some three months salary was past due, McLaughlin, to induce the board to pay him the salary, executed to it the following bond:

"Covington, May 6, 1898.

"Kenton County, Kentucky.

"Bond.

"We, the undersigned principal and surety, do hereby undertake to hold the board of education harmless, and to indemnify the board against any loss which it shall sustain by reason of the payment to W. P. McLaughlin, clerk of said board, any salary now due him as clerk.

(Signed) "W. P. McLAUGHLIN,
"JOHN EVANS,
"T. J. SMITH,
"THOMAS G. WOODS,
"J. O. RICHARDS."

The board accepted the bond and upon the faith of it paid McLaughlin the three months' salary then due, amounting to $300, and continued to pay him the salary of the office until the case was decided in favor of Heyker. It was then compelled to pay Heyker the salary attached to the office from the time of his election in January, 1898, and filed this suit against McLaughlin and his sureties to recover the $300 of salary that was paid to him upon the faith of the bond. Judgment having been rendered in favor of the plaintiff, the defendants appeal.

It is insisted that the board having kept McLaughlin in the office recognizing him as clerk, and he having performed the services, no liability attached under the bond, and the board is estopped to say that McLaughlin was not the clerk or that he was not entitled to the salary. An estoppel never arises except where the other party was misled. McLaughlin was not misled. All the facts were well known to him, and he had the same means of judging as the board. He executed the bond because the board was unwilling to take the risk. His purpose in giving it was to obtain the $300 of salary then due, and he did get the $300 upon the faith of the bond. Three months of time had then elapsed, and the salary of the office was $100 a month. This is conceded in the pleadings. The bond was not without consideration, for it was executed because the board was unwilling to take the risk and McLaughlin desired to get the pay before the suit to settle the title to the office was decided. If the board had paid McLaughlin without the bond he would have been answerable to Heyker for the salary of the office which he had received, and when the board paid Heyker, and was compelled to pay him, there is no reason why McLaughlin should not be answerable upon his bond of indemnity which he executed to the board, at least to the extent of the $300 which he obtained by reason of the bond. The words

"any salary now due him as clerk" in the concluding part of the bond refer to this $300. The meaning of the bond is that the obligors will indemnify the board against any loss it may sustain by reason of the payment to McLaughlin of the three months' clerk salary then due.

Judgment affirmed.

COMMONWEALTH, BY, &c. v. THOMAS, TRUSTEE.

(Filed December 6, 1904.)

Taxation—Private charity—Fund for advancing christianity as taught by the Christian Church—A fund which is held in trust under a will which provides "that the interest thereof shall be expended in the advancement of the principles of primitive christianity as taught by the Christian Church" is a private and not a public charity, and, therefore, is not exempt from taxation under the provisions of Constitution, section 170, exempting institutions of "purely public charity" from taxation.

J. M. Guthrie and P. J. Beard for appellants.

Willis & Todd for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Barker.

Mrs. Pauline Crawford died in Shelby county, Kentucky, leaving a last will and testament, which contained the following:

"Item 12. I give and bequeath to W. J. Thomas, as trustee, the sum of $5,000, the interest of which sum to be used in securing an evangelist in Shelby county, or any other section of the country said Thomas may select. Said sum shall be held by him and his successors in perpetuity. Said W. J. Thomas may select his successor, who must give bond and security approved, and said successor or successors must in every instance be members of the Christian Church. And furthermore, the proceeds of said sum or sums shall be expended in the advancement of the principles of primitive christianity, as taught by the Christian Church.

"Item 13. I direct that my executor shall pay over to a trustee whom he may select the residue of my estate, the interest of said sum to be used in the advancement of the principles of primitive christianity as taught by the Christian Church, subject to the same conditions as are contained in item 12."

The question presented by this record is whether or not the charity thus established is subject, in the hands of the trustee, to State taxation. Whether it is or not depends upon the proper construction of section 170 of the Constitution of this State with reference to it. The constitutional provision referred to is as follows:

"Section 170. There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used

or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods and other personal property of a person with a family not exceeding $250 in value; crops grown in the year in which the assessment is made, and in the hands of the producer; and all laws exempting or commuting property from taxation other than the property above mentioned shall be void. The general assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location."

That the trust under discussion is a charity does not admit of doubt, but, in order to entitle it to exemption from taxation, it must be a "purely public charity." Without undertaking to be technically accurate, a "purely public charity" may be defined as one which discharges, in whole or in part, a duty which the Commonwealth owes to its indigent and helpless citizens. Undoubtedly it is the duty of the State to educate its poor children, and thus fit them for discharging the duties of citizenship; to care for the indigent insane, its helpless orphans, and its poor who are sick and afflicted; and, therefore, any institution which, serving no selfish interest, discharges, in whole or in part, any such duty is a "purely public charity." Under this head would come schools for orphans, the property of the organization known as Young Men's Christian Associations, etc. But it is not within the province, nor is it the duty of the State to teach or disseminate religion as such, it having always been the policy of our government to leave the propagation of religion to the zeal of the sects, with the certain confidence that its interest is best subserved in their hands.

Our forefathers suffered persecution as one of the evils flowing from the union of Church and State, and when they established constitutional government on this continent they saw to it that they were forever separated by affirmative provision in the fundamental law of the land. By section 5 of our present Constitution it is thus declared: "No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience." And this was incorporated in every Constitution adopted by this State. Section 189 is as follows: "No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school."

It does not require profound reflection to reach the conclusion that, whatever deficit there is in the fiscal budget due the State for any given year by reason of exemptions of property which would otherwise be required to contribute to the common weal, is cast as an additional burden upon the other taxpayers; and it results, therefore, that every exemption is, indirectly, an additional tax upon the property owners not enjoying a like benefaction. It would follow, therefore, that an exemption in favor of property devoted to the advancement of any particular religious belief is indirectly, at least, a tax upon all the other property owners of the Commonwealth to support that belief. Construing sections 5, 169 and 170 of the Constitution in pari materia, we are irresistibly forced to the conclusion that "places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; * * * all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto;" constitute all church property which it is the purpose of that instrument to relieve from the burdens of taxation.

If such property as the trust involved herein is exempt as a "purely public charity," there is no necessity for the specific exemption in section 170, for, if the language "purely public charity" embraces any part of the property of a sectarian denomination, it embraces it all, and it is, therefore, entirely useless to specify the exemption of a house of worship and the parsonage, if all church property is exempt under the general expression "purely public charity." We conclude that the trust established by the will of Mrs. Crawford was a private charity, and, consequently, not exempt from taxation. It may not be improper for us to say, in order to save further litigation when the case returns to the lower court, that, in so far as the fund was invested in the stocks of corporations, which had paid the taxes required by law, it can not be taxed again in this proceeding. (Section 4088 Kentucky Statutes.) And the right to subject the trust to assessment for taxation is limited to five years next proceeding the institution of this action. (Commonwealth v. Nute, 24 Ky. Law Rep , 2138.)

For the reasons indicated the judgment is reversed for proceedings consistent herewith.

Whole court sitting.

Judge Paynter dissenting.

FAULKNER v. TUCKER, EX'OR, &c.

(Filed December 6, 1904—Not to be reported.)

1. Wills—Construction—Disclaimer—A father by his will devised to each of his children certain lands for life with remainder to their children, and provided that the land devised should be valued by two disinterested housekeepers, and such valuation should be the value each child should account for in the final settlement of his estate, and that all the balance of his estate should be converted into money and distributed among his devisees after equalization shall have taken place in the value of the land devised. One

of his daughters filed a deed of disclaimer of the will in the office of the county court clerk as provided by Kentucky Statutes, section 2067, and then filed suit for a settlement of the estate. Held—That under the will such daughter is only given a life estate in the land devised to her, and at her death the title passes to her children, and the effect of her disclaimer is to at once vest the title thereto in her children, and she is only entitled to her share of the surplus estate disposed of in the subsequent clause of the will.

2. Settlement of estates—Limitation in filing suit—Necessary allegations—Under Civil Code, sections 428 and 429, devisees, distributees and creditors of the decedent, may institute suit for a settlement of the estate without waiting two years or any length of time after the qualification of the personal representative. Nor is it necessary in order to maintain such action that there should be an allegation of fraud or mismanagement on the part of the personal representative.

W. R. Mizell and Robbins & Thomas for appellant.

W. J. Webb for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Burnam.

The will of Young Tucker was admitted to probate in the Graves County Court on the 19th of August, 1903. After making provisions for his widow, Martha Caroline Tucker, he provides in the third clause of his will as follows:

"It is my desire that my children, Martha E. Faulkner, Thomas H. Tucker, Emaline Prince, and the children of my deceased daughter, Malinda Bullock, shall share equally in my estate. Each of my children are indebted to me, and it is my desire that each of them pay or settle to my executor the various amounts owing by them to me in the payment or settlement by them of what is due me.

"4th. I will and bequeath to my daughter, Martha E. Faulkner, the place on which she lives, consisting of ninety odd acres, to have and to hold to her during her natural life, at her death to pass in fee simple to her children; this to include the children of any of her children that may then be deceased. Said land is to be valued after my death by the selection by her and my executor of two disinterested persons, each of them to select one of the two, and the valuation thus placed by them on said land shall be the value she is to account for in the final settlement of the estate. If the two persons thus selected shall fail to agree on such value, then they are to select a third person to act as umpire, and thus arrive at the value to be placed on said land."

Similar provisions were made in succeeding clauses of the will for the other children of testator. In the sixth clause testator directs that all the rest of his property of every kind, character and description be converted by his executor into money and equally distributed among his devisees after equalization shall have taken place between them in the value of the land devised to them for life, with remainder to their children. On the 19th day of January, 1904, the appellant, Martha E. Faulkner, a daughter and devisee of the deceased, filed her deed of disclaimer of said will in the office of the county court clerk, as provided by section 2067 of the Kentucky Statutes, which reads as follows: "A devisee may disclaim by deed, acknowledged or

proved, and left for record in the clerk's office of the court in which the probate is made, within a year after notice of probate."

And on the 21st day of January brought this action in the Graves Circuit Court for a settlement of the estate of her deceased father, making the executor of decedent, his devisees and heirs at law, parties, in which, after setting out the foregoing facts, she alleged that there were no creditors of the estate; and that she as heir at law of testator was entitled to one-fourth interest in the entire estate of decedent, after provision had been made as directed by the will for the widow, and prayed that the will as to her should be held for naught, and an inventory of his estate be filed for a settlement of same, and for the payment to her of one undivided one-fourth of the net estate. A general demurrer was sustained to this petition, and the plaintiff has appealed.

The contention is made for the appellant that after her disclaimer the property devised to her in the fourth clause of the will of testator, and also in the sixth and eighth clauses, passed as in case of intestacy under section 4843 of the Kentucky Statutes, which reads as follows: "Unless a contrary intention shall appear by the will, such real or personal estate, or interest therein, as shall be comprised in any devise in such will which shall fail or be void, or otherwise incapable of taking effect, shall not be included in the residuary devise contained in such will, but shall pass as in the case of intestacy." And that she is entitled to be equalized out of this property devised to her with the other devisees of testator as required by section 1407 of the Kentucky Statutes.

The first question for decision upon the appeal is the effect of appellant's deed of disclaimer upon the property devised in the fourth clause of the will to her for life and at her death to her children. By that clause the appellant is only given a life estate in ninety acres of land; at her death the title passes in fee to her children. The only effect of her deed of disclaimer as to the property devised in this clause of the will is to at once vest the title thereto in the remainder men therein named (1 Pomeroy's Equity Jurisprudence, sections 468, 517 and 667; Trustees Church Home v. Morris, 99 Ky., 317); and as by the subsequent clauses of the will testator has disposed of all his estate, nothing passed as in case of intestacy. Appellant is only entitled to her share of the surplus estate disposed of in the subsequent clause of the will. In other words, the only effect of her disclaimer is to give up her life estate in the ninety acres of land.

The trial court erred in sustaining the demurrer to plaintiff's petition in so far as it sought a settlement of the estate. Under sections 428 and 429 of the Civil Code devisees, distributees and creditors of a deceased person may institute suit for a settlement of the estate without waiting two years, or any length of time, after the qualification of the personal representative.

Nor is it necessary in order to maintain such an action that there should be an allegation of fraud or mismanagement on the part of the administrator (Holland, &c. v. Low's Adm'r, 101 Ky., 98.)

For this reason, therefore, the judgment dismissing plaintiff's petition is reversed and cause remanded for proceedings not inconsistent with this opinion.

HAGER, AUDITOR v. KENTUCKY CHILDREN'S HOME SOCIETY.

(Filed December 7, 1904.)

A number of people of this State have organized a corporation known as the "Kentucky Children's Home Society." It has no capital. It can make no profit to its officers or stockholders. It seeks out helpless children, cares for them, and places them in homes selected by the institution. An act was passed by the last Kentucky legislature appropriating $15,000 out of the State treasury per annum to aid in this work, the constitutionality of which act is called in question. Held—

1. Appropriations—Taxation—Test—In making an appropriation of money out of the State treasury for purely charitable purposes it must be measured by the same test as that by which it is raised by taxation, that is, if taxes could not be imposed for a purpose, money already in the treasury can not be appropriated to that purpose.

2. Indigent persons—General care—Legislative discretion—While the care of the indigent poor, generally, is given over to the counties and cities (Kentucky Statutes, sections 3933, 3058, 3290 and 3490), the State is not thereby precluded from exercising some part of the same power in some other proper way.

3. Constitution—Loaning credit of the State—The provision of Constitution, section 177, that "the State can not loan its credit to any person or corporation for any purpose," does not mean that the State can not buy and pay for what it needs to enable it to discharge its governmental duties, nor does it mean that the State can not employ a person or corporation to do a lawful act which it has the right to have done and to pay for it.

4. Public appropriation—Private agency—The vital point in all such appropriations is whether the appropriation is public, and if it is, it does not matter whether the agency through which it is dispensed is public or not, the appropriation not being for the agency, but for the object which it serves. It may well and wisely be left to the legislature to say how it will dispense the State's charities.

5. Local or special legislation—The act making the appropriation is not open to the objection that it is local or special legislation. It is an act for the benefit of the homeless and destitute children of this State generally It selects one agency to apply the money so appropriated, which from the nature of the case calls for an act of appropriation applicable to it alone.

6. Creating an indebtedness—Nor does this appropriation create an indebtedness against the State. It may be discontinued, reduced or changed at the pleasure of the legislature, which could not be done if it were a debt. It is a gratuity just as the present provisions for the support of the insane and idiots are.

7. May be abused—The fact that the appropriation may be abused is not a matter for the courts to inquire into. The people alone can control that, as they have reserved to themselves that power over their representatives in matters of legislation.

N. B. Hays and Loraine Mix for appellant.

W. S. Pryor and Hazelrigg, Chenault & Hazelrigg for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge O'Rear.

This appeal involves the constitutionality of the act of general assembly approved February 20, 1904, appropriating $15,000 annually to the Kentucky

Children's Home Society, a private corporation organized under the laws of this State for purely charitable purposes. The articles of incorporation of the society show that it is conducted solely to seek out destitute children and provide for them homes where they will be under the supervision of the institution during their dependent minority.

The constitutionality of the act is assailed on several grounds, which will be taken up in order. That the care of the indigent poor is a purely public charity is not really questioned by the attorney general. Christ commended it as a public privilege, whilst every civilized people upon the earth now regard it as a public duty. That great evasive question propounded in the adjustment of the first social relation of men, "am I my brother's keeper," is answered emphatically in the affirmative upon the consciences of this era of civilization when speaking of the destitute and helpless.

In this State, from its earliest history, it has been treated as it had been in Virginia and England before us, as a public charge, imposed as a matter of rightful exercise of governmental power, upon the State, or such subdivisions of it as legislation might provide. It was borne by taxation, in one form or another, applied to such subjects and under such conditions as addressed themselves to the law making branch as being the most expedient. Whatever errors may have been committed so far in its exercise, it is doubted if any has occurred on the side of its having been more liberal than just. The care of the insane, the special education of the deaf and dumb, the blind and of the feeble-minded, are particular applications of this general doctrine. They are all well provided for by the statute laws of this State, and have been for many years. Separate institutions, especially fitted and officered for the appropriate service in each, are established and maintained at the public expense, by taxation levied upon all the taxable property in the State.

The care of the indigent poor, generally, is given over to the counties (section 3933, Kentucky Statutes) and cities of the Commonwealth. (Sections 3058, 3890 and 3490, Kentucky Statutes.) Instead of this being an exclusive delegation by the State of this governmental function, it is its exercise by the State in the limited manner indicated by the several statutes, by the use of local government subdivisions. But the State is not precluded by these several provisions from exercising some part of the same power in some other proper way. It would scarcely be argued that because legislation had been adopted making it the duty of the counties of the State to provide for their pauper citizens, that the State itself could not take on any part of that burden.

The Constitution provides that taxes shall be levied for public purposes only, and forbids the donation or loaning by the State of its credit to any individual or corporation. (Sections 171-177, Constitution.) That the purpose of the appropriation in this case is a public one is too clear in our opinion to require more extended argument. Obviously, appropriations of money out of the treasury must be measured by the same test as that by which it is raised by taxation and put into the treasury. If taxes could not be imposed for a purpose, money already in the treasury could not be appropriated to that purpose. The purpose being a public one, for which the

State might have levied a tax and applied it, the question immediately recurs, can the State apply it otherwise than through its own officers?

At this point section 177 of the Constitution is invoked by the attorney general. That section reads: "The credit of the Commonwealth shall not be given, pledged or loaned to any individual, company, corporation or association, municipality, or political subdivision of the State; nor shall the Commonwealth become an owner or stockholder in, nor make donation to, any company, association or corporation; nor shall the Commonwealth construct a railroad or other highway."

There was a time when the State was allowed to subscribe, and did subscribe, to the capital stock of various quasi public improvement companies, and loaned or gave its credit to such. It was to prevent a repetition of that practice by the State that the section was enacted. It was to keep the State out of partnership enterprises, or even the doing solely on its own behalf, of that class of public works, the building of highways and railroads. The State can not now loan or give its credit to any person or corporation for any purpose, public or otherwise. But this does not mean at all that the State can not buy and pay for what it needs to enable it to discharge its governmental duties. Nor does it mean that the State can not employ the services of a person or corporation to do a lawful act which it has the right to have done, and to pay for it. For example, the State may provide for the mobilization of the militia at a given point. It may hire a railroad corporation to transport them, and some other person to provision them, and may pay for these services. This is in no sense donating or lending the State's credit to the railroad company or to the caterer. Yet the State is not bound to avail itself of their services, but it may do it. If it does, the transaction in nowise involves section 177 of the Constitution, though it does section 171, i. e., the purpose for which the State's money is paid out must be a public purpose; that is the only inquiry, other than that has the legislature enacted the statute allowing the thing to be done.

When the legislature is authorized to do a thing generally, and no particular method is prescribed, it may pursue its own course in the means adapted to the accomplishment of the purpose. For example, it is admittedly a public purpose for the State to support at the public expense its pauper lunatics and idiots. It might have kept them all in its own institutions. It might have compelled the counties to keep one class, as it did for a while, or to keep either class, or both. But it employs its own institutions in the care of the former, and hires individuals at so much per year for each pauper idiot kept to care for the latter.

Cooley in his work on Taxation, 2d edition, page 125, lays it down that the State, in its care for such dependent objects, might not only do it by an establishment of its own institutions for the purpose. "But," he says, "private institutions might undoubtedly be aided with public funds, in consideration of services to be rendered to the public, and expenses to be incurred by them in assisting and relieving the same necessitous and dependent classes."

In 1899 a terrific cyclone struck the city of New Richmond, Wis., devastating its homes and business houses, killing outright a great many people, seriously injuring a great many others, killing large numbers of animals,

and causing widespread disaster, want and distress. The conditions were such that but for immediate relief beyond the reduced powers of the city and its inhabitants to meet disease and pestilence in addition to the other woes occasioned by the storm, would in every probability have followed. The city incurred a heavy debt to meet the critical emergency, one, in view of the severe visitation upon it, it could ill afford to bear alone. The State legislature voted an appropriation to defray and thus carry in part this burden. Its payment was resisted on the ground that the State had not the right to tax all its inhabitants for the benefit of those of New Richmond alone. The Supreme Court of Wisconsin upheld the appropriation (State of Wisconsin, ex rel, City of New Richmond v. Davidson, 58 L. R. A., 739) on the ground that it was for a public purpose. The court said: "The State at large was concerned in the objects of the appropriation in question, and that, if the legislature had been in session June 12, 1899, it might legitimately have appropriated the amount mentioned for the object in question. This being so, it follows that the legislature had the power to pass the act in question to reimburse the city for such expenditures."

The court admitted that unless the purpose was a public one there was no power under the Constitution to appropriate the State's money to do it, no matter how laudable it may have been. The legislature of Missouri appropriated $50,000 to the St. Louis Insane Asylum, an institution owned and conducted by the city of St. Louis alone, the appropriation being "for the support of the indigent insane in the insane asylum in the city of St. Louis, who belong to the State outside of the city of St. Louis.

The payment of the appropriation was resisted on the grounds that it was not for a public purpose; that the State had otherwise provided for the care of its indigent insane; that the Constitution of Missouri expressly prohibited such appropriations in the following provision: "The general assembly shall have no power to make any grant, or to authorize the making of any grant, of public money or thing of value to any individual, association of individuals, municipal or other corporation whatever."

The Supreme Court of Missouri upheld the appropriation. (The State, ex rel, City of St. Louis v. Seibert, State Auditor, 123 Mo., 424.) The court reasoned thus, in part: "The insane of the State being proper objects of charity, some of the insane of the State outside of the city of St. Louis being supported by the St. Louis Insane Asylum, the Constitution authorizing an appropriation for their support, unless prohibited expressly or by reasonable implication, the question is, whether there is such prohibition.

"The words of the Constitution do not contain a prohibition." (The language of the provision first quoted is then set out.)

The court, continuing: "The appropriation is for the 'indigent insane of the State outside the city of St. Louis,' and not for the institution. There is no prohibition here unless the State has no power to dispense its public charity through the agency of a private institution.

"There is no constitutional inhibition against it doing so. * * * But a private corporation or individual may be the recipient of the funds of taxation, provided that the use be a public one. We can see no reason why the insane of the State," concludes the court, "not belonging to the city of St. Louis, who are found in the city, may not be cared for and supported in

its insane asylum at the public expense, if it can be as well and economically done."

In the case of the Shepherd's Fold of the Protestant Church in New York v. The Mayor, 96 N. Y., 137, the object of the corporation was to receive, adopt, keep, support and educate orphan or friendless children, and the commissioners of charities and corrections were authorized to transfer eligible orphans and friendless children to it; in consideration of the corporation taking care of these children an appropriation of $5,000 annually was made for the benefit of the corporation. A provision of the Constitution of the State prohibited the giving or loaning of the money of the State to, or in aid of, any association or private undertaking, and also prohibited the counties and cities "from giving their money in aid of any individual, association or corporation for the support of their poor." The court held that "caring for the poor of the city through the instrumentality of private corporations was not prohibited, and the legislature had power to authorize the city to provide for the burden assumed by plaintiff and cast upon it by the act of 1868, by payment of a gross sum."

The fact that the corporation might also receive subjects for which the city would in no event be liable was held not to be material, as the city was only paying for what it got.

In Norman, Auditor v. The Kentucky Board of Managers, 93 Ky., 537, this court construed the two sections of the Constitution now involved, sections 171 and 177. In that case an appropriation had been made by the legislature to the appellee board, a corporation, to enable it to make an exhibit of the resources of our State at the World's Columbian Exposition at Chicago. The court held the purpose to be a public one, and that the appropriation was not a loaning of the credit of the State. It was said: "The commissioners selected to expend the money are merely the State's agents to do so, and provide the exhibit for the benefit of its people. The legislature had the power to provide the means for such a purpose."

A similar construction of almost identical constitutional provisions was had in Daggett v. Colgan, 92 Cal., 53, and in City of Minneapolis v. Janney, 90 N. W., 313, 86 Minn., 111, both citing and following Norman v. Board, supra.

In House of Reform v. Lexington, 112 Ky., 171, there was involved the power of a city of the second class to appropriate $5,000 to the houses of reform, State penal institutions for the correction of incorrigible youth. It was held that the legislature had conferred upon the municipality the power to provide itself with houses of reform, for the keeping of its juvenile criminals, and that having the power to do that it might do less by procuring the State to locate its reform houses so that the city could avail itself of the peculiar advantages afforded by their proximity for caring for the former's youthful criminals, the city paying what was deemed a proper equivalent for that service. Section 179 of the Constitution makes the same restrictions against a municipality's donating its money, or loaning its credit, that section 177 does concerning the State. In considering whether that was a loaning of its credit, or donation of its property, the court said: "To hold that a branch of government, such as a county or city, could not exercise a governmental function required of it by the law, by employing the service

to be done, such as the care of smallpox patients in a hospital owned by a corporation other than the city, or that it might not buy a supply of water for the public use from a corporation without the city having the means of furnishing it to the city, would be to place a narrow and restricted construction upon the section, not warranted by the evils existing at the time of its adoption, and which were manifestly sought to be cured by the Convention, as well as to materially hamper municipal subdivisions of State in the exercise of necessary powers and discretion in government."

These authorities clearly settle that the vital point in all such appropriations is whether the purpose is public; and that if it is, it does not matter whether the agency, through which it is dispensed, is public or is not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means. The limitation put upon the State government by the people is as to what things it may collect taxes from them for, to which it may apply their property through taxation; not upon the means by which or through which it will do it. It may well and wisely be left to the legislature to say how it will dispense the State's charities. Varying conditions, improved methods of treatment, changing circumstances affecting the ability of the people to provide for such charges, all bear upon the legislative discretion, and doubtless find a proper application in the measures finally adopted by that body. Yet back of all that must exist the power to do the thing in question, the power to make the provision. It is this power alone that the courts can deal with, and then only to the extent of determining whether it exists. Whether it is exercised, and how exercised, are manifestly matters of exclusive legislative discretion

What is this Kentucky Children's Home Society? A number of people in this State have organized a corporation of that name. It has no capital. It can make no profit to its stockholders or officers, and can declare no dividends. It has been already stated that it seeks out helpless, homeless children, cares for them and places them in homes selected by the institution, and where the little ones may be adopted into suitable families. The last feature is the dominant and peculiar one of the society. There are many foundling asylums where dependent orphans of a limited class are cared for and educated for lives of usefulness by those peculiarly interested in them. The poor houses of the State afford some sort of refuge to the utterly destitute, where the indigent, improvident and frequently worthless are kept. Children reared amid such conditions of inertness and squalor have a poor chance indeed in life. This society has conceived a plan for taking these children who have this or no other chance, who have no claims upon other institutions maintained by certain voluntary organizations, such as lodges and churches, and to put them into homes that have no children. The world has had recently a most striking example of the probable influence of a home life upon a child taken from a public almshouse, in Stanley, who gave the better part of a continent to the world, and what is more, brought the possibilities of the world to a continent. How much of it he owed to the influences of the adopted home where his attainments were gained, and where his character was certainly very largely influenced, if not formed, it may be impossible to say.

Judge Brewer, when a member of the Kansas Supreme Court, in passing

upon an application for a writ of habeas corpus (In re Bullen, Petitioner, 28 Kan., 781), where it was sought to take a young orphan girl from a charitable institution and to give her to her grandparent, in an opinion replete with wisdom and goodness, had this to say: "Two principal reasons control in my mind: First, her life here would be a life in an institution; there, a life in a home. I need not stop to recount the numberless blessings which home gives to a child, especially a female child. The common judgment of all voices the truth, that the best development of a young life is within the sacred precincts of a home. No institution, however cultured and refined its instructors, however pure its life, however faithful and devoted all its officers and teachers to the care, nurture and education of the many children within its walls, will give that sweet, gentle and attractive development to a young girl ,that comes from the personal and affectionate training of a home. There is something of the same difference as between hotel life and a home life. There is more publicity to the one; more privacy to the other. There is something official, as it were, in one, and personal in the other."

There can be no doubt that foundling institutions may be, and generally are, large blessings. But the belief voiced by the eminent judge quoted from, in the advantages of home life as a beneficial influence in the formation of the most useful and independent characters, may have had a place in the legislative mind. To accomplish such work persons whose hearts are in for simple charity's sake, not for the salary of a public office, are the best suited for it. May not the legislature avail itself of the offer and services of such persons in doing what it unquestionably has the right to do by State officers, to care for the helpless and destitute children of the State? But it is argued that as the State does not appoint these officers, and can not remove them for misfeasance or malfeasance, and can not, therefore, control the application of the money appropriated, it amounts after all to the giving of that much money to the society. Without admitting the premise assumed, we turn to the investigation of the question whether the State has made such an unconditional appropriation. The proviso attached to the appropriation reads as follows: Provided, No part of said appropriations shall be paid until there has been executed on the part of said society a bond to the Commonwealth of Kentucky, with good and sufficient security, stipulating and providing that all of said sums of money so appropriated shall be applied to the purposes of the charter of said society, that is, to the care, support and maintenance of homeless and destitute children in this Commonwealth, and providing homes for same, and a failure to do so to be a forfeiture thereof. Said bond to be approved by the auditor of public accounts, and kept as a record in his office. If any part of said appropriation be not so applied, then all of such part thereof as may be unexpended shall be returned to and covered into the State treasury. Said society shall, by its proper officers, make an annual verified statement and settlement with the auditor of public accounts, showing when, where and how said funds or appropriations have been applied and disbursed."

From the foregoing it is seen that the State has taken the precaution to insure that every dollar of its appropriation is expended directly for the benefit of homeless and destitute children of this Commonwealth. The re-

quiring of the report under oath of the officials of the home to the auditor of public accounts reserves to the State the power of enforcing the proper application of its appropriation, the power of visitation, a power which in this country is by the government itself, through the medium of courts of justice. (2 Kent, 240.)

The language of the act also disposes of the argument that the money of the State will be applied to objects of charity having no direct claim upon the State, a fear born of a statement in appellee's charter to this effect: "This corporation may adopt by-laws not inconsistent with the laws of Kentucky and these articles of incorporation, and in harmony with the Constitution and by-laws of the Children's Home Society (National)."

We read this provision to mean that the general scope and plan of operation by appellee within its chosen field, Kentucky, is to be formulated after a plan for placing homeless children in childless homes in use in a National Children's Home Society, not that the children of the National Home Society can have any part of Kentucky's provision for her own destitute children. The very language of the act precludes the imagined danger, because it says the by-laws must not be in conflict with the laws of Kentucky. This act restricts the appropriation made by it to the use of Kentucky children, and compels all money not so used to be covered into the State treasury. Besides, section 331c, Kentucky Statutes, makes it unlawful for any person to bring into this Commonwealth destitute children, except they be his own or nearly related to him, and with the intention of taking them into his own family.

The act is not open to the objection that it is local or special legislation, prohibited by the Constitution. (Section 59.) It is an act for the benefit of the homeless destitute children of this Commonwealth generally. It selects one agency to apply the money so appropriated, which, from the nature of the case, calls for an act of appropriation applicable to it alone. This is allowed by subsection 29 of section 59, Constitution. All appropriations must be made by the legislature. (Sections 230 and 58, Constitution.) Therefore, an act of this character was the appropriate method of making this appropriation.

Nor does this appropriation create an indebtedness against the Commonwealth. It may be discontinued, reduced or changed at the pleasure of the legislature, which could not be done if it were a debt. It is a gratuity, just as the present provisions for the support of the insane and idiots is, which may be altered both as to the amount and manner of application at the pleasure of the law making body. We find nothing in the act violative of the Constitution. Its subject is one wholly within the sound discretion of the legislature; that its exercise may be abused is true of this act, as well as of many other matters committed by the Constitution to that branch of government. But even its abuse is not a matter for the courts to inquire into. The people alone can control that. They have reserved to themselves that power over their representatives in matters of legislation.

The judgment of the circuit court having been in conformity to these views, it is affirmed.

The whole court sitting.

JENKINS, &c. v. BERRY, JUDGE, &c.

(Filed December 17, 1904.)

By the will of Elizabeth Speers a hospital was erected in the city of Dayton, Campbell county, by trustees named in the will, which provides that said hospital "be erected, maintained and conducted in such manner and upon such plan as in their judgment would do the greatest good," and further provides that said trustees shall annually report all their acts and doings to the highest court in Campbell county having original equitable jurisdiction, and all vacancies in said trustees shall be filled by said court, and said court shall require from said trustees proper bonds for the performance of their duties. The trustees now in charge thereof were appointed by the Campbell Circuit Court, which is the highest court having original equitable jurisdiction in Campbell county, but said court is nowhere in terms empowered by the will to remove the trustees. Held—

Jurisdiction of judge of Campbell Circuit Court—Power to act on his own motion—Though the will of Elizabeth Speers conferred on the judge of the Campbell Circuit Court no jurisdiction to supervise or control the trustees in the general conduct of the trust confided to them, or to remove them, he has, independent of the will, the jurisdiction to prevent misappropriation of the trust fund, or to correct any abuse in its management by the trustees, provided such jurisdiction is invoked by some one having the right to institute an action or proceeding for that purpose. But he had no jurisdiction of his own motion to take such action, and in the absence of an action or proceeding instituted in said court against the trustees the several orders and rules made and issued by him against the trustees are void.

John T. Hodge and Otto Wolfe for appellants.

Harvey Myers and C. L. Raison for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Settle.

By their petition filed in this court the plaintiffs, J. O. Jenkins, John L. Phythian and W. E. Senour, trustees of the Speers Hospital, situated in the city of Dayton, Campbell county, Kentucky, ask a writ of prohibition against the defendants, A. S. Berry, judge of the Campbell Circuit Court, and C. L. Raison, Jr., amicus curia of the Campbell Circuit Court, preventing them from interfering with the plaintiffs' control of the Speers Hospital, and from attempting to remove them as such trustees.

It appears from the statements of the petition that Elizabeth Speers, then a resident of Campbell county, died testate, leaving a large estate, which after the payment of certain specific legacies named in her will, she by that instrument devised to three trustees, B. K. Rackford, C. B. Schoolfield and W. G. Pickering, in trust for the "establishment and maintenance" of the hospital in question. So much of the will as relates to the trust is contained in the 19th clause thereof, which is as follows: "It is my will that my said executors, after the payment of my debts and after the payment of those specific legacies which are in no way contingent, and after provision for all continent legacies, and the support and education of the said Bina Elizabeth Speers Makibben, as hereinbefore set out, and the payment of all costs and expenses incident to the settlement of my estate, convey and transfer the

entire balance of my estate, real and personal and mixed, of every kind wherever situated, to Dr. B. K. Rackford, Dr. C. B. Schoolfield and Wm. G. Pickering, as trustees in trust for the establishment and maintenance of a hospital in the city of Dayton, in Campbell county, Kentucky. The said hospital to be erected, maintained and conducted in such manner and upon such plan as in their judgment would do the greatest good. Said trustees shall annually report all their acts and doings to the highest court in said county having original equitable jurisdiction, and all vacancies in said trustees shall be filed by said court. Said court shall require from said trustees proper bonds for the performance of their duties, and it may allow them annually out of the trust funds a just and fair compensation for their labor. If any legacy should lapse, or if there should remain in any fund set apart for any purpose in money after the execution of said purpose, then all such moneys and all moneys or property which from any cause may at any time be in or come to the hands of my said executors after carrying out the provisions of this will other than said provisions as to said hospital, shall be paid over to said trustees, and shall become a part of said hospital trust fund."

It appears from the record that the trustees named in the will, and others that succeeded them, resigned, and finally the appointment fell upon the plaintiffs, who are now the duly qualified and acting trustees of the will of Elizabeth Speers, and as such in full control of the hospital and trust fund. It further appears that the former trustees made annual reports to the Campbell Circuit Court of their management of the Speers Hospital, including a statement of its financial condition, and that the present trustees have done likewise, except that no report was made by them for the present year, until November 19, 1904. It also appears that the defendant, A. S. Berry, judge of the Campbell Circuit Court, in an interview with John E. Waterhouse, the secretary of plaintiffs, made complaint of their report for the previous year, which had been filed in the Campbell Circuit Court several months theretofore and before he became judge of that court, and directed the secretary to withdraw the report and make it conform to certain suggestions then made by him. This direction was followed by the secretary, and the report placed in the hands of an expert accountant, with instructions to make full investigation of the accounts of the trustees and of their management of the affairs of the Speers Hospital. Before the work of the accountant was completed, and as shown by his affidavit before it could be completed, the defendant, Berry, as judge of the Campbell Circuit Court, upon his own motion, on the 9th day of November, 1904, made orders awarding rules against the plaintiffs and their secretary respectively, returnable November 12, requiring the former to show cause why they, as trustees of the Speers Hospital, had not furnished a satisfactory report of the business and condition of the hospital, and the latter to return the last report of the trustees which he had withdrawn by the direction of the defendant, Berry, as judge. The rules were duly issued and served upon the parties. The secretary filed response, accompanied by the report demanded of him, explaining in the response the delay in filing the report. Thereupon the rule against the secretary was dismissed, and the report referred to the defendant, C. L. Raison, Jr., as amicus curia of the court, to which and the

order awarding the rule against him, the secretary, John E. Waterhouse, excepted.

In obedience to the rule against them the trustees appeared in the court of the defendant, Berry, judge, and entered motion, supported by the necessary affidavit, to require him to vacate the bench in order that a special judge might hear the defense to the rule, which motion was overruled, and an exception taken thereto. Thereupon the trustees demurred to the jurisdiction of the court, and upon the further ground that the issue of the rules was without authority of law, and the orders therefor void, because there was no action or proceeding against them then, or at any time pending in the Campbell Circuit Court, and no application for the rules had been made by any one having an interest in the trust estate or a right to ask such rules.

The argument upon the demurrer to the rule against plaintiffs was set for hearing November 21. On the 14th day of November the defendant, Berry, as judge of the Campbell Circuit Court, upon his own motion, made another order awarding a second rule against the plaintiffs, returnable November 21, whereby they were required to show cause why they had not made and filed their annual report as trustees of Speers Hospital for the year beginning July 31, 1903, and ending August 31, 1904. This rule was likewise served upon them.

On November 19, 1904, plaintiffs filed what purported to be a complete report of their doings as trustees of the Speers Hospital from August 31, 1903, to August 31, 1904, which report purported to contain a full showing of all moneys received and disbursed by them, and also a comparative financial statement of the condition of the hospital from its foundation, prepared by one Guy Kenneday, a skilled accountant, whom they had employed for the purpose of making a thorough examination of all the affairs of the institution. Plaintiffs also filed with their report a response to the rule of November 14, wherein was set forth the same grounds of objection and resistance to the rule that were presented by their demurrer to the former rules. The response was accompanied by the affidavit of Kenneday, the accountant, showing that his work in connection with the report was only completed November 18, the day before the filing of the report, and that plaintiff could not, therefore, have filed the report sooner.

On November 21 the defendant, Berry, made an order referring the last-named report to C. L. Raison, Jr., the amicus curia. But neither this order nor the one referring to him the report returned by plaintiffs' secretary, John E. Waterhouse, contained any instructions as to what the amicus curia should do with them, nor do they require of him any report thereon. It is averred in the petition that the amicus curia is the attorney of a former trustee of Speers Hospital, and that he holds a claim for a considerable amount against that institution, which was contracted while the client was one of the trustees thereof, and that he and his client are both hostile to the plaintiffs and the institution of which they are trustees; that the defendant, Raison, as amicus curia, without authority or notice to plaintiffs, prepared and filed in the Campbell Circuit Court a voluminous report, in which the plaintiffs are wrongfully criticized and their action as trustees misrepresented; that the defendant, Berry, as judge of the Campbell Circuit Court illegally confirmed the report made by the defendant, Raison, without

giving plaintiffs an opportunity to object or except thereto. And without passing upon their demurrer, he adjudged their response to the several rules insufficient. On December 12, 1904, he made another order awarding a third rule against them, returnable December 14, whereby they were required to show cause why they should not be removed from the trusteeship of the Speers Hospital; that the rule last awarded has been issued and duly served upon them, and unless prohibited by an order of this court from so doing the defendant, Berry, will illegally remove them as trustees and appoint others in their stead. It is further averred by plaintiffs that the several orders made by the defendant, Berry, awarding rules against them have never been entered upon the records of the Campbell Circuit Court, nor were they made or entered in any action or proceeding instituted or pending in the court presided over by the defendant, Berry, as judge.

The answer of the defendant, Berry, in substance denies the material averments of the petition as to the alleged illegal acts complained of, and charges gross mismanagement upon the part of the trustees of the hospital and its affairs, especially as to its finances, and justifies his issual of the several rules against the plaintiffs upon the ground of their alleged failure to make reports to the Campbell Circuit Court as required by the will of Elizabeth Speers, and of their alleged general incompetency as well. The answer presents the further defense that the will of Elizabeth Speers confers upon him as judge of the Campbell Circuit Court authority to supervise the trustees of the hospital and their management of its affairs, and in the event of their incompetency or failure of duty, to remove them and appoint others in their place. The answer of the defendant, C. L Raison, Jr., in substance denies that he is hostile to the plaintiffs, and avers his good faith and fair dealing in accepting the appointment of amicus curia, and in the work of making his report, and further avers the correctness thereof.

The first question presented for our consideration is what powers, if any, are conferred upon the judge of the Campbell Circuit Court by the will of Elizabeth Speers? After providing what part of the estate of the testatrix shall be turned over by the executors to the three trustees named therein, the will goes on to say that they are to take it "in trust for the establishment and maintenance of a hospital in the city of Dayton, in Campbell county, Kentucky." Then follows the language to which we must look to ascertain the duties and powers of the trustees. It is as follows: "The said hospital to be erected, maintained and conducted in such manner and upon such plan as in their judgment would do the greatest good."

The language here employed is comprehensive indeed; it leaves everything to the judgment and discretion of the trustees. They are not required to consult with or be advised by others as to the manner in which the hospital is to be maintained or conducted, nor can they be interfered with in their control of the institution from any source, unless guilty of such mismanagement, extravagance or fraud as would endanger the trust estate, or violate the rights of the beneficiaries.

Let us now see what relations the Campbell Circuit Court sustained to the trust and trustees. On this point the will provides as follows: "Said trustees shall annually report all their acts and doings to the highest court in said county having original equitable jurisdiction, and all vacancies in

said trustees shall be filled by said court. Said court shall require from said trustees proper bonds for the performance of their duties, and it may allow them annually out of the trust funds a just and fair compensation."

The highest court in Campbell county having original equitable jurisdiction is the circuit court of that county. It will be observed that the court is authorized by the will to receive annual reports from the trustees. It may allow the trustees annually, out of the trust fund, just and fair compensation for their services as such, and is given the power to compel them to give proper bonds, but nowhere in terms is the court empowered by the will to remove the trustees except perhaps for a failure upon their part to give bond when required by the court to do so, and even for this cause the power to remove is implied from the power to require the bond. But in no reference to what may be done by the court is it said in the will that it is given any visitorial or other supervision over the hospital, or any control over the trustees in the manner of maintaining and conducting the hospital. But while no such power can be exercised by the Campbell Circuit Court by virtue of the will, it may under the general power inherent in a court of equity interfere upon proper grounds, and in a proper action or proceeding, to prevent such acts or conduct upon the part of the trustees as would, if unrestrained, result in serious injury to the trust estate, or loss to the beneficiaries of the trust. This is especially true of trusts for charitable uses, for it is said that courts look with peculiar favor upon charitable gifts, and take special care to enforce them, to guard them from assault and protect them from abuse.

So ancient is this peculiar form of jurisprudence that even the oldest English law writers are uncertain as to its origin. It is, however, said in Perry on Trusts "that the same religious spirit and charitable sentiment which led individuals and communities to devote large sums of money to pious uses, religious houses, churches and educational institutions, to the relief of the old and poor, and to the general promotion of the public convenience, utility and good, also led the makers and administrators of public laws to take a favorable and liberal view of such charitable donations." (Perry on Trusts, volume 2, section 688.)

Various statutes on this subject were from time to time enacted by the English Parliament, culminating in the enactment in 1601 of the famous statute on charitable uses known as 43d Elizabeth, and since its passage all objects named therein are considered charitable. It was said by Lord Eldon that this statute created no new law, but only "a new ancillary jurisdiction by commission to issue out of chancery, to inquire whether funds devoted to charitable purposes had been misapplied."

It seems to be well settled in most of the States of the American union that courts of equity have an original and inherent jurisdiction in equity over charities independent of the statute of Elizabeth. It was, however, held by this court in Moore v. Moore, 4 Dana, 365, in an opinion by Judge Robertson, that the statute of 43d Elizabeth was a part of the common law, and also of the general statutes in force in Virginia when Kentucky became a separate State, and the latter State by her Constitution having adopted the laws of Virginia, it made that statute a part of the law of this State. The same conclusion was reached by this court in the cases of Bap-

tist Ed. Society, 1 B. M., 215, and in Attorney General v. Wallace, 7 B. M., 611.

We are of opinion, therefore, that though the will of Elizabeth Speers conferred upon the judge of the Campbell Circuit Court no jurisdiction to supervise or control the trustees in the general conduct of the charitable trust confided to them, or to remove them, he has, independent of the will, the jurisdiction to prevent any misappropriation of the trust fund, or to correct any abuse in its management by the trustees, provided such jurisdiction is invoked by some one having the right to institute an action or proceeding for that purpose. But he had no jurisdiction of his own motion to take such action as was attempted by him in the proceedings of which the plaintiffs complain. The former practice under the statute of 43 Elizabeth required a commissioner to inquire into and bring to the attention of the chancellor the abuses and mismanagement of funds and lands given to charity, but this proceeding by commission soon fell into disuse in England, and has never been employed in this country. In England, in lieu of the commission, it became the practice to require an original bill or information in chancery to be filed by the attorney general, and we may add that such has been the practice in this State. (Moore v. Moore, 4 Dana, 365; Chambers v. Baptist Ed. Society, 1 B. M., 215; Attorney General v. Wallace, 7 B. M., 611.)

In Attorney General v. Wallace, supra, which was an action brought in equity in the name of the attorney general of Kentucky by Cord as relator, to have enforced a charitable devise, it was held that, in the absence of action by those interested in the trust, the action was properly maintainable in the name of the attorney general, and also that the relator was a necessary party; and further, that the attorney general had no right to dismiss the action as he attempted to do. We have been unable to find that the rule thus announced has ever been abrogated by this court, and hence we conclude that, in order to authorize a chancellor to inquire into an alleged mismanagement of trust property, or a misappropriation of a trust fund, dedicated to a charitable or private use, his jurisdiction must be invoked by some one interested in the execution of the trust, or in the name of the attorney general as the representative of the State, in an action or proper proceeding authorized by law to be instituted for that purpose. In this case no action or proceeding against the trustees had been instituted or was pending in the Campbell Circuit Court at the time the several orders and rules complained of were made and entered. The judge of the circuit court acted solely of his own volition, and upon his own motion, and without information or action upon the part of any one. We are of opinion that he was without jurisdiction, and that the several orders and rules made and issued by him against the plaintiffs were void. (Clay v. Edwards, Trustee, 84 Ky., 548.)

The makers of the present Constitution, by section 110 of that instrument, conferred upon this court authority "to issue such writs as may be necessary to give it general control of inferior jurisdictions." And this court has repeatedly exercised the power thus conferred, not only to prevent courts of inferior jurisdiction from acting in matters out of their jurisdiction, but also in cases where the right of appeal did not afford a plain,

speedy and adequate remedy. (Hindman v. Toney, 97 Ky., 413; Weaver v. Toney, 21 Ky. Law Rep., 1157; McCain v. City of Louisville, 23 Ky. Law Rep., 588; Clark Colt v. Warner, 25 Ky. Law Rep., 858.

Wherefore, the prayer of the petition is granted and the writ of prohibition may issue.

DURHAM v. STRAIGHT, &c.

(Filed December 7, 1904.)

1. Supersedeas bond—Insufficient surety—Subsequent execution—Where upon an appeal to this court appellant executed a supersedeas bond with surety, which was accepted by the deputy clerk, the fact that the surety was insufficient, although thought to be so when accepted, did not authorize such deputy to ignore the bond and issue execution on the judgment appealed from. If appellee regards the surety as insufficient his remedy lies in a motion and rule to require additional surety.

2. Same—Practice—Rule from appellate court—Insufficient response—Where a rule was issued by the appellate court against the appellee, the master commissioner, deputy clerk and sheriff of Warren county, to show cause why they should not be punished for contempt in failing to obey the supersedeas issued therefrom, a response to the rule that the deputy clerk accepted the surety on the appeal bond under the mistaken belief that the bond was only for the costs on appeal, and, on learning his mistake, the deputy, at the instance of the commissioner and without giving appellant an opportunity to give additional surety on the bond, issued an execution on the past due sale bond given by the purchaser of the lot sold under the judgment appealed from, which was levied on the same lot as the property of the purchaser. Held—That the deputy clerk issued said execution without right, and the response is insufficient, and the rule is made absolute.

Samuel D. Hines and W. B. Gaines for appellant.

J. McKenzie Moss and Sims & Grider for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Settle.

A rule was issued in this case from this court against the appellee, Straight, and the master commissioner of the Warren Circuit Court, a deputy clerk of the court, and sheriff of Warren county, to show cause why they should not be punished for contempt for failing to obey the supersedeas issued from this court, it appearing that they were proceeding, notwithstanding the supersedeas, to sell under the judgment appealed from a certain house and lot in Bowling Green, under execution issued from the Warren Circuit Court.

It appears from the response to the rule that the deputy clerk accepted the surety on the appeal bond under the mistaken belief that the bond was only for the costs on appeal, and that he would not otherwise have accepted such surety but for that fact, as he was not the owner of sufficient property subject to execution to make him good for any greater sum than the costs that might accrue on the appeal. But learning his mistake after taking the bond, the deputy clerk, at the instance of the master commissioner and without giving appellant opportunty to give additional security upon the bond, issued execution on the past due sale bond that had been executed by

the purchaser of the house and lot sold under the judgment appealed from, and this execution was levied upon the house and lot sold as the property of the purchaser.

We think the deputy clerk issued the execution without right. It appears that the judgment of the lower court enforced a lien upon appellant's real estate which was sold under the judgment and purchased by appellant's wife, who executed sale bonds for the purchase money with security. Thereafter exceptions were filed by appellant to the report of sale, which were overruled by the court and the sale confirmed, and from the judgment overruling his exceptions and confirming the sale an appeal was prayed and has been taken. The appeal bond was executed before the clerk of the lower court to stay proceedings on the judgment and the supersedeas followed. It is apparent that the bond executed by the appellant was duly accepted by the deputy clerk with the surety offered. The fact, if it be a fact, that the surety accepted by the clerk was insufficient, did not authorize him to ignore the bond and supersedeas and issue execution. If appellee regards the surety in the bond insufficient, his remedy lies in a motion and rule to require additional security.

Regarding the response insufficient the rule is made absolute.

ALLEN, &c. v. HOPSON, &c.

(Filed December 7, 1904.)

1. Public roads—Gates—Right to abolish—Under Kentucky Statutes, section 4297, authorizing county courts to abolish gates across a public road, such court has no authority to abolish gates unless it be shown that they were erected by order of the county court.

2. Opening road—Erecting gates at same time—Presumption—In the absence of proof to the contrary, where it is shown that gates were erected at the time the road was established, and have been maintained for thirty years without objection, the presumption is that the road was established upon the condition that the owner of the land on which it was established was granted the right to erect and maintain the gates across it.

3. Agreement—Parol evidence—Competency—Parol evidence that there was an agreement between the viewers of the road and the owner for the owner to give the right of way and reserve the right to erect gates across it, is incompetent, the presumption being that if such agreement was made it was reduced to writing, which is the best evidence, and should be produced.

4. Res judicata—If it be a fact that the county court did grant the right to erect gates under the statute, this proceeding would not be a bar to another proceeding under Kentucky Statutes, section 4297, to abolish them.

Sims & Thomas and J. C. Dabney for appellants.

John W. Kelly and R. A. Burnett for appellees.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Nunn.

It apppears from the record that in the year 1869 a new road was established leading from Canton to Cumberland Church in Trigg county. This new road was established through the lands of appellees a distance of one

and one fourth miles, Joshua Hopson, the father of appellees. then being the owner of this land.

This proceeding was instituted in the Trigg County Court, under section 4297 of the statutes, to cause the court to abolish two gates. It appears these gates were erected at the time of the establishment and opening of the road at the points of entering and leaving Hopson's lands. The appellants proceeded upon the theory that the public good required the removal of these gates. The appellees made an issue with appellants, and contended that the public was benefited by the gates, rather than injured; that this road through their farm was in the Cumberland river bottom, which, to a great extent, was overflowed each year by the waters from that river; that if the gates were abolished and fences erected on each side of the road, driftwood would accumulate and mud holes would be formed in the lane, which would make it inconvenient and injurious to the traveling public; that with the gates and fences to catch the driftwood and confine the public to the roadway, the traveling public would be interfered with; that the gates were not kept closed except during the crop season, and also in granting the right of way for public use the right to erect and maintain the gates was reserved by Hopson when he granted the roadway to the use of the public.

On the other hand, appellants show that the gates inconvenience the public to a great extent; that persons traveling the road are compelled to stop and much of the time to alight from their horses or vehicles and open the gates, and during the crop season, in driving stock to market along this road, the owners were put to the expense of employing additional hands to drive the stock through appellee's farm to avoid injury to the crops and the loss of the stock. On this proof the county judge ordered the gates abolished. On an appeal to the circuit court and a trial by jury it found a verdict in favor of appellee. The evidence of appellants is silent on the question as to how and by what authority these gates were erected. It was not shown that the gates were permitted by the county court to be erected under the provisions of the statutes. By section 4297, Kentucky Statutes, it is provided: "The county ocurt may, after the occupant of the premises upon which gates shall be erected across a road has had ten days' previous notice of the proceeding * * * order the gates repaired, removed or abolished, if the public good requires it."

This provision of the statute is the same in substance as contained in the statute in existence when this road was established. This statute authorizes the county court, on certain conditions named therein to remove, or abolish gates which the county court had permitted by order to be erected by virtue of sections 4289 and the first part of 4297 of the statute. The power and authority of the county court under section 4297 to remove or abolish gates depends upon the fact as to whether the gates were erected by permission of the county court under the provisions of sections 4289 and 4297. If not so erected the court can not abolish them by proceedings under section 4297. If a person without any authority should obstruct the public road by the erection of gates he could be punished therefor under section 1241 of the statute, or by indictment for the creation and maintenance of a nuisance. Under such a state of case it could not be contended that the wrongdoer should be proceeded against under section 4297 and have the county

court to make an order abolishing the gates for the public good. In such state of case, in addition to a fine which might be imposed, any citizen might remove the obstruction, i. e., the nuisance, from the public highway, if it could be done without committing a breach of the peace. The appellants failed to prove that the gates were erected across this road by permission and order of the county court by virtue of the sections referred to, and the proof, without any contradiction, shows that the gates were erected at the time the road was established, and have been maintained for a term of thirty years or more without interference or objection until this proceeding was instituted. These circumstances create a strong presumption that when the road was established the owner granted the right of way upon the condition that he was to be permitted to erect and maintain these gates. The appellees introduced two witnesses, who stated that they were present in 1869 when the viewers were performing their duties in reference to the establishment of this road, and heard the agreement between them and Joshua Hopson, the father of appellee. Hopson agreed to and did give the right of way for the road without any charge, reserving the right to erect and maintain the gates; that the viewers accepted this proposition. This evidence was objected to, but the court overruled the objection. This evidence was not competent; there was no proof that this agreement was not reduced to writing. The presumption is that the viewers' report to the county court contained this agreement. If so, it was the best evidence, and should have been introduced if in existence or within their power to produce it. There was no evidence showing the destruction or loss of this report or the papers connected with the application to open and establish this road. If appellee's father in surrendering to the public this right of way through his land reserved the right and privilege of erecting and maintaining these gates, then they can not be removed and the appellees be deprived thereof in a proceeding like this. In such a case the owners of the land are entitled to be compensated for their loss by virtue of section 4292 of the statutes. It would be inequitable and unjust to a land owner to obtain from him land from which to establish a road and to avoid the necessity of erecting and maintaining two strings of fence where he gives the land without charge upon the condition that he be permitted to erect and maintain gates, and, after the road is established, then institute proceedings in the county court, under section 4297, and abolish the gates, thus obtaining the land from the owner without any compensation. This would be a species of wrongdoing that was never intended or contemplated by the general assembly when enacting the statute. As stated, this section was only intended to authorize the county court to abolish gates when they had been erected by permission of the county court under the sections named. It does not appear that appellees were permitted by the county court to erect these gates under the statute, but the presumption, from all the evidence and circumstances shown in the record is that Hopson in granting the land to the public reserved the right to erect and maintain these gates. If it be the fact that the county court did grant the right to erect the gates under the statute stated, this proceeding would not be a bar to another proceeding under section 4297 to abolish them.

Wherefore, the judgment of the lower court is affirmed.

YEISER, &c. v. RUSSELL & CO.

(Filed December 7, 1904—Not to be reported.)

1. Sale of goods—Warranty of quality—Acceptance—Notice to vendor—Where a vendee accepts goods delivered under a warranty of quality, or retains them after discovering they are not the goods purchased and fails to give notice within a reasonable time that he declines to receive them because not in conformity to the contract, he can not thereafter refuse to pay for them.

Hays & Wells for appellants.

E. B. Anderson for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 6th day of August, 1901, the appellees, Russell & Co., contracted in writing to furnish to their agent, John G. Delker, at Owensboro, Ky., for the appellant, one left-hand No. 2 single sawmill; one sixty-four inch solid tooth saw, 9x10 gauge; one saw swage, and all other per list; one 9x18 portable engine on wheels; 25 feet smoke stack, in consideration of the sum of $1,400, $400 of which was to be paid for in a Heelman engine and double sawmill, and for the residue notes were to be executed, due respectively in six, twelve, eighteen and twenty-four months, aggregating $1,000. On the 20th of June, 1903, appellees brought this action against the appellant, in which they prayed judgment for these various notes, with interest, and for an enforcement of the mortgage lien which was executed upon the machinery to secure their payment. On the 3d of August defendants filed an answer, in which they admit liability on the notes, but by way of counterclaim allege that the plaintiffs were to furnish a screen for the smoke stack, which they had failed to do; and that in consequence thereof sparks of fire escaped from the stack, which set fire to the saw dust and lumber near the mill and the mill shed, which resulted in the destruction of the mill itself. They also alleged that instead of the sixty-four inch saw contracted for the plaintiffs furnished a sixty-inch saw; and that instead of a twelve-inch five ply rubber belt, plaintiffs furnished a ten-inch four-ply belt; and that in consequence of these various breaches of plaintiffs' contract they had been damaged in the sum of $1,200, for which they sought judgment. The plaintiffs in their reply alleged that the written contract filed with the answer was the only agreement between the parties; that they had shipped two sets of machinery of the same general character to their agent at Owensboro, one for the defendants and the other for a man named Taylor, who lived in Daviess county; that the saw and belt intended for defendants were by mistake delivered to Taylor, and those for Taylor to the plaintiffs. They denied that they were to furnish a screen as a part of the machinery sold to the defendants. The pleadings being made up, a jury trial resulted in a verdict and judgment in favor of appellants for $40 on their counterclaim.

Whilst the written contract filed with the defendants' answer does not purport to include a screen, the defendants testify in substance to a parol contemporaneous agreement with the defendants' agent to furnish it as a part of the outfit. This was denied by appellee. It appears from the testi-

mony that after the defendants discovered that the saw furnished them was not the one contracted for they called the plaintiffs' agent's attention to the fact, who acquainted them with the fact that their saw was in the possession of Taylor, who was operating a mill some five or six miles distant from the point where defendant's mill was located, and suggested that they send out and get it. This they failed to do, but continued to make use of the sixty inch saw for nearly a year before the fire which consumed their mill shed. The rubber belt was never used by appellants in the operation of their mill as they preferred to use an old one which they already had. It is shown that the difference in value between the belt and saw contracted for and those furnished did not exceed in value $20; and that if they had refused to accept them others could have been procured, conforming to the provisions of the contract, in a few days. This, however, they failed to do. It also appears that shortly after the delivery of the sawmill that appellants wrote appellees, claiming that they were entitled to a screen for the smoke stack. In response to this the plaintiffs wrote, denying that the screen was included in the original contract, but offered to furnish it at the regular rates. The mill shed was burned in the absence of the defendants, and it is a matter of conjecture as to how the fire originated, but in any contingency, it was nearly a year after they began to operate their plant. On the 28th of January, 1903, about four months after the alleged fire, the defendant, Melving, addressed the following communication to the plaintiffs:

"January 28, 1903.

"Russell & Co.,

"Louisville, Ky.:

"Gentlemen—We will have to admit that we have not paid your notes for the sawmill as we agreed, and are sorry we have not been able to pay you any money. I as sawyer have been sick, and this delayed us. We have made some bad sets with the mill, and did not get our money. Our mill burned down last fall, but we have repaired it now. If you will give us more time and will renew notes for us, we will pay the interest and try to catch up and make full payment for the mill."

There is no better-settled principle of law than if a vendee accepts goods delivered under a warranty of quality, or retains them after the discovery that they are not the articles purchased, and fails to give notice within a reasonable time that he declines to receive them because not in conformity with the contract, or exercises ownership over them, he can not thereafter refuse to pay for them. (2 Benjamin on Sales, section 1356; 2 Southerland on Damages, 2d edition, section 650.)

The instructions given by the trial court fairly stated the law applicable to the facts adduced upon the trial, and we perceive no error prejudicial to appellants.

Judgment affirmed.

CITY OF HENDERSON v. YOUNG.

(Filed December 7, 1904.)

Cities—Discretion—Extending electric plant outside the city—Taxpayers—Injunction—In an action by a taxpayer to enjoin a city of the third class from extending its electric light plant outside the city to increase its reve-

nues, Held—That in the management and operation of its electric light plant a city is not exercising its governmental or legislative powers, which should be strictly construed, but its business powers, which the city may conduct in the manner which promises the greatest benefit to the city and its inhabitants, in the judgment of the city council; and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters.

John Francis Lockett for appellant.

Clay & Clay for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by the appellee, S. A. Young, a resident and taxpayer of the city of Henderson, to enjoin the city authorities from furnishing to property outside of the city limits an electric light current from the electric light plant belonging to the city, upon the grounds that by the express terms of subsection 5 of section 3290 of the Kentucky Statutes, which is a section of the charter of cities of the third class, to which Henderson belongs, it was only authorized to provide the city and the inhabitants thereof with water, light, power, heat, telephone service, etc., and by necessary implication it was prohibited from extending such service beyond the city limits. The city, for answer, says in substance: "That the electric light plant belonging to the city is equipped with machinery which is capable, with the same number of employes now found necessary to conduct it, to furnish, with a small additional expense for fuel, light to a very much larger number of customers than it now has or is likely to have for some years to come; and that the only way in which it can pay for the construction of the plant and meet its operating expenses is to enlarge the number of its probable customers; that in the instance complained of it has the personal guarantee of solvent parties, living just outside of the city limits, to pay such a sum for three years as will reimburse it for all the expense to which the city would be subjected in making the proposed extension, and to take and pay for the electric current to be furnished by the city at 10 per cent. in excess of the price charged to residents of the city. It is further alleged that the city will be in nowise embarrassed in its duty to furnish light to the city by the proposed contract with parties living outside of the city; but that such contract would be for the mutual benefit of both parties."

A general demurrer was sustained to the answer and the city perpetually enjoined from extending its electric current outside the city limits, and the city has appealed.

A city has two classes of powers, one legislative and governmental, in the exercise of which it is a sovereignty and governs its people; and in the exercise of this class of powers the statute must be strictly construed. The other class of powers is conferred upon it for the purpose, not of government, but for private advantage to the city and its inhabitants. In the exercise of these powers it is governed by the same rules that govern private individuals or corporations. (Dillon's Municipal Corporations, 3d edition, 86, and authorities cited in note.) In the management and operation of its electric plant a city is not exercising its governmental or legislative powers-

but its business powers, and may conduct it in the manner which promises the greatest benefit to the city and its inhabitants in the judgment of the city council, and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters. Questions similar to the one at bar were very fully considered in the cases of Illinois Trust and Savings Bank v. City of Arkansas City, 34 L. R. A., 518, and Pike's Peak Power Co. v. City of Colorado Springs, 105 Federal Reports, 105. In the opinion in the latter case the court used this language: "But it is equally true that municipalities and their officers have the power and use of all public utilities under their control for the benefit of their cities and citizens, provided always that such application does not materially impair the usefulness of these facilities for the purpose for which they were primarily created. * * * Where a city has had legislative authority to erect a dam for the purpose of waterworks for the city, it might lawfully lease for private purpose any excess of water not required for its waterworks. This is a just and reasonable rule. It is a rule not inconsistent with any principle of law or equity, and in accord with that good sense and good business principles which recognizes as a public good the growth of two blades of grass where but one grew before, and the conversion of waste to use."

It seems to us that this case falls clearly within the rule announced in the foregoing cases, and that the trial court erred in sustaining a demurrer to the answer.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

YATES v. CITY OF COVINGTON.

(Filed December 7, 1904.)

1. Streets—Injury thereon—Pleading—Dangerous condition—Evidence—Prior accidents—In an action against a city for damages from a fall by reason of the unsafe condition of a sidewalk, evidence of prior accidents having occurred at the same place, was competent to show the dangerous character of the walk at that point and that such fact was known to the city authorities.

2. Peremptory instructions—When any evidence is introduced on the trial tending to establish plaintiff's cause of action, it is error in the court to peremptorily instruct the jury to find for the defendant.

B. F. Graziani for appellant.

F. J. Hanlon for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

The appellant on the 4th of October, 1902, filed his petition against the appellee in the Kenton Circuit Court and in substance alleged that in the night time, on the 21st of February, 1902, when walking along the sidewalk on the east side of Russell street in the city of Covington, and while crossing an alley, he fell, injuring his hip and back, causing the muscles and ligaments of his limbs to become strained and bruised, in consequence of which

he had become a permanent cripple. He alleged that his injuries were the result of the negligence of the appellee in permitting this sidewalk or flagging to become sunken and tipped and the stones between to become sunken so as to form a deep hole; that he was using ordinary care to avoid injury at and prior to the time he fell; that the unsafe condition of the street or sidewalk, at the place he received his injury, was known to appellee a sufficient length of time before the accident to have repaired and made the place reasonably safe, and that he, appellant, did not know of its unsafe and dangerous condition.

The appellee controverted the petition and pleaded contributory negligence on the part of appellant. This plea was controverted by appellant. A jury was empaneled and heard the evidence of appellant and two witnesses for appellee, when the court on motion of appellee, by a peremptory instruction, directed the jury to find for the appellee, and the case is here on appeal. The only questions to be determined on this appeal are whether or not there was any evidence introduced on the trial tending to establish appellant's cause of action, and whether the court erred in rejecting evidence offered by appellant. It appears in the record that it was agreed that Russell street is one of the prominent streets of the city and much traveled; that appellant, on the evening stated in the petition, was going from his home to church, and just as he reached about the center of the alleyway mentioned in the petition, his foot slipped on the uneven surface of the rocks, and he fell and was severely and permanently injured. Some of the witnesses described the place at which appellant fell, in substance, as follows: That there were holes and ruts about the center of the alley, the slabs over the center thereof had widened by long usage and time to about fifteen inches apart and six or seven inches in depth. These stone slabs were worn and tilted, and made it more dangerous to pedestrians on account of the sudden decline from where the sidewalk terminated at the north side of the alley to the center thereof. These slabs had worn slick and oval in shape, with a space between the ends thereof in the center of the alley of several inches and six or eight inches in depth; that this condition of the sidewalk had existed for several years, gradually becoming worse.

The facts in the case before us are almost identical with the facts in the case of Carlisle v. Secrest, 25 Ky. Law Rep., 336. In that case the court said: "It was the duty of the appellant to keep its sidewalk reasonably free from defects endangering the traveling public while using it, and if it failed in the performance of this duty, it is responsible for the damages caused by such failure. The question as to whether or not there was such failure upon the part of the municipality, or as to whether or not the appellee was guilty of contributory negligence in the premises, were peculiarly within the province of the jury to determine, and as these questions were properly submitted by the court to the jury in the instructions given, the judgment is affirmed."

In the case of Fugate v. City of Somerset, 97 Ky., 53, this court said: "Upon these issues presented by the pleadings as to whether said street was so obstructed as to render same dangerous and unsafe for public travel, and whether plaintiff was injured by reason of same, and as to whether plaintiff was himself guilty of such negligence as to prevent his recovery, were all

questions of fact for the determination of the jury under appropriate instructions by the court. Under the usual rule that, admitting every fact given in evidence to be true, and every inference deducible therefrom, if plaintiff has made out his case, it is error to take the case from a jury by a peremptory instruction."

We are of the opinion that there was some evidence introduced tending to support appellant's cause of action, and the court erred in giving a peremptory instruction. On the trial the appellant introduced several witnesses by whom he proved the condition of the sidewalk as stated, and then offered to prove by them that for fifteen or eighteen months next prior to appellant's injuries they had frequently seen pedestrians fall upon this sidewalk at the place where appellant fell. Some of them were injured slightly, and some of them were not injured.

On the trial of the case of District of Columbia v. Armes, 107 U. S., 524, the plaintiff in the lower court was permitted to show that prior to the accident to him a large number of persons were injured at the same place on the sidewalk. The court in that case, Justice Field writing the opinion, used this language in reference to the competency of this evidence: "On the trial a member of the Metropolitan police, who saw the deceased fall on the sidewalk and went to his assistance, was asked, after testifying to the accident, whether, while he was on his beat, other accidents had happened at that place. The court allowed the question, against the objection of the city's counsel, for the purpose of showing the condition of the street, and the liability of other persons to fall there. The witness answered that he had seen other persons stumble over there. He remembered sending home in a hack a woman who had fallen there, and had seen as many as five persons fall there. The admission of this testimony is now urged as error, the point of the objection being that it tended to introduce collateral issues, and thus mislead the jury from the matter directly in controversy. Were such the case the objection would be tenable; but no dispute was made as to these accidents, no question was raised as to the extent of the injuries received; no point was made upon them; no recovery was sought by reason of them; nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character; at least, it is some evidence to that effect. Persons were not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of the inquiry to which attention was called by the nature of the action and the pleadings, and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject. Besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention of the city authorities." (Quinlan v. Utica, 11 Hun., 217; Chicago v. Powers' Adm'x, 42 Ill., 169; Pomfrey v. Village of Saratoga, 104 N. Y., 459.)

In the first case cited the court said, on the competency of like evidence: "There was testimony showing quite conclusively that for several years immediately preceding the accident, including the various times to which the

testimony under consideration referred, the walk was in the same general condition that it was in when the plaintiff received her injuries. It is claimed by counsel for the respondent that, under these circumstances, the evidence in question was properly received, on the ground that it tended to show that the walk, tested by actual use, had been demonstrated to be in an unsafe and improper condition, and that such was its condition at the time when the plaintiff was injured."

Under these rulings, it was competent to show prior accidents and injuries received by pedestrians at the place where appellant fell, both for the purpose of tending to show, with other evidence, the unsafe condition of the sidewalk at that place, and as tending to show that the dangerous character of the walk at that point was brought to the attention of the city authorities. We are, therefore, of the opinion that the lower court erred to the prejudice of the appellant in rejecting this evidence.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

FLETCHER v. COMMONWEALTH.

(Filed December 7, 1904—Not to be reported.)

1. Substantive evidence—Admission in rebuttal—On the trial of one for murder it is error to allow substantive evidence of a material character which was evidence in chief to be introduced before the jury in rebuttal, over the objection of the defendant, after defendant's evidence in chief had been closed, such evidence not having been admitted under an exercise of a discretion because it had originally been overlooked, but admitted without other explanation or excuse than that it was germane to the issue.

2. Conflicting statements—Effect—Failure to admonish jury—An eye witness to the killing having testified that another than defendant inflicted the fatal wound, denied that she told two police officers that defendant did it, and they testified she so told them. The sole effect of this testimony was to impeach the credit of such witness, and the court erred in failing to admonish the jury accordingly.

3. Instruction—Appearances—Right of defendant to prevent assault on another—Some rude boys took refuge in a house where defendant was, and were followed by deceased and three other men with intent to chastise them, and who, a companion of deceased, demanded should be turned over to them. In the altercation which ensued deceased and his companion, with appellant and two others, struggled for the possession of an ax. It may have appeared to defendant, in the exercise of a reasonable discretion, that deceased and his companions intended to use the ax in committing a felonious assault on some other person present, and if this was so, the defendant had the right to interpose to prevent such assault, and upon this feature of the case the jury should have been instructed.

4. Irrelevant evidence—Evidence as to what was said and done at the river when defendant was not present, and as to what occurred between other boys and boating parties on the river on other occasions, should have been excluded from the jury.

A. F. Parker for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Jefferson Circuit Court, Criminal Division.

Opinion of the court by Judge O'Rear.

This appeal is prosecuted from a conviction on the charge of murder.

The most serious error in the record, and the one upon which we feel compelled to reverse the judgment, is that the court, over the objection of appellant, allowed substantive evidence of a material character, which was evidence in chief, to be introduced before the jury in rebuttal, and after the defendant's evidence in chief had been closed. This was not admitted under any exercise of discretion because it had been overlooked originally, but was admitted without other explanation or excuse than that it was germane to the issue. Coming as it did at such a stage of the trial in defiance of the Code provision regulating the subject, it has a tremendous force and is characterized by this court, in the case of Williams v. Commonwealth, 90 Ky., 596, opinion by Judge Lewis, as a prejudicial error for which the court is bound to reverse.

Another error of the trial judge in admitting evidence was in not admonishing the jury as to the effect to be given to the testimony of the police officers, Moran and Ford, wherein they contradict the witness, Fanny Rawlings. The Rawlings woman was an eye witness to the killing. She testified on the trial that another than the defendant inflicted the fatal wound which defendant was charged with having done, and that defendant did not do it. She was asked on cross-examination if immediately after the killing she had not said to officers Moran and Ford that she saw the killing, and that defendant Fletcher did it, and described him so that the officers could find him. Having denied making this statement to the officers, they were called in rebuttal to prove that she did make it. The sole effect of the testimony of this witness was in law its tendency to impeach the credit of Fanny Rawlings as a witness, and the court should have admonished the jury accordingly. Otherwise it would be possible that hearsay evidence, statments made out of court and not under oath, could be admitted as substantive proof on the trial of one accused of crime. What Fanny Rawlings said out of court as to who did the killing was of itself manifestly irrelevant. The fact that she had previously made a statement different from her testimony is always relevant to be shown, not for the purpose of establishing the verity of her previous statement, but to discredit her sworn statement.

In lieu of the instruction given by the court defining self-defense, with which we are not entirely satisfied, though we are not prepared to say that the case would have been reversed on its account, the court should have told the jury in substance that if they believed from the evidence that the defendant, at the time and in the manner charged in the indictment, killed the deceased, and that he believed, and had reasonable grounds to believe, that he was in imminent danger of death or great bodily harm at the hands of deceased, he had the right to use such means at his command as were necessary, or as to him, situated and surrounded as he was, may have appeared reasonably necessary, to avert the impending danger, real or apparent, the law under such circumstances holding the defendant not guilty upon the ground of self-defense and apparent necessity. (Rowsey v. Commonwealth, 25 Ky. Law Rep., 841.)

The court is furthermore of the opinion that, under the circumstances in this case, another instruction should have been given. It appears that deceased and three other men were chasing some insolent boys, had run them for some distance, with the expressed intention and threat of chastising them, or doing them some physical hurt. The boys took refuge in the house where the defendant was. A companion of the deceased demanded that they be turned over to them. In the altercation that followed deceased and his companion with appellant and two others struggled for the possession of an ax. Just what the deceased intended to do with the ax is not clearly shown. It may have been, or it may have appeared to the defendant in the exercise of a reasonable judgment under the circumstances and surroundings as shown in the evidence, that the deceased and his companion intended to use the ax in committing a felonious assault upon the youths, or some other person there present. If that was so, then the defendant had the right to interpose to prevent such assault, and to do for the person against whom it was attempted what such person might have done for himself. The doctrine announced by this court in Morrison v. Commonwealth, 24 Ky. Law Rep., 2494, states the rule of law applicable to this subject. The court is also of opinion that the evidence as to what was said and done at the river when the defendant was not present, and as to what occurred between other boys and boating parties on the river on other occasions, have no place in this case, and should have been excluded from the jury.

For the reasons indicated the judgment must be reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

AMERICAN BOOK CO. v. WELLS, COUNTY SUPERINTENDENT, &c.

(Filed December 7, 1904—Not to be reported.)

1. Common schools—Book contract—Furnishing books to school children—Breach of bond—A bond was executed by appellant, American Book Co., to the Commonwealth of Kentucky in the sum of $10,000, conditioned that appellant would, if its school text-books were adopted by any of the county boards of examiners of this State, sell to the patrons of the common schools of such county the books published by appellant, at prices not greater than it sold the same books to the patrons of the schools in other States. Thereafter appellant contracted with the board of examiners of Mason county for the use of certain of its books in the common schools of said county. In an action by the superintendent of schools in said county of Mason against appellant for a breach of said bond, in which plaintiff alleged and proved that such books were sold to the schools of Mason county by appellant at a price greater than that charged by appellant for the same books in the State of Ohio, Held—That such sales were a breach of appellant's bond.

2. Defenses—Validity—The fact that appellant furnished the books to the retailers in this State at the list price named in the bond with the agreement that they were to sell them to the school children at a discount of 20 per cent., while under the laws of the State of Ohio appellant was required to discount them in that State 25 per cent., is not a valid defense to a charge of a breach of appellant's bond in charging a greater price in Kentucky than in Ohio, or the further fact that it is more expensive to merchandise appellant's books in Kentucky than in Ohio is not a valid defense.

3. Penalty—Liquidated damages—The question is re-argued whether the

sum of $10,000 can be recovered in one action upon the breach of the bond as liquidated damages. We have re-examined the question and remain satisfied with the conclusion reached on this point in the opinion of Commonwealth v. Ginn, 111 Ky., 110, which holds that the whole sum can be recovered in one action. The penalty is fixed by the statute and a statutory penalty is never void or unenforcible because, in the opinion of the court, it is harsh.

Myers & Howard and Sallee & Slattery for appellant.

E. L. Worthington, C. Burgess Taylor and C. D. Newell for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee, the superintendent of common schools of Mason county, Kentucky, brought this suit against appellant American Book Co. and its sureties to recover on the bond executed to the Commonwealth before the State Board of Education. The bond was conditioned that the principal, the American Book Co., would, if its school text-books were adopted by any of the county boards of examiners of this State, sell to the patrons of the common schools of such counties the books published by appellant, a list of which, with the prices thereof, were set out in the bond, at prices not greater than it sold the same books to the patrons of schools in other States. The bond in this case is in every material particular the same as the one before the court in Commonwealth v. Ginn, 111 Ky., 110.

The facts are that appellant American Book Co., desiring to have its school text-books introduced for exclusive use in some or all of the common schools of this State, complied, as a condition precedent to such right, with the requirements of sections 4428-4434, Kentucky Statutes, by executing the bond for $10,000 to the Commonwealth, conditioned as required by the statutes, and as above stated. Thereafter the board of examiners of Mason county adopted for use in the common schools of that county some of the text-books published by appellant, among them being McMaster's History; Ray's Practical Arithmetic, and McGuffey's Fifth Reader. In the list of books and prices furnished the superintendent of public instruction by appellant these three books were included, and the undertaking of the bond was that their wholesale, as well as their retail, prices fixed in such counties in this State as might adopt them were not to be exceeding the following:

	Wholesale list price.	Retail list price.
McMaster's History	$1 00	$1 00
Ray's Practical Arithmetic	50	50
McGuffey's Fifth Reader	72	72

Appellant book company, as a compliance with its obligations in the bond, sold these books to local retail dealers in Mason county at the list prices fixed in the bond, and above set forth, less 20 per cent. discount, as follows:

McMaster's History	$0 80
Ray's Practical Arithmetic	40
McGuffey's Fifth Reader	58

It bound the retail dealers, by agreements entered into between them to

that effect, that the books should be resold to the pupils at the list prices of $1, 50 cents and 72 cents respectively.

The proof shows that during the period covered by the adoption of these books by the Mason County Board appellant sold the same books to the township boards of education of two townships in Ohio (one in Adams county and the other in Brown county), at the following prices:

McMaster's History	$0 75
Ray's Practical Arithmetic	88
McGuffey's Fifth Reader	54

Under the statutes of Ohio it appears that the State School Book Board is authorized to invite publishers and dealers in school text-books to file samples before them, with their list prices of such books as they proposed to sell for use in the public schools of the State, whereupon, if the board approves the publications as text-books, the publishers or dealers and the State enter into contracts by which the publishers and dealers are bound to furnish the books to township boards of education at prices not exceeding 75 per cent. of the list prices submitted. These facts being certified to the local boards, they are then permitted to adopt such of the publications as may be suitable for their purposes and be chosen by them. The publishers and dealers are required to furnish the books so selected, and none other can be used during the term covered by this selection at the prices fixed with the State Board. The statute further provides: "Each board of education shall have power to, and shall, make all necessary provisions and arrangements to place the books so purchased within easy reach of and accessible to all the pupils in their district, and for that purpose may make such contracts, and take such security as they may deem necessary, for the custody, care and sale of such books and accounting for the proceeds, but not to exceed 10 per cent. of the cost price shall be paid therefor, and said books shall be sold to pupils of school age in the district at the price paid the publisher, and not to exceed 10 per cent. thereof added."

It was also allowed by the Ohio statute that the local boards might arrange with local retail dealers to furnish the books at the prices above specified. The local boards appear to be also authorized to donate the books to pupils, if they chose to adopt that plan. Appellant, in pursuance to the statute of Ohio alluded to, did submit samples and price lists of its school text-books, including the three above particularized, the list prices being the same as those furnished to the State of Kentucky, and entered into contract with the State of Ohio to furnish them to any local board at 75 per cent. of the list prices. The boards of the two townships in Brown and Adams counties then adopted these three text-books, and they were furnished to them, and by them to their pupils, at the following prices:

	Publisher's prices to Township Board.	Board's prices to Pupils.
McMaster's History	$0 75	$0 83
Ray's Practical Arithmetic	38	42
McGuffey's Fifth Reader	54	60

Upon these facts the circuit court adjudged that appellants had violated the undertaking in their bond, and that they pay to appellee for the use and benefit of the common schools of Mason county the full penal sum of

$10,000. Appellants very earnestly insist that under the facts stated they have not broken the bond. They contend that the bond means that their principal would not sell direct to patrons elsewhere at a less price, either by wholesale or retail, than it sold to Kentucky patrons for; that as the sales in Ohio were not to patron pupils, but to the township boards, the property in the books passed out of the book company, and their sale at whatever price by the local boards was, therefore, beyond the book company's control.

If this argument were sound, the Kentucky statute and the bond executed under it would be without value. As a matter of fact, appellant book company does not sell direct to the Kentucky pupil at all, but sells to local retail dealers, who in turn sell to the pupils. Therefore, the argument would lead to this: As the book company sold to neither Ohio pupils nor Kentucky pupils, but in each instance sold to retailers to sell again, over whom it had no sort of control, there could never be a breach of the bond in Kentucky, nor of the Ohio statute; and as the statutes impose no penalties against retail dealers not publishers for selling at any price, nor undertake to regulate their action at all, the whole policy so carefully framed by the legislatures of these States would be abortive of any good result.

What was the object of all this legislation? It is stated in the title of the Ohio Statute to be (so far as that State is concerned): "An act to provide for supplying the schools of Ohio with good and sufficient school books at the lowest possible prices." Of the Kentucky statute this court in the Ginn case, supra, said: "It was the evident purpose of the legislature of Kentucky to provide for the supplying of the school children of Kentucky with proper text-books at certainly not a greater price than the same books were furnished to the school children of other States."

It was believed, and it is no doubt true, that the prices of these books and such publications can be regulated and controlled by the joint action of the State and the publishers. When they agree upon the maximum prices at which they are to reach the pupil, the State thereupon adopting such publications for a period to the exclusion of all others, it is within the intent of the high contracting parties, as well as within the power of the publisher, that the latter will provide means of not only furnishing books of specified grade and quality, but also at the specified prices. It will not do to say that the publisher can not control the price after he sells to the retail dealer. The control of the retail dealer is wholly outside of the question. The publisher obligates himself to furnish the books and fix and maintain the consumption price. If he can not do it through retail dealers they must be discarded, and other means of supplying the demand be substituted.

Appellants extend the argument to say that the book company does not fix the prices of its books in Ohio, but that the State of Ohio fixes them.

This argument is applied alike to the sales by the book company to the township boards and to the sales by the township boards to pupils. In the sales by the book company to the local boards it is not true that the State fixes the prices. They are fixed by the agreement of the two contracting parties, the State, representing the buyers, and the publisher as seller. If the sales were condemnations by the State, if such a thing were allowed, then it might be said that the State fixed the prices. But the publishers are not bound to agree to the terms of the Ohio statute; they are not bound

to sell these books for use in the Ohio public schools at all unless they choose to. When they do accept the terms of the Ohio proposition, and submit price lists, agreeing to take 75 per cent. of them for their books, they thereby fix the wholesale prices of their publication when sold for the public use in that State. They have agreed with Kentucky, and bound themselves thereto by the bond sued on, that they will sell their publications in this State so that they will reach the Kentucky pupils at a price not exceeding their lowest wholesale price for the same books elsewhere. This they have failed to do.

But if the Kentucky statute did not mean what it says, and what was held in the Ginn case, supra, that it meant, that is, that the retail list price in Kentucky was to be as low as the lowest wholesale list price, or the lowest retail list price fixed by the book company for the same books in any other State or country, but was to mean only that the retail list price fixed for Kentucky was to be as low as the lowest retail list price fixed by the book company for the same books in any other State or country, still we conclude that the facts stated show a breach of the bond. It is not necessary in order that the publisher shall fix a retail price list that it shall have recommended or initiated it. It is enough if the publisher sells to a retailer for resale under an agreement that the retailer may resell at the specified retail price list. The retailer can not resell at all unless the publisher first sells him the books with an agreement that he may resell at a stated price, or without any limitation of his right to so sell. When the publisher voluntarily enters into a contract with the State by which the State contracts on behalf of local boards of education who may adopt the books for their purchase at 75 per cent. of their list price, and for their resale to pupils at not exceeding 10 per cent. advance on that cost, the publisher "fixes" the last-named selling prices within the meaning of our statute as a retail selling price of the books in that State. It could not be done except by the publisher's co-operation. The complaint is not that the publisher has sold to Ohio at the prices it did, or that it put the books into the hands of the Ohio pupils at the prices made possible under its contract with that State, but that, having elected to do so, it has not done the same in Kentucky. Appellant's offer to sell the same books to Kentucky boards at the same prices as they are sold in Ohio does not satisfy the terms of their bond to Kentucky; nor is it an argument of any value in the case. The Kentucky Statutes and system do not admit of an acceptance of the suggested offer. It is only a proposition to do something that can not be accepted in lieu of what they had agreed to do.

Appellants say that the cost to the book company in merchandizing these books in Kentucky is an item that must be taken care of somewhere in the transaction, and must have been so understood by the legislature. Selling to retail dealers, they say, must be at such price below the stipulated retail price as to allow a margin to the retail dealer, covering freight, cost of handling, losses from bad accounts, and left over stock, and the like; that the 20 per cent. discount made to the Kentucky retail dealers by the book company was to cover this feature. The argument proceeds upon the theory that the statute was passed to aid, or at least was intended not to interfere with, retail dealers in school text-books. Possibly nothing that could have

been touched on by the statute was further from the legislative purpose. The dominant idea was to procure uniformity of text-books for reasonably long periods at the lowest prices to the pupils. Where the text-books of a publisher were adopted in a county, it was for a term of five years, and was exclusive. It gave to that publisher practically a monopoly of that market for all the books of that grade used in the common schools of that county for a long and definite term. But to obviate the greatest danger of monopoly, namely, extortion, the most exact care was prescribed to insure that the prices of such books to the Kentucky pupil were to be regulated by the most favorable prices at which the publisher sold, or permitted to be sold, the same books elsewhere, whether by wholesale or retail, for, as the whole market in Kentucky counties adopting the books was turned over to that publisher, it was deemed a wholesaling so far as the advantages to the publisher were concerned. It was, therefore, bound to duplicate here the advantages given by wholesale transactions in the same book elsewhere. This idea in the statute is brought out distinctly in the bond sued on, for it is therein stated in most explicit terms that the wholesale and the retail prices were to be the same.

A condition of the bond is that if the principal "failed to comply with any of the provisions of the bond in honor and good faith in selling any books," etc., then the obligors shall be bound as for its breach. The petition alleged a breach of this condition. It is insisted for appellants that the proof fails to sustain the charge. We are consequently called upon to notice particularly this feature of the case.

Appellant book company's attitude in the record is not creditable. The testimony of its assistant manager creates the distinct impression that it has endeavored only to live up to the letter, in utter disregard of the spirit, of its undertaking. He says it has published a price list of all its school text-books. He files a copy of it in the record. It is called neither a wholesale nor a retail price list. The witness declined to say which it was. As a matter of fact it was neither, except, it seems, for the purpose of contracting with the States that have adopted some plan similar to the Kentucky plan of protecting school patrons from frequent changes of text-books, and from extortion and other abuses. The price list, as published by appellant book company, is the one by which it contracted with this State, and embraces the books and identical prices set out in the bond sued on. It seems it was the same price list furnished the State School Book Board of Ohio in making the contract over there. Does appellant company regulate its wholesale transactions by that list? It does not. It sells to Ohio local boards at 75 per cent of those published prices, and to the local retail dealers in Kentucky at 80 per cent., generally, but sometimes at other and less rates. Nor is the retail trade regulated by that list. While it is furnished the local retail dealers in Kentucky, and while they are made to agree that they will observe it in making sales to pupils, yet there is no practical way of enforcing that agreement if appellant's theory of the case should be adopted, for, they say the title to the books and all control over their sale pass from the publishers when they sell to the retailers. The latter are not under legal obligation to the State to sell the books at any particular price. Therefore, if the books should be sold by the retailers in violation of their agreement

with the publishers at a higher price than that fixed by the bond sued on, the book company would not be liable, under its theory, because it had neither made the retail sale, nor had fixed the price at which it was made. The retailer would not be liable on its undertaking to the book company because it had sustained no damage by reason of the transaction.

So, in Ohio, the published price list furnishes the basis for neither the wholesale nor the retail trade, except as a point from which to calculate discounts. The books are sold to the township trustees at less than the published price list, and by them resold to the school pupils of Ohio at less also than the published list. Appellant's contention, that it "fixes" the prices of its publications by the printing or circulation of a price list which is not observed in either the wholesaling or retailing of the books in practical operations, and which is not enforced, will not satisfy the terms of its bond, nor the requirements of the statute under which it had voluntarily sought and obtained the exclusive right to have its publications used in certain of the common schools of this State. Where the statute requires the publishers to "make such arrangements with local dealers or agents to sell such textbooks in sufficient quantities to supply the patrons and pupils * * * at the special retail price list herein provided for," it does not contemplate a violation of the foregoing parts of the act forbidding discriminations against Kentucky consumers; it was not intended that thereby the publisher was to be allowed to put it entirely out of his power to compel the observance of his part of the contract, as, for example, by parting with the title and control of the books to retailers—just the reverse was in mind. The arrangements that were to be made with local dealers or agents were to be such as would make the publisher liable if they were violative of the bond to the State, must be such as to be a discharge of, not to avoid, its undertaking.

The opinion in the case of Mills v. Myers, &c., 24 Ky. Law Rep., 971, is relied on by appellants. That is a manuscript opinion in no sense intended to trench upon the doctrines announced in Commonwealth v. Ginn, 111 Ky., 110, supra, nor does it purport to do so. On the contrary, it expressly states that its facts are different. It may be that the facts of the Mills case are as they appear here, as is asserted in argument. If that be true, it is clear that they were not so understood by the court, or its decision would have been different. The only thing meant to be decided in the Mills case was, that if somebody in another State, and not by the connivance or consent of the book company, sold these publications at a less figure than the Kentucky contract, the bond was not thereby broken. The illustration used, and which evidently had been impressed upon the court as a fact in that case, shows what was intended to be covered by the decision, that is, where department stores offered and sold such books at less than their cost for a day or two to attract customers to their store. Or where, after the sales to the State of Ohio, or its local boards, at a price not less than the Kentucky price, and the local boards, without previous understanding with the publishers to that effect, or in violation of the statute of that State, or under statute passed subsequent to the sale by the publishers, allowing the local board to sell at less prices, sold these books at a lower price than the one fixed here, manifestly it would be a matter not within the power of appellant company to control, and would not, therefore, be a breach of its bond.

The question is re-argued whether the sum of $10,000 can be recovered in one action, upon a breach of the bond, as liquidated damages. The proposition that it can be is assailed upon the ground that penalties, or forfeitures, provided for by contract, which are disproportionate to the actual damages for its breach, are disfavored by the courts, and not allowed. We have re-examined the question, but remain satisfied with the conclusion reached on this point in the opinion in Commonwealth v. Ginn, supra. In addition to the reasons given in that opinion we will add that the penalty imposed on the obligors by this bond is one fixed by the statute. Consequently it is the law that allows its recovery, and not merely the agreement of the parties, as is the case where the courts sometimes relieve the one in default upon a contract because it is a hard bargain and against conscience to enforce it. But a statutory penalty is never void or unenforcible because in the opinion of the court it is harsh; that is a matter solely for the legislative discretion, to correct which is wholly beyond the power of the judiciary. (Clark v. Barnard, 108 U. S., 436.)

The final contention is that the bond is invalid because it was not approved by the State Board of Education. The facts upon this branch of the case are that the bond was executed before and was endorsed "approved," followed by the signatures of the ex-officio members of the State Board of Education, filed in the office of the superintendent of public instruction, and acted upon by that official and by appellant book company, as valid and sufficient. Under it and by authority of its due execution appellant's books and prices were certified to the counties of the State, and adopted by some of them. But there was no entry by the board upon its record book of the fact of its approval. Waiving certain objections as to the time and manner of presenting the objection, we come direct to consider it on its merits. Appellant's argument here is that by statute the Kentucky State Board of Education is a body-corporate (section 4377, Kentucky Statutes), and that as such it is incapable of acting as such except by its record; that the individual approval of all the members of the body-corporate is not equivalent to the corporate approval, and is not the approval of the corporation. A corporation may in such matter speak otherwise than through its records. (Pryse v. Farmers Bank, 17 Ky. Law Rep., 1056; Bank of U. S. v. Dandridge, 12 Wheat., 64.)

Statutes requiring bonds to be approved by certain officials are not for the purpose of protecting the obligors in the bond, but are aimed to protect the public, to insure their solvency, and to create evidence of an unimpeachable character of the fact of their execution. When they are executed for a legal purpose, before a proper tribunal, and are in fact accepted and approved by the officer or body whose duty it was to approve them, it could serve no useful purpose of the law to hold them invalid, to release all the obligors thereon, and to defeat every purpose of its execution, simply because the fact of approval was not endorsed precisely as had been directed by the legislature. The bond is valid if in fact executed, delivered and accepted substantially in the manner pointed out by the law. (Combs v. Breathitt County, 18 Ky. Law Rep., 809; Young v. State, 7 Gill & J., Md., 261; Jones v. State, 37 Am. Dec., 180; Estate of Ramsey v. People, 197 Ill., 572; 64 N. E., 549; 90 Am. St. Rep., 177; Meacham on Public Officers, section 269.)

The statute required the publishers to execute bond before the ex-officio members of the State Board of Education, and it was made "the duty of the ex-officio members of the said State Board of Education to accept and file said bond in the office of the superintendent of public instruction." (Section 4424, Kentucky Statutes.) The approval of the members seems to be the only approval required, and as endorsed on the bond in this case, satisfied every purpose of the law.

Perceiving no error in the record the judgment of the circuit court is affirmed, with damages.

CHICAGO, ST. LOUIS & NEW ORLEANS R. R. CO. v. ROTTGERING.

(Filed December 7, 1904—Not to be reported.)

1. Railroads—Right of way—Question of damages—Verdict of jury—On the trial of the question of damages done to the owner of land by a railroad company for its right of way, the verdict of the jury will not be disturbed unless it is apparent that it is unsupported by or is flagrantly against the evidence, or so excessive as to indicate that it was the result of passion or prejudice.

2. Evidence—Availability of land taken for building lots—In estimating the damages to the owner of land lying near a city, taken for a railroad right of way, evidence is competent to prove that the land taken was suitable for building lots, and also to prove the price at which other adjoining and contiguous lots sold for about the time of such taking.

3. Burden of proof—In condemnation proceedings the party filing exceptions to the report of the commissioners has the burden of proof and the closing argument.

Wheeler & Hughes, J. M. Dickinson and Pirtle & Trabue for appellant.

Bloomfield & Trice for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Settle.

By petition filed in the McCracken County Court as provided by section 885, Kentucky Statutes, appellant instituted proceedings to condemn and thereby acquire, for the purpose of constructing and operating a railroad thereon, a strip of ground 100 feet in width through appellee's land. Upon appellant's application commissioners were appointed by the county court to assess the damages that would result to appellees by the taking of their land and the construction and operation of the railroad. Soon thereafter the commissioners filed their report, in which the value of the land taken was fixed at $300 and the damages to the remainder of the tract at $1,200. Process was then issued against the appellees to show cause why the report should not be confirmed, in response to which they filed answer to the petition and exceptions to the report of the commissioners, in which complaint was made of the smallness of damages allowed, and averring that they were grossly inadequate. Thereupon a jury was summoned as provided by section 839 of the statutes, supra, to try the questions of fact raised by the exceptions.

The trial which followed resulted in a verdict in favor of appellees for

$8,000, and judgment was duly entered condemning the strip of land for use of appellant's road, and directing that it be given possession thereof upon the payment by it to appellees of the amount of damages awarded by the jury. Both parties appealed from this judgment to the circuit court, and upon a trial before a jury in that court a verdict was returned in appellees' favor fixing their damages at $8,500, and judgment was entered in accordance therewith and in proper form, and of that judgment the appellant now complains.

Appellees' tract of land contains 193 acres, and lies on Perkins creek, about one-fourth of a mile from the corporate limits of the city of Paducah, with a frontage of 1,200 feet on the Paducah and Cairo gravel road and extending about the same width from the gravel road to the Ohio river. Perkins creek enters the land at a point about 300 feet from where its west line intersects the gravel road, and running through the land a short distance leaves it by crossing the west line between 400 and 500 yards from the gravel road, thereby cutting off from the main body of the land about eight or ten acres of the southwest corner, which is flat land. But that part of appellees' farm lying on the east side of the creek, extending therefrom to the east line and back from the gravel road, embraces from twelve to fifteen acres of high, fertile and well-drained land, suitable for building lots or for gardening purposes. This part of the land contains an elevated formation called the "mound," supposed to have been made by an ancient race known as the "Mound Builders."

From that part of appellees' land last described the strip desired by appellant for its roadbed was condemned and taken. This right of way, 100 feet in width and containing two and ninty-three one-hundredth acres, begins near the northeast corner of appellees' land, runs diagonally through it and intersects Perkins creek about 400 feet from the gravel road; from there it continues in the same course and leaves the land a few feet east of the southeast corner of the gravel road. It appears from the record that in constructing its road appellant made a cut from sixty to ninety feet in width, and from four to fourteen feet in depth, from where its right of way entered appellees' land to the east bank of the creek, and from there to where it crosses the gravel road a fill from fifteen to twenty feet high was required. By the cut and fill the main part of the farm was separated from that fronting on the gravel road, leaving appellees without any way of crossing the railroad from one point on their land to another, and cutting them off entirely from the eight or ten acres on the west side of the creek, for in order to get to the land on the west side of the creek appellees must travel the gravel road beyond their land and then go through the land of another, and to reach their land on the east side of the creek from one side of the railroad to the other they must go through Maplewood Terrace, a distance of half a mile or more.

It is insisted for appellant, first, that the verdict is not supported by sufficient evidence; second, that incompetent evidence was admitted upon the trial to its prejudice; third, that the court erred in awarding the burden of proof to appellees and in giving their counsel the concluding argument to the jury; fourth, that the court erred in instructing the jury and in refusing instructions asked by appellant. It appears from the record that twenty-

five witnesses were introduced in behalf of appellees, and eighteen in behalf of appellant, upon the trial in the circuit court. We do not think it necessary to undertake a discussion of the evidence in detail. Much of it was conflicting, not, however, as to the main facts, but in the differences of opinion expressed by the witnesses in testifying in regard to the amount of damages sustained by appellees from the taking of their land and the constructing of appellant's railroad thereon. Such of appellees' witnesses as testified in regard to the value of the farm immediately before the taking of any part of it for appellant's road, said it was worth from $18,000 to $20,000. Appellant's witnesses testifying upon this point fixed its value at from $10,000 to $12,000.

Appellees' witnesses fixed the value of the land taken for the right of way at from $1,000 to $2,500, and damages to the remainder of the tract at from $2,000 to $2,500, making the aggregate $3,500 to $5,000. Upon the other hand appellant's witnesses placed the damages sustained by appellees at about half, and in some instances less than half of the amounts fixed by appellees. But there can be no doubt that the jury had sufficient evidence to justify them in placing appellees' damages at the amount named in their verdict, if they were willing to accept the testimony of their witnesses in preference to that of appellant's witnesses, which they evidently did. And we find nothing in the record that tends to show appellees' witnesses any less intelligent or reputable than those of appellant. It does, however, appear that many of them live nearer the land of appellees, and by reason of that fact were probably better acquainted with its value than were the witnesses of appellant.

It is likewise apparent from the evidence that by the construction and operation of the railroad through appellees' land the symmetery of the fourteen-acre lot fronting on the gravel road has been marred, the best building sites thereon practically destroyed, its value for farming purposes impaired and their lands separated by a cut and fill in such manner that they can not cross the railroad to reach a large part of their land, but must get to it by other means and greater distances at considerable inconvenience. The jury were permitted to view the ground condemned for appellant's railroad, and the whole of appellees' farm, and by this means were afforded an opportunity, not only to test the accuracy of what had been testified to by the witnesses and the value of their opinions, but also to ascertain for themselves the extent of appellees' damages.

In view of the evidence and the opportunity allowed the jury to obtain an ocular demonstration of the facts we, are not prepared to say that their estimate of the damages sustained by appellees was excessive, though we think the amount allowed was sufficiently liberal. The question of appellee's damages was one to be tried by the jury, and as has been repeatedly held by this court, their verdict will not be disturbed upon appeal unless it is apparent that it is unsupported by, or is flagrantly against, the evidence, or so excessive in amount as to indicate that it was the result of passion or prejudice upon the part of the jury. It is complained by counsel for appellant that the trial court erred in admitting testimony to the effect that appellees' land fronting on the gravel road was, before the running of appellant's railroad through it, suitable for building lots, and also to prove the

price at which other adjoining and contiguous lands sold about the time appellees' was taken.

As it appears from the evidence that appellees' land was only about a quarter of a mile distant from the corporate limits of the thriving city of Paducah, and that town lots adjoining had been laid off and were in the market for building purposes, we think it was competent to prove the availability and adaptability of their lands for such use as well as for gardening or farming purposes.

In W. Va., P. & T. R. R. Co. v. Gibson, 15 Ky. Law Rep., 7, it is said: "The court allowed the appellee to prove what was the market value of the strip of land, taking into consideration its close proximity to the town of Pineville and its adaptability for town lots and building residences thereon, and for railroad tracks and for other railroad purposes. The question is, was such evidence competent? The rule seems to be that in estimating the value of property taken for public use the owner is entitled to the reasonable market value of the property, which value must be ascertained, not by what use the property has been actually applied, but with reference to its availability and adaptability for valuable uses, having regard to the existing business or wants of the community, or such as may reasonably be expected in the immediate future. The proper inquiry in such case is its value in view of any use to which it may be applied and to all the uses to which it is adapted."

The same rule for ascertaining the value of property taken for public use seems to have been approved by the Supreme Court of the United States in the case of The Mississippi and Rum River Boom Co. v. Patterson, 98 U. S., 403, for in that case it is said: "The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted: that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is enabled to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes that it is, perhaps, impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

As to the evidence in regard to the prices at which other lands near that of appellee's sold, it will suffice to say that such evidence has by this and other courts been declared competent. "Such sales when made under normal and fair conditions are necessarily a better test of the market value than speculative opinions of witnesses, for truly here is where money talks." * * * (City of Paducah v. Allen, 23 Ky. Law Rep., 701; L. & A. and P.

V. Elec. Ry. Co. v. Whipps, &c., 25 Ky. Law Rep., 2312; Railway v. Clark, 121 Mo., 169.)

Though objection is made by counsel for appellant to the instructions given by the lower court, it seems to be conceded that instruction No. 1 is correct. By this instruction the jury were told in substance that in estimating the direct damages, if any were sustained by appellees, they should allow such a sum as they believed from the evidence was the fair and reasonable value of the strip of land taken, considering it in relation to the entire tract, and such other direct damages, if any, as directly resulted to the remainder of the tract on account of the taking of the strip condemned for the use of appellant's railroad, and such additional improvements, if any, as might be necessary to the reasonable enjoyment by appellees of the land, but that their finding, if any, of direct damages, should not exceed in all the amount they might believe from the evidence was the difference between the actual value of the land immediately before and its actaul value immediately after the taking of the 2 93-100 acres by appellant for its right of way.

By instruction No. 2 the jury were in substance told that they might also find for appellees such incidental damages as they believed from the evidence had resulted to the remainder of their land from the taking of the right of way, and the building and operating in a prudent manner of the railroad upon it, but that they should deduct from such incidental damages, if they found any, whatever sum is the worth of the advantage or enhancement in value resulting to the land from the building of the road; and further, that by the term "incidental damages" as used in the instruction was meant all the inconvenience actually suffered by appellees as a result of the taking of their land and its use by the railroad company in a proper and prudent manner.

It will be observed that instruction No. 1 only authorized the finding by the jury of direct damages, such as the value of the land actually taken for appellant's use, the injury to, or diminution in, the value of the remainder of the land from such taking and the cost of such improvements as were rendered necessary by reason thereof, which in this case was additional fencing at a cost to appellees, as shown by the evidence, of $100. Under the law such damages as the jury were by instruction No. 1 allowed to find could not be reduced or set-off by any advantage to, or increase in, the value of the appellees' land that might result from the building and operating of the railroad thereon. But under the second instruction, which permitted the finding by the jury of incidental damages, that is, compensation to appellees for such inconvenience as resulted to them from the taking of their land and its use by appellant, they were directed to deduct therefrom any advantage to or increase in the value of the remainder of appellees' land that might have resulted from the use by appellant of the strip occupied by its railroad.

We are of opinion that the law was correctly given by the court in instruction Nos. 1 and 2, as they conform to sections 13 and 242 of the Constitution, and section 836, Kentucky Statutes. We think it will also be found that the statement of the law as contained in the two instructions in question has been approved by this court in the following cases: W. Va., P. &

T. R. R. Co. v. Gibson, &c., 15 Ky. Law Rep., 7; Asher v. L. & N. R. R. Co., 87 Ky., 394; L., St. L. L& T. R. R. Co. v. Barrett, 91 Ky., 489.

Being of opinion that the two instructions given by the trial court contained all the law of the case, we are unable to see that appellant was prejudiced by the court's rejection of the instruction asked by its counsel. We are unable to sustain the remaining contention of appellant's counsel, that the court erred in adjudging that the burden of proof was upon the appellees. The only questions of fact in the case were tried by the jury, and those questions were raised by exceptions filed by the appellees to the report of the commissioners. No exceptions were filed by appellant to the report, and if none had been filed by appellees the report would have been confirmed by the court. Section 888, Kentucky Statutes, provides that "if no exceptions have been filed by either party, it (the court) shall confirm said report as against the owners not excepting." If after filing the exceptions appellees failed to introduce proof, the exceptions would have been overruled and the report confirmed. Section 526, Civil Code, provides: "The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." Manifestly appellees would have been defeated if no evidence had been given on either side. It follows, therefore, that no error was committed by the court in ruling that appellees had the burden of proof and were entitled to the closing argument to the jury.

Regarding the record free from any prejudicial error the judgment is affirmed.

The Kentucky Law Reporter.

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COURT OF APPEALS OF KENTUCKY.

ALLEN v. BRADY.

(Filed December 7, 1904—Not to be reported.)

Slander—Petition—Actionable words—Under the act of March 21, 1902, making the fraudulent conversion of the property of another a crime, a petition alleging that the defendant, intending to injure the plaintiff in his good name and in his business as a butcher, meatcutter and clerk, falsely and maliciously spoke of him these slanderous words: "Allen has robbed me out of all I made in that butcher shop; he has robbed me of all my profits, and is now living on what he stole from me while he was working for me," charge the plaintiff with a crime, and are actionable per se, as affecting his general reputation and character, as well as his trade or business.

Herschel T. Smith for appellant.

Ed. Thomas and Robbins, Thomas & Tyler for appellee.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Nunn.

The appellant sued the appellee for slander. A demurrer was sustained to his petition; he amended, and a demurrer was again sustained to the petition as amended. We quote the following language from the amended petition: "For amended petition the plaintiff says he is a meatcutter, butcher and clerk in a butcher shop by trade and occupation; is such now and was such before and during the time the defendant made the false and slanderous statements herein complained of, and was such when the false and slanderous statements in the original petition were made of and concerning him, and he says that in pursuit of his trade or business it becomes, and is necessary, and he does, in the prosecution of his business, handle, collect and make change with money belonging to the person or persons for whom he cuts meat and clerks, and that he has not, nor had he at the time of the slanderous statements complained of, any other trade, occupation or business. He alleges that he worked for defendant in his capacity and character as meatcutter, butcher and clerk. He says that the defendant, with the malicious purpose of injuring and intending to injure his good name, credit

and reputation and to bring plaintiff into disgrace and disrepute as a clerk, meatcutter and butcher among the people of this State and county, spoke and published of and concerning this plaintiff in his trade, business and occupation the following false, malicious and slanderous words: 'Allen has robbed me out of all I made in that butcher shop; he has robbed me of all the profits, which amounted to several hundred dollars, and is now living on what he stole from me while he was working for me as a meatcutter and butcher.' "

To maintain an action for slander for injury to the general reputation or character it is essential that the words spoken should contain an express imputation of some crime for which the party is liable to punishment.

To maintain an action for slander for injury to one's trade or business it is essential that the words spoken must be calculated to affect the party prejudicially in the trade or business in which he is engaged. The language quoted, considered in connection with the fact that appellant was an employe of appellee in a butcher shop, as butcher and clerk, and by reason of this position and trust received the money from appellee's customers and had the custody thereof, clearly charges that appellant in effect had fraudulently converted the money of appellee to his use and was then supporting his family upon it, which, as it existed under the law prior to the taking effect of the act of March 21, 1902, with reference to the fraudulent conversion of the property of another, was not a crime, but only a breach of trust. But the act of March 21, 1902, made this a crime (24 Ky. Law Rep., 2352), and since appellee was charged with this misappropriation after the act took effect, he was charged with a crime, and, therefore, the language was actionable per se, as affecting his general reputation and character, as well as affecting his honesty and integrity in the trade or business in which he is engaged.

There were other alleged slanderous words quoted in the petition which we deem it unnecessary to notice in detail as we apprehend that the lower court will have no trouble in applying the principles herein enunciated to them. (Fred v. Traylor, 24 Ky. Law Rep , 1906; 2 T. B M., 65; Macauley v. Elrod, 16 Ky. Law Rep., 292; Cooley on Torts, pages 196 and 202.)

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

LOUISVILLE RAILWAY CO. v. HARTMAN'S ADM'X.

(Filed December 7, 1904—Not to be reported.)

1. Instructions—An instruction is objectionable which particularizes and gives undue influence to particular facts proved.

2. Evidence—Peremptory instruction—Where there is any evidence that will authorize the verdict the court should not give a peremptory instruction, and in this action, if the theory of appellee as to the negligence of appellant was correct, the peremptory instruction asked by appellant was properly overruled.

Fairleigh, Straus & Fairleigh and R. L. Greene for appellant.

Weaver & Bensinger and Samuel D. Hines for appellee.

Appeal from Jefferson Circuit Court, Common Plea Branch, First Division.

Opinion of the court by Judge Nunn.

This action was brought by Corilla Hartman, administratrix of the estate of her husband, Charles Hartman, against the appellant to recover damages for the death of her husband, who was run over and killed by a car of the appellant company. The accident occurred June 15th, 1908, at or near the corner of Fourth avenue and "N" streets, in the city of Louisville. It was alleged in the petition that the decedent was a messenger on the South bound Fourth avenue car: that he alighted therefrom at "N" street and was immediately struck and run over by a car coming from the opposite direction, that is, north bound. The usual charges of negligence and carelessness were made by the appellee. The usual denial of negligence and the allegation of contributory negligence were made on the part of the appellant. The jury returned a verdict in favor of appellee for $1,500. The appellant asked and was refused a new trial, and is here on appeal. The appellant claims that the court erred in refusing to give to the jury a peremptory instruction to find for it, and also in refusing to give an instruction marked "D."

It was agreed in the proof that decedent was a passenger on appellant's south bound car, which ran on its western track on Fourth avenue. Appellee's proof tended to show that when the car arrived on the south side of "N" street, where it crosses Fourth avenue, the decedent alighted from the car and passed around the back end of it. When he reached the eastern track on Fourth street another car of appellant coming from the south struck him and ran over him, carrying him from the point where he was struck near the south boundary line of "N" street across "N" street to a point about 80 feet north of the north line of "N" street, where the car was stopped and the body of decedent was found back of all the wheels of the car, and under the rear platform of it; that the car when it struck him was traveling at a rate of 15 or 18 miles per hour. A portion of the scalp of the decedent, with hair attached to it was found, on a rail of the eastern track in about four feet of the south line of "N" street.

Appellant's proof tended to show that the decedent was struck at the north line of "N" street, and that he was only carried 30 or 35 feet before they could stop the car. Appellant's motorman stated that he saw the decedent when within about 50 feet of him, and he appeared to be about to cross the eastern track, upon which his car was moving north; that he noticed the decedent halt as though he had determined to let the car pass before crossing the track; that he then turned on the power, but at that moment the decedent started ahead and went upon the track; that he then used all the diligence and power that he possessed to prevent the car from striking him, but failed. If appellee's theory was correct there was certainly evidence upon which to submit the case to the jury, and the court did not err in refusing a peremptory instruction.

Instruction "D" offered by appellant, which the court refused to give, is as follows: "If the jury believe from the evidence that the plaintiff's intestate by any movement or action in the street indicated to the defendant's motorman in charge of the car that injured plaintiff's intestate that he

(intestate) would remain in a place of safety until the car passed, and that thereafter the said intestate changed from such position into a place of danger, so close to the approaching car that his injury could not have been prevented by the exercise of ordinary care in stopping the car after the intestate thus changed his position and gave the indication as aforesaid, then the law is for the defendant, and the jury should so find." This instruction was objectionable for the reason that it particularized and gave undue prominence to the particular facts proven. (22 Ky. Law Rep., 92; 23 Ky. Law Rep., 431.)

The instructions as given by the court presented for the consideration of the jury every phase of the case as presented by the pleadings and evidence and were well prepared and unobjectionable, as repeatedly held by this court. (See the cases above referred to and 20 Ky. Law Rep., 1845.)

Wherefore the judgment of the lower court is affirmed.

BRAMBLET v. COMMONWEALTH LAND AND LUMBER CO., &c.

WINTER'S EX'OR, &c. v. MILLER, &c.

(Filed December 7, 1904—Not to be reported.)

1. Corporation—Director—Acceptance of office—One who is elected as director of a corporation must accept the office in some way before he can become such officer, and the acceptance must be during the term for which he was elected. Holding over applies only to officers who were elected and installed during their term.

2. Insolvent corporation—President—Buying its debts for speculation—A president of an insolvent and failing corporation can not traffic in its property to his advantage and to its disadvantage, or buying debts against it at a heavy discount and then assert them for full value. Whether he acts from a mistaken notion of his rights or from an actually fraudulent purpose is immaterial as affecting the invalidity of the transaction.

3. Stockholders—A mere stockholder in a corporation, unlike a director, is under no duty to serve his corporation. He may deal with it or its debts, or property, as any stranger.

4. Stockholders—Buying judgments against company—Buying company property at public sale—Appellee company being largely in debt and disorganized and the other stockholders refusing to advance money for its relief in payment of judgments against it, appellant, who was a large stockholder, for the purpose of saving his investment therein, as well with a view to a possible speculation, bought judgments against the company, amounting to about $65,000, for $10,000, which he paid in cash and had same assigned to him, and at the sale of the property under these judgments bought the property for $65,000, for which he gave his bond and paid $10,000 on the bond to remove prior liens on the land. Appellant being about to realize on his purchase, the other stockholders of the company are claiming the right to share equally with him in his profits. Held—That they having refused to bear any of the risk or burdens, are not entitled to any of the benefits of appellant's purchase.

5. Restoration—If the company wants the land it must relieve appellant and take it cum onere, but before it will be allowed to do that it must restore to him all he has paid out and all his expenses incurred in that behalf, including $10,000 paid for the judgments, $10,000 paid on the purchase bonds, with interest on both sums' nd his costs in the suits enforcing

liens, including his personal traveling expenses, reasonable compensation for his personal services, fees paid counsel and expenses incurred in defending and perfecting the title to the land since he bought in these judgments, these being betterments which enhance the value of the land.

6. Services—Benefit of constructive trustee—While one may not make himself by his voluntary action a creditor of an unwilling property owner, by rendering services on the latter's behalf, yet where the services are rendered by one in the honest belief that the property is his, and afterwards another recovers it from him as a constructive trustee, to the extent that the former's labor and means have enhanced the value of the property taken from him he should be reimbursed.

W. S. Pryor, Helm, Bruce & Helm for George W. Bramblett.

Carroll & Carroll for bondholders.

O. A. Wehle and Albert S. Brandies for stockholders.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge O'Rear.

In 1887 Thomas F. Hargis and J. M. Fetter sold to the Commonwealth Land & Lumber Co., a Kentucky corporation, several boundaries of land, said to be situated in Harlan county, Kentucky, taking the company's notes for some $35,986, in the aggregate, to evidence the purchase price to be paid. Thomas F. Hargis was the president of the Commonwealth Land & Lumber Co., and continued to be throughout the transactions discussed hereinafter. One-half of the foregoing purchase money notes, or say $17,968, belonged to Hargis, and were by him assigned as collateral to the Kentucky National Bank to secure a debt owing it by him of $22,853.70. Hargis also assigned as collateral on his note 764 shares of stock in the Commonwealth Land & Lumber Co., which he owned and which stood in his name. Later the Commonwealth Land & Lumber Co. borrowed $5,200 of the Kentucky National Bank, to secure which Hargis, as president of the Commonwealth Land & Lumber Co., pledged 280 shares additional of its stock to the bank as collateral security. This stock also stood in Hargis' name. One of the other land notes had been assigned to the Falls City Bank.

The purchase money notes not having been paid when due, the banks brought suit on them in the Jefferson Circuit Court and recovered personal judgments. On these judgments executions were issued, which were returned "no property found." The Kentucky National Bank also sued Hargis on his note for $22.853.70, to secure which the judgment against the Commonwealth Land & Lumber Co. was then held as collateral. Hargis interposed various defenses, so the case did not come to trial. Then attachment suits, based on the returns of "no property," were instituted by the banks (judgment creditors above) under section 439, Civil Code, against Commonwealth Land & Lumber Co., and attachments levied on the Harlan county lands. On account of the remoteness of their situation, and the indefiniteness of their location, and the fact that Hargis, who alone, it seems, had enough information concerning them to identify them whilst he was being sued, withheld it from the banks and their counsel, the cases dragged along, without any material progress being developed for many years. One of the witnesses, Murray, president of the Kentucky National Bank, thus

expresses the situation as it impressed him, and which, from the proceedings, may have been the common belief of the other creditors: "The fact is that there was so much and there was so little of real record and want of knowledge that I did not know in this whole business of the Commonwealth Land & Lumber Co. how to proceed, and was finally glad to get away from it as we were near death. * * * All of us, Mr. Davie and myself, worrying with Hargis and the whole business, trying to find titles. We were quite worn out with endless litigation, want of knowledge, faithlessness and fraud of the whole business generally. So that Mr. Davie, the counsel of the bank, and myself were so anxious to get to the end of it that we were glad to find a buyer who would give even so reasonable a price as we got for what we had." Pending these proceedings Hargis undertook to negotiate a sale of the lands to foreign buyers. A number of fair-promising efforts proved fruitless. Finally a Denver, Colorado, syndicate contracted for the property, and it appeared for a while that the sale would be made at a price that would realize at least $7,500 to whoever had the ultimate right to the assets of the Commonwealth Land & Lumber Co. It was at this juncture that Hargis induced appellant, Geo. W. Bramblet, to enter with him into a scheme by which they were to become solely entitled to these assets. Hargis was impecunious. Bramblet had some means and credit, was an old personal friend and comrade of Hargis, and had already embarked considerable money in the enterprise as a stockholder in the company, as well as had advanced large sums to or for his friend Hargis. The latter suggested that Bramblet should buy up the judgments against the Commonwealth Land & Lumber Co., which by that time would amount to about $67,000 or more, and which, by reason of the obfuscation created by Hargis' defenses to his suit and the withholding by him of information concerning the location of the lands, the state of the titles, etc., could be had at a very small price. Hargis "sounded" the banks, as he puts it, and it was learned that these judgments could be bought for $10,000. When it appeared morally certain that the Denver deal was to be a success Hargis and Bramblet agreed that the latter should furnish the money and buy in the banks' debts, and then that they, Bramblet and Hargis, would divide the profits of the deal on an agreed basis. Bramblet did furnish the money, $10,000, bought the judgments of the banks, and the collateral held by them, including the certificates of stock pledged by Hargis. Hargis joined in the transfers. But the Denver deal fell through. Nothing came of it. After some time Bramblet took up the suits, and pressed them with vigor and effect, resulting in judgments sustaining the attachments and vendors' liens acquired by him from the banks, decreeing a sale of the lands, and generally bringing the situation to a head. At the decretal sale he became the purchaser at about $65,000, and executed his bonds for the purchase money. There were some liens ahead of his, to discharge which he has paid into court about $10,000 of the sale bonds. At this stage of the proceedings certain minority stockholders of the Commonwealth Land & Lumber Co. have come into court, and ask that Bramblet's purchase of the banks' judgments be adjudged to have been for the benefit of that company in trust, and that the proceeds of the sale of the lands to him be distributed by first crediting him with the sum paid out by him in purchasing the judgments, and the residue

to the corporation, the Commonwealth Land & Lumber Co. This claim is based upon two grounds: First, that Geo. W. Bramblet, when he bought the judgments against the company, was a director of the company, and was, therefore, prohibited by law from assuming a relation to it inconsistent with his duty as director and quasi trustee; second, that Hargis, the president, was under like disability; that his transaction with Bramblet was a fraud upon the rights of the corporation and its stockholders, and that Bramblet having notice of it, is prohibited from profiting by it, and that whether Bramblet had notice or not of the fraud, still he will not be allowed to profit by it because to do so would be against public policy.

Early in the history of the Commonwealth Land & Lumber Co., some eight or ten years before Bramblet bought in the judgments from the banks, he had been elected a director of the company. He was not present, and his stock was not represented at that meeting. His election was for one year, "and until his successor was elected and qualified." Bramblet did not accept the office, and did not attempt to qualify or act as director at any time during the year, nor does he appear to have known of it during that year. No other election was ever held. Many years after Bramblet's election, and indeed after he had bought these judgments, he appears to have been present at one meeting, of which the minutes state that he was present as director; that Bramblet understood he was present in that capacity does not clearly appear. On another and later occasion he is said to have represented himself as being a director. He denies this. But be that fact as it may, we are satisfied that it did not constitute him a director. Whether he might have been estopped as against the person to whom he made the representation, who was a stranger to the corporation, is immaterial here. One elected to an office must accept it in some way before he can be said to have become an officer. And he must accept it during the term for which he was elected. Holding over applies only to officers who were elected, and installed during the term. We conclude that Bramblet was never in fact a director of the company. On the second ground there is more difficulty. We have no hesitancy in declaring the law to be that a president of an insolvent and failing corporation can not traffic in its property to his advantage and to its disadvantage, or buy in debts against it at heavy discount and then assert them for full value. To the argument that it does not matter to the corporation who owns its debts, so it honestly owes them, and that it is immaterial to it whether its president gets them for nothing, as it does not have to pay any more than it actually owes in any event, the answer is, it does matter, for human nature is not so constituted that the same person can fairly represent opposing sides of the same question—can not be both creditor and debtor. The corporation was entitled to the untrammeled judgment and efforts of its president in administering its affairs in its behalf exclusively. When he assumed an attitude wherein his personal interest came into conflict with his duty to his corporation, where he would be tempted to serve it less diligently in order that he personally might profit by his relaxation of official vigilance, his disloyal act to his company will be turned aside from his pocket, and the profits of his speculation will be turned into the corporation. The policy of the law is to insure fidelity of trustees to their trusts by making it impossible for them to profitably neglect or abuse them. Whether the derelict officer acts from a

mistaken notion of his rights, or from an actually fraudulent purpose, is immaterial as affecting the invalidity of the transaction. The principle is too well settled to require elaboration. (Thompson on Corporations, sections 4040; Widrig & Co. v. Newport Street Ry. Co., 82 Ky., 511; Cov. & Lex. R. R. Co. v. Bowler's Heirs, 9 Bush, 468.)

Although Judge Hargis may have believed that the stockholders had abandoned the property, and that in consequence he would, unless he could save it by the plan which he followed, lose ultimately all he had invested in the corporation, and although he may not in fact have had bad motive against the stockholders' interests, yet his duty as president of the corporation is not to be measured by fears of his personal loss. He was bound in law to serve the interests of all alike in that crisis of the corporation's affairs. Taking advantage for his own sake of the necessitous condition of his corporation, is deemed in law constructive fraud. The effect of it, in so far as it allows the corporation to go behind his action, is the same as if he had been guilty of actual fraud. That there was actual fraud on his part is not found to be a fact.

But what is the effect of Hargis' connection with Bramblet in the matter? It may be conceded that Bramblet alone had the right to buy in the judgments at whatever price he could get them, and then to enforce them for their full amount against the company, although he was a stockholder in the company. A mere stockholder, unlike a director, is under no duty to serve his corporation. He may deal with it or with its debts or property as any stranger. The president's illegal connection with the transaction taints it throughout. Neither he nor any one claiming through him can be allowed to profit by it. If his partner were allowed to hold his part of the profits, giving the president's part to the corporation, then the law would be favoring at least partial faithlessness upon the part of corporate officials. Just how much of appellant's share of the profits depended upon the president's abdicating his oversight of his company's interests, and what part of it was dependent upon the illegal bargain by which the president (or his wife) was to share in the profits, it is impossible to determine. The chancellor will not hazard a guess in an effort to apportion them, but will resolve the doubt by giving the profits to the cestui que trust whose interests have been sacrificed by their trustee (Mitchum's Heirs v. Mitchum's Adm'r, 3 Dana, 261; Hoffman, &c., Co. v. Cumberland C. & I. Co., 1 Md., 456; Hull v. Chaffin, 49 Fed. Rep., 524), which brings us to consider upon what terms the complaining stockholders, on behalf of their corporation, will be granted equitable relief.

In addition to the facts already stated it appears from the record that Hargis had for years been trying to get the stockholders to advance more money to relieve the company of the embarrassments of its debts. But they had declined. They would not attend meetings. They seem to have practically abandoned the property to the mercy of the creditors and to chance. Bramblet was one of the heaviest stockholders. He continued to co-operate with Hargis, as in this way only did it seem possible to save any of his investment. After these many years of apparent abandonment and neglect by all other stockholders, with their express refusal to co-operate further, it may well have been deemed futile to call them to a meeting which it was known in advance they would not attend, in order to submit to them a

proposition to put up this $10,000 to buy in the bank's judgments, when they had already refused to advance more money for any purpose. The corporation was a derelict, its assets salvage, so Bramblet not unnaturally thought. It was hazardous and difficult to rescue it, more so it seems than even Bramblet realized. Yet he put in his time, labor, money and credit, involving years of hard toil and the involvement of a fortune. Just as it appears that he has cleared away the most of the difficulties, and is about to realize on his undertaking, the other stockholders claim the benefits, or the right to share equally with him in them. We can not approve the method by which Bramblet acquired the judgments against the company, although we do not find and can not say that he was guilty of actual fraud in the matter. Nor can we approve of the negligence of the other stockholders, and their selfishness in endeavoring to hold Bramblet to his purchase, giving him only a share of the profits, without their paying any of the money. They ought to have offered to take Bramblet's place; to have repaid to him what he had paid out on behalf of the company, and that ought to have been done under the circumstances of this case as a condition precedent to their right to recover anything. The judgment of the chancellor merely giving Bramblet a lien on the property, or a credit on his purchase money bonds for what he had paid out in buying the judgments, is not full equity in the case. These lands may or may not have good titles. They may or may not be worth $65,000, more or less. But for the belief that he owned the judgments for more than $65,000, which were liens against the land, Bramblet may not have bid that amount for them at the decretal sale, and may not have bid at all. The stockholders did not promptly come in as soon as Bramblet began to assert his ownership of the judgments and attempt to enforce them, and ask that the corporation be substituted to his purchase of the judgments, but they stood by and let him prosecute the judgement, to a sale, and confirmation of it, under the belief on his part that he owned the judgments. The corporation can not affirm part and repudiate part; it must take the whole or none. So if the corporation wants the land, it must relieve Bramblet and take it cum onere; but even before it will be allowed to do that it must restore to him all he has paid out, and all expenses incurred by him on that behalf. That includes the $10,000 paid the banks, and interest on it; the sums paid on the purchase bonds and interest on them from the dates of such payments; it includes his costs in the attachment suits and in enforcing the liens; also including his personal traveling expenses and a reasonable allowance to him for his personal services in attending to these suits, and looking after these lands; it also includes fees paid counsel and expenses incurred in defending and perfecting the titles since he bought in these judgments. These things are in the nature of betterments, made by one in possession, under an honest belief that the property was his They have gone to enhance the value of the corporation's title, and are just what it would have had to pay out but for the fact that Bramblet has already done it. They were necessary expenses, like taxes are. There is no reason why Bramblet should bear this great burden for the corporation. In equity he should not. He is not a volunteer. His action was not mala fides. He believed he had the right to do just what he did, and believed that was the only way in which he could save his previous investment. Nor is there any reason why equity should compel him to give

his personal services and time to the corporation. He did not agree to nor intend to nor was he anywise bound to. While one may not make himself by his sole voluntary action a creditor of an unwilling property owner by rendering services on the latter's behalf, still where, in a case like this, the services are rendered by one in the honest belief that the property is his, and afterwards another recovers it from him as a constructive trustee, to the extent that the former's labor and means have enhanced the value of the property taken from him he should be reimbursed, for while the property may belong to the other party, the labor and material and money of the unintentional wrongdoer, who has honestly improved it, do not.

If the stockholders representing the corporation elect for it, after this knowledge of what they will have to assume, to take Bramblet's place in the purchase of the corporation's judgment debts from the banks, then they should be required within the time indicated below to make the election and to pay to Bramblet the money and interest already advanced by him and shown now by the record, and pay as hereinafter directed the expenses and costs incurred by Bramblet in behalf of the title, including a reasonable compensation for his personal services, as indicated in this opinion. As the corporation seems to be without a necessary complement of officers, who are qualified to act in this matter, and as Bramblet, now the owner of a majority of the stock, may not care to co-operate with the minority stockholders in their scheme of redemption and liquidation, and owing to having a personal interest antagonistic to the other stockholders, may not, or will not, be apt to select directors who would fairly reflect the minority's interest, it occurs to us that a receiver ought to be appointed by the court in this action for the Commonwealth Land & Lumber Co. (if one has not been already appointed), who would be authorized and directed to act for all the stockholders. If the minority stockholders on behalf of the corporation do elect for it to be availed of Bramblet's purchases, the receiver may carry into effect any feasible plan offered, and which may be approved by the court, for perfecting the redemption of the lands and the liquidation of the corporation. In order that the stockholders may be enabled to act intelligently in making the election, appellant Bramblet is directed to submit and file in the circuit court within thirty days an account of the expenses that may be claimed by him under this opinion. If not accepted by the minority stockholders, they may file exceptions to such items as are deemed improper. The parties then should be confined by order of the circuit court to thirty days within which to take proof before the commissioner, who, from the proof and the record, should be authorized to fix the amount to be paid to appellant Bramblet under this opinion. Within fifteen days after such report the election herein allowed must be made, and if it be to accept the property, the amounts allowed and covering all matters indicated herein must then be paid in cash to appellant, Geo. W. Bramblet, who, in that event, will be released from all further obligation on the sale bonds executed by him in this case. Thereupon immediately the complete title of all parties to this suit to the lands and assets of the Commonwealth Land & Lumber Co. will become vested in the receiver of the Commonwealth Land & Lumber Co., for sale or other disposition, to carry out the directions of this opinion and the judgment of the circuit court thereunder, and looking to as speedy

liquidation as the circumstances will admit of. The purpose, and it is hoped the effect, of all this will be to render to each his own; to allow all to act understandingly; to take all power from any one to oppress the others; to give each as complete authority as is possible, consistent with the rights of others, and to terminate a relationship anomalous in its antagonisms and inharmoniousness.

Until the election is made the circuit court will not enforce the collection of the sale bonds executed by appellant Bramblet.

Upon the failure of the minority stockholders and the Commonwealth Land & Lumber Co. to make such election and payment, their cross petition and claim should be dismissed and Bramblet's purchases be confirmed.

Counsel for the minority stockholders ask in addition that Bramblet's purchase of Hargis' stock, included in the transfers by the banks, should be held to also inure to the benefit of the Commonwealth Land & Lumber Co. On this point the circuit court decided in favor of Bramblet, and the Commonwealth Land & Lumber Co. has prosecuted a cross appeal. In this part of the judgment we think the circuit court was right. The stock did not belong to the corporation. Bramblet had the right to buy it. In the joint agreement between Bramblet, Hargis and the banks it was agreed that this stock was to be released of the lien to the banks, and be assigned to Bramblet. The banks have no further interest in it, and are not complaining. Hargis joined in the transfer of it to Bramblet. His representatives are not complaining, if they have any complaint. The stockholders say that as the corporation is made to repay Bramblet the full $10,000 paid by him to the banks for the judgment and liens, including the stocks, that it should have all that Bramblet got for the $10,000, or at least have credit for the value of the stock retained by Bramblet. Bramblet was not the corporation's agent, but was acting for himself. In addition to what he paid to the banks there were other transactions between him and Hargis, which may have furnished, and doubtless did furnish, the real consideration for the transfer of Hargis' stock to Bramblet. Besides all that, if the corporation had with its own money, $10,000, paid off its debts owing the banks, on which there was pledged collateral belonging to another who had put it up as an accommodation to the corporation, it would not have been entitled to the collateral, but the owner would. In that event the stock would have gone to Hargis. So it was competent for him, then, to transfer it to Bramblet without just complaint from the corporation. There is another branch of this litigation known as the bond branch. It will require a separate and further statement of the case.

Thomas F. Hargis, as president of the Commonwealth Land & Lumber Co., conveyed by deed all the lands of that company to the North Cumberland Manufacturing Co. The grantee was a corporation, organized by Hargis. It never had any money or property. The deed of conveyance to it recited the consideration as being $110,000, $40,000 of which had been paid in cash, and the remaining $70,000 secured by lien on the land in favor of the grantor, Commonwealth Land & Lumber Co. In fact nothing was paid. Hargis seems to have been managing the newly-created North Cumberland Manufacturing Co. On his advice it executed a mortgage on all this land to the Minneapolis Trust Co., trustee, to secure $500,000 of mortgage bonds,

issued by the North Cumberland Manufacturing Co., payable in ten years to the Minneapolis Trust Co., of Minneapolis, Minn., trustee, or bearer. Each bond had ten annual interest coupons attached to it, the interest being payable annually.

After the banks, creditors of the Commonwealth Land & Lumber Co., had brought their attachment suits against that company, and had caused their attachments to be levied on all its properties, including the lands conveyed to the North Cumberland Manufacturing Co., and attacking the validity of the conveyance to that company as well as of its mortgage to the Trust Co., all of them being made parties defendant to the creditors' bills, Hargis sold about $168,000 of these bonds to appellees, Miller and Kilgore for about 2 per cent. of their face value. The bonds were sold and delivered some seven years after their date, and had attached to them all the interest coupons. The circuit court adjudged that Miller and Kilgore, who set up the bonds held by them and claimed a prior lien on the land therefor, should recover the sums paid for them, and not their face value. From that judgment the corporation and its stockholders appeal. The bonds were not negotiable instruments under the statute then in force in this State. (Schnable v. German Am. Title Co., 21 Ky. Law Rep., 1063; Louisville Ins. Co. v. Hoffman, 20 Ky. Law Rep., 2016.)

Or if they be deemed obligations payable i n Minnesota and be judged by the laws of the State, yet the fact that interest coupons were so long overdue and unpaid and attached, as well as the absurdly low price at which they were sold, were enough to give notice of infirmity to the purchasers and to have put them upon inquiry which would have led to a discovery of the truth. (Daniel on Neg. Instruments, 777a.; Parsons v. Jackson, 99 U. S., 434; First Nat. Bank v. Commissioners of Scott Co., 14 Minn., 77.) But although the bonds were issued and by their terms made payable in Minnesota, their security, the mortgage, by which alone they constituted a lien upon the land now sought to be subjected to their payment, was executed and recorded in this State upon property situated here. The validity of that lien is a matter to be tested by the laws of this State alone. We have no hesitation under the evidence in declaring that the fact was that the deed to the North Cumberland Manufacturing Co. was executed to hinder and delay the creditors of the Commonwealth Land & Lumber Co.; was in law in fraud of the rights of the creditors of that corporation, and was void as to them. (Section 1906, Kentucky Statutes.) The holders of the bonds took them with notice of their infirmity, including the fact that they issued lis pendens, and were subordinate to the rights and subject to the final decree in the attachment suits referred to. (Taylor v. Building, &c., Association, 22 Ky. Law Rep., 1560.) The Commonwealth Land & Lumber Co. approved of the transfer to the North Cumberland Manufacturing Co. The same authority was authorized to act for both, and did act for both. The president of the two companies sold these bonds, with their knowledge, to raise funds to meet certain urgent needs of the company. He testifies that the money realized from the sale of the bonds was so used. It, therefore, seems to us that, as between the Commonwealth Land & Lumber Co. and these bondholders, the latter are entitled to be reimbursed the money actually advanced by them, not the face of the bonds, and six per cent. per annum interest on the

sums so advanced. The mortgage given to secure these bonds is, however, subordinate to the purchase money lien notes and interest, and the costs of the suits of the banks and their assignee, Barmblet, to enforce them. It then follows that if the election above provided for is not made, or the money under it is not paid to Bramblet, the holders of the bonds will be postponed till Bramblet's acquired liens and costs are paid. If the election is made and perfected, the bondholders' liens will be reckoned as preferred liabilities of the corporation.

Wherefore, we conclude that the judgment should be affirmed on the cross appeal of the Commonwealth Land & Lumber Co. and its stockholders against Bramblet, and be reversed on the original appeals of Bramblet against Commonwealth Land & Lumber Co., and its complaining stockholders, and be also reversed on the appeal of Julius Winter's executor, etc. (the Commonwealth Land & Lumber Co., and its stockholders) against P. Galt Miller and Kilgore. In so far as the judgment is reversed the cause will be remanded for further proceedings not inconsistent herewith.

LUDLOW LUMBER CO. v. KUHLIN, &c.

(Filed December 8, 1904.)

1. Contract—Damages for breach—Acceptance of building—In an action by the owner of a house against the contractor for damages for its defective construction, the fact that the owner accepted and occupied it for more than eight months before discovering the defects will not prevent a recovery for a breach of the contract.

2. Discovery—Reasonable time—Even if the law is that a discovery of the defect must be made in a reasonable time (which it is not necessary here to decide), the failure to make the discovery before eight months is not an unreasonable time.

Furber & Jackson and B. F. Graziana for appellant.

William A. Byrne for appellees.

Orlando P. Schmidt for B. C. Davis.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Paynter.

The appellees owned a lot in Ludlow, and desiring to have a brick house built upon it they entered into a contract with T. Johnson and others, as partners, doing business under the firm name of Ludlow Lumber Co., by which they, in consideration of $2,100, agreed to furnish the material and labor and erect the house according to the plans and specifications. It was completed in October, 1901, when it was turned over to the appellees under representations by the appellants that it had been completed according to the contract. The appellees lived in it until May, 1902, a period of eight months, when they awoke one morning and found the walls of the house badly cracked and out of plumb, and it cost them several hundred dollars to repair the foundation and house. This action was brought against appellants to recover damages for the defective construction of the house. The defendants sought to avoid a recovery by showing that it had been com-

pleted according to the contract, and that the damages resulted from a cause other than defective construction. The verdict of the jury, which was sustained by the court, and upon which the judgment was rendered, allowed the plaintiff $388.95.

There was a conflict in the testimony, but it was the province of the jury to reconcile it, and having done so, this court must decline to disturb the finding of the jury upon the question of fact. The principal reason urged for a reversal is that the appellees accepted the house and moved into and lived in it for eight months before discovering the alleged defect. Even if there had been a defect in the construction, and they had knowledge of it before moving into the house, that fact would not prevent them from recovering for the breach of the contract. The law on this question is well stated in Morford v. Mastin, &c., 6 T. B. Monroe, 409, in which the court said: "We are unwilling to attach so much importance to the defendant's receiving the work. How could he reject it without abandoning his estate on which it was situated? It was already part of his freehold, and he received every part as it progressed. The court seems to have confounded the case of a building on an employer's premises with such jobs of work and labor as a tailor performs in making his garment, the cabinet maker his furniture, or the painter his figures. In these latter cases it is admitted that much depends on the acceptance of the article made, and not objecting to it, and rescinding the contract so soon as the defect is discovered, and that for a very good reason, because it is necessary to do justice to the mechanic by repossessing him of the article out of which to make his money, instead of keeping both the article and the price. Hence Starkie, volume 3, page 1769, says: 'Notwithstanding the universality of the position, that performance when it is the consideration for the payment of the stipulated price is a condition precedent, yet the conduct of the employer in adopting the contract, when if he disputed the performance he had it in his power to rescind it in toto, by placing the parties in statu quo, affords, as against him, a conclusive presumption that the work has been properly executed, or at all events excludes the party acquiescing from making the objection. Instances to this effect have already been cited. The principle extends to all cases of executory contracts, for works of art to be delivered in a complete state. The party receiving the work under a specific contract must abide by it, or rescind it in toto.' But it is well known that such return and such rescinding of a contract is impracticable with regard to a building erected on an employer's own premises. He could not object to the work and leave it on the hands of the workmen, without conveying away his estate, nor could the mechanic receive or sell it for his own indemnification. Hence the reception, that is, leaving it on his premises not demolished, or even living in it, could not, with any good reason, preclude the employer from making the objection on the trial, as the instruction given supposes."

The case of Escott & Son v. White, &c., 10 Bush, 169, is to the same effect. The legal principle announced by these cases was applied by this court in its instructions, and we think properly so. However, counsel for appellant insists that the principle of the Morford case does not apply, because in that case the defect was discovered before taking possession of the property and

before all of the contract price was paid. The right to recover in that case was not based upon the fact that the defect was discovered before the owner took possession of the property and because he protested that it was not completed according to the contract. If it was a fact that the house was defectively constructed when appellees paid the contract price and took possession of the property, a cause of action existed. They did not forfeit their claim against the appellant for damages because they did not discover that appellant had not built the house according to contract. If the law is that such a discovery must be made in a reasonable time (it is not necessary here to decide that it must be done), the failure to make the discovery before eight months is not an unreasonable time.

We are of the opinion that the jury's verdict fixes a proper amount of compensation for appellees, therefore, they are not entitled to a reversal on the cross appeal.

The judgment is affirmed on the original and cross appeals.

STANDARD OIL CO. v. COMMONWEALTH.

(Filed December 7, 1904—Not to be reported.)

Humphrey, Hines & Humphrey for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Oldham Circuit Court.

Judge O'Rear delivered the following extended opinion:

Appellant thinks the opinion is not clear in its meaning. We decide that, sales by appellant and others doing similar business, where the oils are delivered from its wagons and the sales are to retail dealers for resale, the transaction comes under section 4234, involved in the appeal. For each wagon so engaged a license fee of $5 per annum must be paid, which is the license fee for the use of that wagon anywhere in the State. If the sale from the wagon are to others than retail dealers for resale, the act is peddling (Standard Oil Co. v. Commonwealth, 26 Ky. Law Rep., 142), and to do that character of business appellant must take out peddler's license, being $50 per year for one person with two horse wagon; $40 for one person with one horse wagon, and $20 additional for each additional person accompanying the wagon. Those fees are for the whole State. For the county, one-fourth as much as is charged for the whole State.

MATTINGLY v. SPRINGFIELD FIRE & MARINE INS. CO.

(Filed December 8, 1904.)

1. Sale of farm—Policy on dwelling—Continuation of policy by vendor—Parol agreement by agent—Where insured had a policy on his dwelling on his farm, before selling his farm went to the agent, who issued the policy and obtained his consent to his retaining the policy on the house as a security for his unpaid purchase money, and after making the sale and deed again went to the agent and told him what he had done, and the agent again agreed that the policy should remain in force for his protection, the company will

not be allowed to defeat a recovery where the house is burned, by reason of the failure of the assured to do something that the company itself induced him not to do.

2. Statute of frauds—Oral agreement modifying contract—A contract of insurance is not within the statute of frauds. It may be oral as well as in writing, and although in writing like any other contract, it may be modified by subsequent agreement between the parties. The fact that the contract provides that no subsequent agreement shall be valid unless in writing and indorsed on the policy, does not change the rule, for this part of the contract stands like any other part of it, and may be changed by a subsequent parol agreement.

3. Collateral security—The policy held by the insured being only collateral security for the unpaid purchase money owing to the insured, whatever sum is collected on the collateral must be credited on the notes held by the insured for the purchase money. The house being burned, the vendor may look both to the policy and the land for his money.

L. S. Pence and J. T. Ford for appellant.

Rives & Spalding for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hobson.

On November 8, 1900, appellee issued to W. E. Mattingly a policy insuring his dwelling house in the sum of $500 for three years, he then paying the entire premium of $12.50 in advance. The policy, among other things, contained the following stipulations: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple, * * * or if any change other than by death of the insured take place in the interest, title or possession of the subject of insurance, except change of occupants without interest of hazard, whether by legal process or judgment, or by voluntary act of the insured, or otherwise. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power, or be deemed or held to have waived such provisions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Some time after the issual of the policy Mattingly sold and conveyed the farm and dwelling house thereon to one C. C. Reynierson, retaining a lien on the property for $4,000 of the purchase money. About a year after this conveyance was made, and while the policy was still unexpired, the house burned down, and Mattingly instituted this suit against the insurance company to recover for the loss. In order to avoid the effect of the stipulations of the policy above set out he averred the following facts: Pending the

negotiations between him and Reynierson, and before any transfer or change was made, for the express purpose of preventing any forfeiture or any contention in that regard, and in order to continue the policy in force, the plaintiff went in person to the defendant's agent who had issued the policy and informed him of the negotiations pending between him and Reynierson, but not consummated, and asked him that if in the event of a sale and transfer of the property, he retaining a lien for the unpaid purchase money, $4,000, whether or not he could still retain the policy on the house as collateral security for the deferred payments of purchase money. The agent assented that this might be done, and that the policy would not be forfeited. After this assent was given the plaintiff, relying thereon, conveyed the property to Reynierson, retaining a lien for $4,000, and then informed the agent of what he had done, and asked him to note on the books of the company that in consideration of the unearned premium the policy should stand and remain in force as collateral security of the plaintiff as lien holder until the expiration of the policy. The agent then and there assented to this, and the company retained the unearned premium, with notice of the transfer and with notice that the plaintiff's interest in the property was as lien holder, and, as he pleaded, by its conduct is estopped from relying on any forfeiture of the policy because of the change of the title as the plaintiff had acted upon the assurances of the agent and had been led to believe by him that his policy would stand good to secure him as lien holder.

The court sustained a demurrer to the petition, and the plaintiff failing to plead further, dismissed it. The only question on the appeal is as to the sufficiency of the facts alleged to show a waiver of the conditions of the policy above quoted. A contract of insurance is not within the statute of frauds. It may be oral, as well as in writing, and although it is in writing, like any other contract, it may be modified by a subsequent agreement between the parties. The fact that the contract provides that no subsequent agreement shall be valid unless in writing and endorsed on the policy does not change the rule, for this part of the contract stands like any other part of it, and may be changed by a subsequent parol agreement, just as any other provision of the contract may be subsequently modified. In Bell v. Offutt, 78 Ky., 632, the parties made a verbal contract, and agreed that it should thereafter be reduced to writing, which they failed to do. It was held that if the contract was made it was not invalid because not subsequently reduced to writing, according to the agreement, and that the validity of the contract did not depend upon the understanding of either of the parties as to whether it was to be only obligatory when reduced to writing. In Phœnix Insurance Co. v. Spiers, 87 Ky., 285, the policy provided, as here, that it could not be changed by any susbequent agreement unless in writing endorsed upon the policy, but this court held the subsequent contract valid. It said: "The contract of insurance may be by parol. It is not within the statute of frauds. Such a contract, although in writing, may be changed by parol, even though it provide that it shall only be done by writing, because men can not so tie their wills as not to be able thereafter to do by consent what the law allows."

This is in accord with the general current of authority. Thus in 1 Wood on Fire Insurance, section 10, it is said: "A contract of insurance may be

changed by parol, or by indorsement upon the policy, and the parties thereto may thus be changed, or the subject-matter of the risk; and such change affected by any person whom the company places in a position of apparent authority will, prima facie, be binding upon it, as an agent authorized to make contracts of insurance, a clerk or person acting as secretary in the office of the company, or any person whom the company permits to act for it in such a manner as to indicate authority to act in such respects." Again, in section 525, is the following: "When the insurer, knowing the facts, does that which is inconsistent with its intention to insist upon a strict compliance with the conditions precedent of the contract, it is treated as having waived their performance, and the assured may recover without proving performance, and that, too, even though the policy provides that none of its conditions shall be waived except by written agreement." (13 Am. & Eng. Ency. of Law, 818.)

The rule is that where an insurance company has by its assurances or conduct led the insured to believe that a forfeiture of his policy will not be insisted upon, and he has been in fact induced by it to act upon this understanding, the company will not be allowed to set up the forfeiture of the policy and thus to defeat a recovery upon the policy by reason of the failure of the assured to do something which the company itself induced him not to do. (Continental Insurance Co. v. Browning, 24 Ky. Law Rep., 992; Walls v. Home Insurance Co., 24 Ky. Law Rep., 1453; Insurance Co. v. Eggleston, 96 U. S., 578, and cases cited.)

In the case before us the insured went to the agent who issued the policy before he made the trade with Reynierson and obtained his consent to the plaintiff's retaining the policy as a security for his unpaid purchase money, and after he had made the deed to Reynierson he again went to the agent and told him what he had done, and the agent again agreed that the policy should remain in force for his protection. The defense is purely a technical one, for plaintiff's interest in the property was eight times as great as the amount of the insurance on the house, and if the agent had not misled him he could have protected himself by conforming to the conditions of the policy. The rule in cases of this sort is that if the agent when approached simply tells the assured to bring in the policy and he will make the endorsement, there is no waiver of the condition; but if he says "it is all right," or makes use of any expression indicating satisfaction with the change without requiring compliance on the part of the assured with the terms of the policy, a waiver is established. (2 Wood on Fire Insurance, page 1155.) If the rule were otherwise, an insurance company could mislead the insured and thus induce him to believe that his rights were fully protected until after a loss, and then, having thus prevented him from protecting himself by having endorsements made on the policy, defeat a recovery because the insured accepted as true the representations which the company made. In insurance as well as in other things the law requires good faith, and where a person knows that the conduct of another is to be based upon what he tells him to do, he will not when his direction has been acted upon be allowed to set up to the prejudice of the other person that something else ought to have been done which he had led the person to understand was unnecessary.

It is insisted for appellee that the judgment of the circuit court is right,

because if appellant may recover in this action he may still recover his $4,000 from Reynierson, and that he will thus get $500 more than is due him; but this is not true. The insurance policy is only collateral for the security of the payment of the unpaid purchase money. What is collected on the collateral must be credited on the notes for the purchase money just as in the case of any other collateral held for the security of a debt. The insurance policy represents the house. The house being destroyed by fire, appellant may look to both the policy and the land for his money. He retained the policy instead of turning it over to Reynierson in the trade simply to protect him in his purchase money. His other security, the lien on the land, has been reduced to the extent of the value of the house which was burned, and when he collects the insurance money he will have received that much of his purchase money. The arrangement was made with the assent of the company, and while it is different in form from the usual arrangement, it does not entitle the plaintiff to anything more than he would have been entitled to if there had been endorsed on the policy by consent of all three of the parties a statement that the company consented to the conveyance to Reynierson, and that the policy should be held as collateral for the purchase money notes; and in this event the company would be bound to pay plaintiff the amount of the policy, and after he had collected this much from the company he would only be entitled to look to Reynierson for the balance of his debt, less the cost of collecting the collateral.

Judgment reversed and cause remanded, with directions to overrule the demurrer to the petition.

JONES, &c. v. GREEN, &c.

(Filed December 8, 1904—Not to be reported.)

Homestead and dower—G. died leaving a tract of land worth less than $1,000, and a widow and daughter. Both married and left the homestead, but before doing so the widow conveyed it to Jones by deed of general warranty, which he took and had recorded in the proper office. In an action by the heirs at law for a sale of the land, and division of the proceeds Jones set up the plea that the deed to him was intended to be a lease to embrace all of the homestead of the widow during her life, and asked that the deed be reformed, and that he be entitled to the dower right of the grantor. Held—The widow's right of homestead was one of occupancy only, and she could abandon it whenever she desired, and the conveyance to Jones was only evidence of abandonment. Jones set up that she was occupying the land as a homestead, and this being true she could not take both dower and homestead; and having elected to take the homestead right, she waived her right of dower. When she abandoned the homestead the basis of the claim of Johnson, who was her tenant, failed.

R. E. Johnson and W. J. Webb for appellants.

J. E. Warren for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Barker.

A. S. Green died intestate, in Graves county, Ky., owning a small tract of land, worth less than a thousand dollars, which he occupied as a home-

stead. At his death he left a widow, A. N. Green, and an infant daughter, Alice U. Green, who occupied the homestead with her mother. Afterwards the daughter, although an infant only fifteen years of age, married, and, with her husband, moved from the homestead, and is known in this record as Alice U. Flood. The widow intermarried with J. H. Flood, and also abandoned the homestead, with her husband, but before doing so undertook to convey it to the defendant, C. M. Jones, by general warranty deed, which was delivered to him, and by him procured to be recorded in the proper office.

These transactions having taken place, the appellees, who are in part the heirs at law of A. S. Green, instituted this action for the sale of the land and division of its proceeds among the owners, treating the homestead right as at an end by the abandonment of those entitled to its occupancy. Alice U. Flood, A. N. Flood, her mother, C. M. Jones and J. K. Johnson were made defendants, it being alleged that Johnson and Jones claimed some interest in the land, which they were called on to disclose, and the validity of the claims of these two are the questions involved on this appeal. Johnson claims that at the time of the marriage of the widow he was her tenant by verbal lease for two years, and that as she was entitled to homestead at the time of this contract she could not, by abandonment, invalidate his interest. Jones sought to parry the legal effect of the absolute deed made by the widow to him of the homestead right by alleging that he did not accept it as such, but that it was really intended to be a lease to embrace all of the homestead right of the widow during her life, and asked that the conveyance be reformed, and, at all events, he be adjudged entitled under the deed to the dower right of his grantor. The widow herself answered, disclaiming any interest in the land in question. For the purposes of this case it is immaterial whether the widow undertook to convey the property absolutely to Jones or to make a lease for her life, although we think it clear that the former was intended. Her homestead right in her husband's property was one of occupancy only, and she could abandon it whenever she desired. The absolute deed to Jones was only evidence of abandonment, which is fully established by her actions and answer without reference to it, abandonment being a matter of intention. Both Jones and Johnson affirmatively set up that the widow was entitled to and was occupying the land as a homestead. This being true, she could not have both dower and homestead, and having elected to take the homestead interest, she waived her right to dower. (Funk v. Walters, 6 Ky. Law Rep., 297; Burch v. Atchison, 89 Ky., 595.) It follows, therefore, that Jones' claim, that his deed from the widow, even if it destroyed her right to homestead, conveyed to him her right of dower in the property, can not be sustained, as she, by her election to take homestead, lost her dower. Neither can the claim of Johnson, that he had vested rights for two years under his contract of lease, be sustained, the right of the widow being that of occupancy only. When she abandoned the homestead the basis of her tenant's claim failed. In the case of Gaines v. Casey, 10 Bush, 99, where the owners of a homestead mortgaged it to secure a debt, it was held that upon abandonment of the homestead the mortgage lien failed. In the case of Freeman v. Mills, 19 Ky. Law Rep., 316, it is said: "It will be seen that occupancy is a continuing condition precedent to the

right (of homestead), and it is manifest that the law did not intend to vest in the widow an unconditional or vendible life estate in a homestead like that given her to the dower right, else nothing would be said as to occupancy."

The principle that abandonment by the widow destroys the homestead is sustained in the opinions of this court in Bryant v. Bennett, 29 Ky. Law Rep., 1866; Kimberlin v. Manson, Isaacs, &c., 23 Ky. Law Rep., 42; Freeman v. Mills, 22 Ky. Law Rep., 859, and Clay's Guardian v. Wallace, 25 Ky. Law Rep., 820. It follows, therefore, that neither Jones nor Johnson disclosed a valid claim to the land in question, and as the judgment of the trial court is in harmony with this view, it is affirmed.

ZUMBIEL v. ZUMBIEL, &c.

(Filed December 8, 1904—Not to be reported.)

Husband and wife—Divorce and alimony—Former judgment—Pleading—Where judgment had been rendered divorcing appellant from appellee, and decreeing certain alimony and the use of their dwelling, it was error to adjudge that Anna Zumbiel was the owner of the house (she having purchased it from her co-defendant during the pendency of this action); that her title to it was valid, and granting her a writ of possession. Anna Zumbiel filed an amended petition setting up the same facts as in her original petition. It was not made a counterclaim against appellant, and no judgment could be rendered against her on such a pleading. Appellee, John Zumbiel, should have been brought before the court upon cross petition, and the amended answer should have been made a counter claim against appellant, and this branch of the case should have been heard upon its merits.

W. A. Byrne and Byrne & Reed for appellant.

O. M. Rogers for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

Mary Zumbiel and John Zumbiel were married in April, 1888. Four children were born to them, the youngest being about a year old in June, 1900, when she filed suit against him for divorce, alimony and custody of the children. By an amended petition she averred that pending the action John Zumbiel had executed, without her knowledge or consent, a deed of conveyance of their home, the only visible property of the defendant, to Anna K. Zumbiel for the pretended consideration of $1,250 for the purpose of defeating her claim and preventing her and the children from obtaining proper alimony and support; that Anna K. Zumbiel well knew that the action was pending and that plaintiff was seeking alimony and support for herself and children, and that she conspired with the defendant for the purpose of defeating the plaintiff's claim; that there was no consideration in fact for the deed and that it was fraudulently made. Anna K. Zumbiel filed an answer, in which she denied the allegations of the petition and pleaded affirmatively what the consideration of the deed was and how it was paid, admitting, however, that there was a balance of $300 unpaid. After this the case was submitted, and the plaintiff's petition was dismissed

on the idea that she had no grounds of divorce. She appealed to this court. On the appeal the judgment was reversed. The court, after setting out the facts shown by the evidence, held sufficient to entitle the wife to a divorce from bed and board, concluded its opinion with these words: "Since this suit appellee has conveyed his homestead to his sister-in-law for the recited consideration of $1,250. The issues and proof on this branch are not sufficient to yet justify a decision. It should be further prepared. The husband (appellee) earns admittedly $17 per week, possibly more. The children were eleven, nine, seven and one year of age, respectively, when the suit was brought

"The judgment is reversed and the cause remanded, with directions to grant the appellant a divorce from bed and board of appellee, to award her the custody of the children, affording appellee reasonable opportunities to visit them and have them visit him, for a judgment decreeing appellant a suitable sustenance, not less than $30 per month, in addition to the use of the house, and for other necessary proceedings not inconsistent herewith." (Zumbiel v. Zumbiel, 24 Ky. Law Rep., 590.)

On the return of the case the circuit court entered the following judgment as directed in the mandate on November 25, 1902: "The mandate of the Court of Appeals herein being filed, and notice of its filing having been waived by defendant, and this cause being now under submission for judgment, it is adjudged that Mary Zumbiel be, and she is hereby, divorced from bed and board from John Zumbiel; and it is further adjudged that she is awarded the custody of the children and that the defendant may visit the children, and that the time for said visits may be agreed upon by the parties. It is also adjudged that plaintiff permit the children to visit defendant at such times and place as they may agree upon. It is further adjudged that the plaintiff may have the use of the house in which she resides and the defendant pay her the sum of $30 per month on the first day of each month, beginning December 1, 1902, and that defendant pay all the costs of this proceeding and an additional sum of $50 to plaintiff's attorney, W. A. Byrne.

"This case is reserved on the docket for further order which may be necessary concerning the custody of children, the father's relations with the children and the maintenance of wife and children."

On March 10, 1903, Anna K. Zumbiel filed an amended answer, which she made a cross-petition against John Zumbiel, in which she set out substantially the same facts which she set up in her original answer, and prayed judgment for the possession of the property, or, if she was not entitled to this, for the amount of her purchase money which she alleged she had paid. The plaintiff filed a demurrer to the second and third paragraphs of the amended answer, and without any action on the demurrer the case was submitted on the motion of Anna K. Zumbiel for judgment on her answer and cross petition. On this submission the court entered a judgment that the deed was valid, subject to the plaintiff's potential right of dower in the property, and that Anna K. Zumbiel was the owner of it and was entitled to the possession of it. A writ of possession was awarded her for the property. From this judgment Mary Zumbiel appeals to this court.

It is insisted that the judgment of November 25, 1902, above quoted, adjudging plaintiff the use of the house, finally settled the rights of the parties,

and that the court was without jurisdiction after that judgment had become final to allow the amended answer to be filed or to enter any further judgment in regard to the house and lot. But, as shown on its face, that judgment was entered pursuant to the mandate of this court, and under the opinion of this court, upon which the mandate issued, it is expressly stated that the issues and proof on this branch of the case are not sufficient yet to justify a decision. It is true the court directed a suitable maintenance to be decreed, of not less than $30 a month, in addition to the use of the house, and the judgment of the court below literally follows the mandate. But in giving this direction as to the house the court evidently had in mind only a temporary provision until a final judgment might be rendered on the branch of the case involving the title to the house and lot, and the judgment of the circuit court entered upon the mandate must receive the same construction. The plaintiff was in possession of the house and lot, and had been for several years. No judgment could be rendered against her on the pleading filed by Anna K. Zumbiel unless it was made a counterclaim against her. The amended answer was made a cross petition against John Zumbiel and against him only. It does not appear that he had been brought before the court on the cross petition or had entered his appearance to it. The pleading was not made a counterclaim against the plaintiff, and her demurrer to it had not been acted on when the case was submitted on the motion to enter judgment on the amended answer. In addition to this the plaintiff had charged facts in her petition sufficient to invalidate the deed if true. The amended answer put these facts in issue. Still there could be no judgment entered on the amended answer against the plaintiff without the submission of the case upon the merits, for the affirmative allegations of the amended answer, though admitted to be true, would not show that the deed was not in fact executed for the fraudulent purpose of defeating the plaintiff's claim. A deed may be fraudulent in fact, although it is executed upon a valuable consideration.

On the return of the case to the circuit court Anna K. Zumbiel will be allowed to make her answer a counterclaim against the plaintiff if she desires to do so, and John Zumbiel will be brought before the court upon the cross petition. The plaintiff will then be allowed time to reply. Proof may be taken if desired by the parties, and this branch of the case may be heard on the merits. Under the mandate of this court Mary Zumbiel must be adjudged a support of not less than $30 a month, in addition to the use of the house, and if the use of the house is taken from her her allowance must be increased to such a sum beyond $30 as fairly represents the value of the use of the property, unless it shall appear that there has been such change in the situation or circumstances of the parties since the former judgment as to make it proper to modify that judgment as to the amount of the allowance. The case as now presented is not such as to enable us to determine whether the deed was fraudulent or not, or what are Mary Zumbiel's rights in the house and lot which is the home of the family.

Judgment reversed and cause remanded for further proceedings consistent herewith.

PIONEER GRANITE CO. v. REIDY.

(Filed December 8, 1904—Not to be reported.)

1. Contracts—Fraud—In this action to recover the purchase price of a monument the chancellor found that the written contract was obtained by appellant by fraud, and on a question of fact the finding of the chancellor will not be disturbed.

2. Competency of evidence—Although the facts testified to by appellee in this action took place on different days, it was competent to prove them because they were all more or less connected.

Furber & Jackson for appellant.

Byrne & Reed for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, Catherine Reidy, shortly after her husband's death made a contract in writing with appellant to erect a tombstone over his grave. Appellant erected the tombstone, and she refused to pay for it or to accept it on the ground that it was not what she bought. Appellant then filed this suit against her to recover $200, the agreed price. She defended upon the ground stated, pleading that the written contract sued upon was obtained from her by fraud. The circuit court on final hearing dismissed appellant's petition, and it appeals.

The evidence shows that the monument which has been erected is in accord with the written contract which appellee signed, that is to say, the contract gives certain figures indicating the dimensions of the monument. These figures are as follows: "Die 2—6x1—2x2—8; 2 base, 3—0x1—8x8—0; 1 base, 3—8x2—4x1—4."

There is also upon the face of the contract a drawing of a monument. Appellant testifies that she did not understand the figures or know what they meant, and that she pointed out to the agent the respects in which the monument she wanted differed from the drawing on the contract, and that the agent said that he only wanted her to sign the paper to show that a sale was made. She testified that there was near her lot in the cemetery a monument known as the Kelly monument, and that the agent agreed with her to put up on her lot a duplicate of the Kelly monument; that she did not know the dimensions of the Kelly monument or what sort of monument the figures above given would make, and that she signed the contract upon the assurance of the agent that it was for a monument like the Kelly monument. While the agent denies her statements, his answers are not direct and positive, but often evasive on material matters as to what he said to appellee to induce her to sign the contract. The monument which he put up is worth perhaps $100 less than the Kelly monument and is much smaller. Appellee tried to see the monument before it was erected, but was not permitted to do so, at least such is the proof on her behalf, and as soon as she saw it she notified appellants to take it away.

On the question of fact as to whether the contract was obtained by fraud we can not disturb the chancellor's finding. The circumstances sustain it, and especially the testimony of the agent is not such as to impress the court with his sincerity.

Appellee was allowed to prove what took place between her and appellant's manager when she went to look at the monument before it was erected. Her statements there to appellant and what he said to her were competent, for without this evidence the subsequent correspondence between the parties would not be properly understood. In other words, all that took place between appellant and appellee in regard to the monument, although it took place on different days, is competent, for it was all more or less connected.

Judgment affirmed.

SHROPSHIRE, &c. v. GAULT, &c.

(Filed December 8, 1904—Not to be reported.)

1. Wills—Construction of—Where a testator provided that a certain part of his estate, after three years, should be divided between his two sons, but if both or either should die before that time, or die leaving no heirs, then the portion should go to his sisters as already named, what was meant was that if either died without issue before the period of distribution his share should go to his aunts. The word "or" must be read as equivalent to "and."

2. Same—Rule of construction—The purpose of all construction is to arrive at the intention of the testator, and in doing this the court will consider the whole instrument and the circumstances and situation of the testator, that it may read his words in the light of the circumstances attending him.

Hobbs & Farmer for appellants.

Guy H. Briggs for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hobson.

The will of John W. Gault is in these words: "First, it is my will that all just debts be paid, then I make the following bequests: To my sons, Walker and Scott, I leave the proceeds to be divided from the Connecticut Mutual Life Insurance Company, to be equally divided between them; to my sisters, Hallie Shropshire, Julia Fishback, Josie Dodd and Katie Banta, I leave the sum of three hundred and fifty ($350) dollars to each of them; to my niece, Mary Fishback, three hundred ($300) dollars. The above bequests to be paid within twelve months after my death or as soon thereafter as they can be realized out of my personal estate. I will the farm on which my son, Walker, now resides to his wife, Octavia, so long as she may remain his wife or widow; at her death or marriage it is to revert to my estate. I leave the sum of two hundred and fifty ($250) dollars for tombstones at the graves of my mother, sister Carrie and daughters, Hallie and Bonnie. My other real estate (outside of said farm) I wish to be kept rented out for three years after my death, and my executors to pay to my sons, Walker and Scott, the sum of fifteen ($15) dollars per month each during said three years. The house occupied by Scott he is to have free of rent. The note I hold against Walker for five hundred ($500) dollars I donate to him. The income to be derived from rents, after paying the above bequests and paying taxes, insurance and keeping up repairs, is to be invested in some safe investment, and at the end of the three years the estate is to be divided as equally as

possible, without any sale, between Walker and Scott. If either or both should die before the expiration of said three years, or die leaving no heirs, then the portion of my estate that would go to him is to go to my sisters already named, equally divided between them. I wish my friend and former partner, Lewis Mangan, my sister, Banta, and my son, Walker Gault, to administer on my estate, and no security is to be required of either of them, and the acts of either two of them to be binding."

The three years provided for in the will have expired and the question raised is what estate Walker and Scott Gault take in the real estate devised to them. The question turns upon these words in the will: "If either or both should die before the expiration of said three years, or die leaving no heirs, then the portion of my estate that would go to him or them is to go to my sisters already named, equally divided between them." It is insisted for appellant that under this clause Walker and Scott Gault take a defeasible fee in the land, and that upon their death at any time without issue their estate goes to their sisters. It is insisted for appellees that they, having survived the period of distribution, take a fee simple estate in the land.

The construction of the will is not free from difficulty. The purpose of all construction is to arrive at the intention of the testator, and in doing this the court will consider the whole instrument and the circumstances and situation of the testator, that it may read his words in the light of the circumstances surrounding him. The rule is that in order to effectuate the intention of the testator the word "or" may be read as "and," or vice versa, when necessary to avoid defeating his intention. (Hunt v. Johnson, 10 B. Mon., 342; Robb v. Belt, 12 B. Mon., 647; Aulick v. Wallace, 12 Bush, 531.) The rule is also that the word "heirs" will be read as meaning "children" when they are evidently so intended, and that when the division of the estate is postponed, a provision that if one of the devisees dies without issue is construed to refer to his death before the time of division. (Duncan v. Kennedy, 72 Ky., 580; Webster v. Webster, 93 Ky., 632; Dunlap v. Shreve, 2 Duvall, 334) Bearing in mind these principles, how must we construe the will above quoted?

By the first clause the testator gave his two sons equally the life insurance policy. He then gave to his sisters certain special legacies, and with the exception of these special legacies he devised the rest of the estate to his two sons, or for their benefit, one tract of land being devised to the wife of one of the sons and a provision being made for some family tombstones. It is thus apparent that the two sons are the objects of his bounty outside of the special legacies. At the end of the three years not only is the land to be divided, but also the accumulations of the estate in the hands of the executors. No distinction is made between the money in the hands of the executors and the land. It is evident from the will that the testator did not intend to postpone his own blood for the benefit of his collateral kindred, and that he did not intend that if either of the sons died leaving issue the sisters should take the property in preference to the grandchildren. Yet if we construe the will literally, if either of the sons died before the expiration of the three years his share went to his aunts, although he died leaving children. It does not appear whether the sons had children at the father's death, but it does appear that one of them had a wife and that the other

occupied a house, and so was a housekeeper. What the testator meant was that if either of the sons died without issue before the period of distribution his share should go to his aunts, for the executors were then to pay over the money and the land was then to be equally divided. If the testator had had in mind that the property was to go to his sisters upon the death of either of the sons without issue at any time, then the words "before the expiration of said three years" are meaningless or superfluous, for the sense would have been expressed, and if he had omitted these words and had said "if either or both should die leaving no heirs," etc. The word "or," therefore, must here be read as equivalent to "and," or, what is the same thing, the words "die leaving no heirs" must be taken as a limitation upon the preceding clause to express the idea that if they died before the expiration of the three years leaving no heirs, then the share of the one so dying should be distributed to the aunts.

Judgment affirmed.

TAYLOR v. WEBBER, &c.

(Filed December 8, 1904—Not to be reported.)

1. Lands—Defect in pleading—In an action to vacate a judgment directing a sale of land, the failure of the pleader to add to the allegation that the land was susceptible of division among the owners at the time it was sold for indivisibility, the words "without impairing its value," a denial in the answer that the land was susceptible of division without impairing its value, cured the defect in the petition, the denial being as broad in terms as the allegation in the petition should have been.

2. Same—Infants—Where the land was sold for about one-third of its appraised value, and the defendants were infants, without any statutory guardian to look after their interests, such sale was invalid and should be set aside.

W. J. Webb for appellant.

Lee & Hester for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Barker.

Halcomb Jackson (an ancester of appellant) died intestate, leaving as part of his estate one hundred and eighty acres of land, situated in Graves county, Kentucky, of this, at the beginning of the transactions out of which grew this litigation, the appellee, A. A. Webber, was the owner of an undivided five-tenths interest, the appellee, Charles Tucker, of an undivided two-tenths, Hillary Taylor of an undivided two-tenths and Frank Justice of an undivided one-tenth interest therein.

Hillary Taylor and Frank Justice are grandsons of Halcomb Jackson, and were infants over the age of fourteen years at the time of the occurrences hereinafter set out. Neither, so far as this record discloses, had a statutory guardian. On October 28, 1897, the appellees, Webber and Tucker, instituted an action against them in the Graves Circuit Court for a sale of the land for division, under section 490 of the Civil Code of Practice, alleging its indivisibility without material impairment of its value. A guardian ad litem was appointed for the infant defendants, and such proceedings were

then had that a judgment was rendered adjudging a sale of the land for a division of its proceeds among the owners.

The land seems to have been composed of two tracts, one of fifty-five acres and the other of one hundred and twenty-five acres, which, although near, were not contiguous. The one hundred and twenty-five acre tract was treated in the judgment and order of sale as being composed of three different tracts, to-wit: Fifty acres, thirty-five acres and forty acres. These four tracts were appraised as follows: The fifty-five acre tract at $220, the fifty acre tract at $350, the forty acre tract at $140, aggregating $885. At the sale all of the tracts were purchased by the appellees, Webber and Tucker, the latter purchasing the thirty-five acre tract at the price of $70. The other three tracts were purchased by appellee Webber at the following prices: The fifty-five acre tract at $80, the fifty acre tract at $110 and the forty acre tract at $60, the whole realizing the aggregate sum of $330. This was divided between the owners according to their respective interests, Hillary Taylor receiving $45 and Frank Justice $22.50, as their respective shares of their ancestor's estate.

Within a year next after his twenty-first birthday Hillary Taylor instituted this action in equity, under section 391 and subsection 4, 5 and 8 of section 518 of the Civil Code of Practice, alleging substantially the foregoing facts as to the sale of his land; that the same was divisible; that the sale was had for the fraudulent purpose on the part of appellees of obtaining his land for less than its real value, and that his land was so obtained by the appellees at less than its real value. All of the substantial allegations of the petition were denied by separate answers of the defendants (appellees). Subsequently the appellees were allowed by the court to file a demurrer to so much of the petition as alleged that the land in question was divisible, and this was sustained by the court. No reason is given in the record for this ruling, but we conclude that it must have been based upon the failure of the pleader to add to the allegation that the land was susceptible of division among its owners, at the time it was sold for indivisibility, the words "without impairing its value," and if we consider alone the allegation in the petition, undoubtedly this was correct but it was evidently overlooked that the answers of the defendant specifically denied that the land was susceptible of division without impairment of its value, and this denial cured the defect in the petition. Under the elementary rule of pleading, that if an allegation is defective because its terms are too narrow to include the legal principle sought to be stated, its denial in terms as broad as the allegation should have been cures the defect.

We proceed, then, to a discussion of the merits of the case. Although the reason for the sale of the land is based upon the fact of its indivisibility without impairment of its value, it was divided into four different tracts, and appraised, sold and purchased separately, and as it was wild, rough, farming land, it needs but little evidence to show that it was susceptible of division without impairment of its value. The defendants in the action to sell were infants, with no statutory guardian to look after their interests, and the land was sold for about a third of its appraised value, the latter, as shown by the evidence, being little, if any, greater than one-half the real value of the property. We think this is demonstrated by the subsequent sale

of the fifty-five acre tract. This was appraised at $220, and purchased by Webber for $80, and then, without any improvements being added thereto, was subsequently sold by him to G. Potts for $400, and the weight of the evidence shows that all of the rest of the land was obtained by the appellees for relatively as much less than its real value as was the fifty-five acre tract, the net result of the sale being that appellant received $1.25 an acre for his land, which is about one-fifth of its real value. Considering that the defendants in the original suit were infants, unable to protect themselves, and without statutory guardians, we think the transaction which took place in the suit for the sale sufficiently substantiate the allegations of the petition, to entitle appellants to a new trial, and that his right thereto is fully upheld in the cases of Bunnell v. Bunnell, 23 Ky. Law Rep., 808; Allen v. Troutman's Heirs, 10 Bush, 62; Newland v. Gentry, 18 B. M., 670, and Richards v. Richards, 10 Bush, 619.

Upon the return of the case appellant's portion of the land should be set apart to him by proper proceedings, and he required to do equity in regard to the money he may have heretofore received out of the sale of which he complains. G. Potts should be allowed to keep the land purchased by him from Webber, the latter being required to account for the purchase money instead of the land. As the remainder of the original estate is in the hands of the appellees, who procured the sale, full justice can be done to all parties in interest as if no sale had taken place.

For the reasons indicated the judgment is reversed for proceedings consistent herewith.

MILLER, &c. v. THE KNIGHT MANUFACTURING CO.

(Filed December 8, 1904—Not to be reported.)

Principal and surety—Liens—Where at the time appellants became surety upon the notes sought to be recovered upon in this action appellee had acquired the mortgage lien held by others and owned the debt it was given to secure, there can be no foundation, either in law or equity, to base their claim of substitution to the mortgage lien; and as they had no lien on the property mortgaged, they can have no claim against appellee because it appropriated to the payment of its debt the proceeds it brought under the sale.

Denton & Robinson for appellants.

O. H. Waddle for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, the Knight Manufacturing Co., sold and delivered to J. D. Brown a sawmill for about $1,500, on which he paid $800, and executed his notes for the balance of the purchase money, with Christian Bros. as surety. Christian Bros. advanced $135 to Brown to pay the freight on the mill, and when a $400 note which had been executed for part of the purchase money matured they advanced Brown $245 to pay on it. To secure the payment of $880, the sum of the two payments mentioned, Brown executed to Christian Bros. a mortgage on the sawmill and also to protect them against liability as his sureties to appellee. After this was done Brown executed a mortgage to appellee on

the mill to secure it in the payment of the balance of the purchase money. Christian Bros. became bankrupts, and in the proceeding to settle the estate it was adjudged that a lien existed on the mill for $380. In order to save the mill from sale and to protect its mortgage lien thereon the appellee paid the trustee in bankruptcy $380 and took an assignment of the debt and mortgage, which had been executed to Christian Bros. to secure it. After this was done Brown desired to pay the $380, and he paid $30 thereon and executed to appellee his notes aggregating $350, with the Miller Lumber Co. as surety. Brown failed to pay the notes. The mill burned and the appellee took possession of the remaining part of it under its mortgage and carried it out of the State. When the appellants were sued on the notes they sought to prevent a recovery upon the grounds: First, on a special plea of non est factum; second, that their signature was procured by misrepresentation and fraud; third, that they should be substituted to the mortgage lien of Christian Bros.; fourth, that the appellee had taken the mill from the State and that it was of greater value than the debt, and that they are thereby released. The special plea of non est factum is not sustained, as the notes which they signed were to enable them to carry on the business for which their partnership was formed; and further, that it was executed with the consent of all of the members of the firm.

The proof wholly fails to show that they were induced to sign the notes by misrepresentation or fraud. There is no foundation in law or equity upon which to base their claim of substitution to the rights of Christian Bros'. mortgage lien upon the property. At the time they executed the notes appellee had acquired the mortgage lien held by Christian Bros. and owned the debt which it was given to secure. The purpose of appellee in having Brown give new notes with security was to have its debt paid which it had acquired by assignment from the trustee in bankruptcy. The execution of the new notes with new security was a novation. The appellee would have received no benefit by accepting the notes with the appellants as sureties if, when they paid it, they could have a first lien on the property upon which it had a lien for its unsatisfied debt against Brown. When the appellants paid the debt they paid it for Brown. Brown had no lien upon his own property to secure his debt, hence he had no lien to which the appellants could be substituted by discharging the debt for which they were sureties. The appellants were not the sureties of Christian Bros., and, therefore, never paid appellee any debt which Christian Bros. owed it, because at the time they became the sureties on the notes the appellee owned the debt and held it not against Christian Bros., but against Brown, therefore, the appellants simply became Brown's sureties upon the debt which he owed appellee.

As the appellants had no lien on the mill they can have no valid claim in law or in equity against appellee, because it appropriated it to the payment of its debt against Brown. Besides, appellee's debt against Brown amounted to nearly $1,200, and the evidence of the appellants shows that the mill was only worth $500 or $600 at the time appellee took possession of it.

The judgment is affirmed.

TERRELL v. MAUPIN.

(Filed December 9, 1904—Not to be reported.)

1. Married women—Limitation to actions—Under Kentucky Statutes, section 2525, allowing married women the same length of time in which to bring an action for fraud or mistake, after the removal of her disability, as is allowed to persons having no such impediment, one who has continuously been a married woman for more than ten years after her cause of action accrued is not barred from bringing such action by the ten-year statute of limitation provided by section 2519, Kentucky Statutes.

2. Separate property of wife—Rights of husband under subsection 3 of section 497, Civil Code—The proceeds of land when received by the wife are her separate property. By subsection 6 of section 494, Civil Code, such proceeds, until actually received by her, descend as real estate so far as her husband is concerned. Such proceeds are treated as real estate, therefore, her husband had no right to receive such proceeds without her consent, and in such case the statute of limitation does not run against the wife.

Henry C. Hazelwood for appellant.

Burnam & Moberly for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge O'Rear

Appellee is a married woman, and has been during all of the times covered by the occurrences in this suit. She was the distributee of a certain fund realized from the sale of land in which she had an interest, the fund being in the custody of the Madison Common Pleas Court. Under an order of distribution the commissioner of the court, who appears also to have been its receiver in that matter, executed a check to appellee for $244.16, on April 16, 1891. The check was payable to appellee's order. D M. Terrell, together with appellee's husband and another, had bought the land at the commissioner's sale, from which was raised the fund above referred. Appellee consented that two of the payments coming to her out of this fund should be applied by her husband on his part of the purchase money, and they were so applied, but she claims that she did not consent to the application of the third payment, which is the one now in question. Nothwithstanding this D. M. Terrell falsely represented to the commissioner that appellee had authorized him to get and use this check. The proof shows that he did get it, endorsed her name on it and endorsed his own, and deposited it to his credit in the bank, and received the money on it.

In 1902 appellee discovered, for the first time, that this check had been delivered to D. M. Terrell, who was her uncle, and that he had, without her knowledge or consent, thus fraudulently appropriated it to his own use. Whereupon she brought this suit against him to recover the amount of the check and interest.

There are two defenses: First, there was a plea of the ten-year statute of limitation (section 2519, Kentucky Statutes), applicable to relief from fraud; second, it was claimed that the appellee had authorized her husband to use this check and to pay it to appellant, and that he did so with her knowledge and consent. A demurrer was sustained to the first defense, and an issue joined upon the second, which was tried out by the circuit judge, and the

fact was decided upon the evidence in favor of appellee. It would serve no useful purpose to discuss this evidence in detail. It is enough to say that, in our opinion, the chancellor's conclusion is fully sustained by the evidence, and that appellee did not endorse the check and did not authorize its use, and did not know of it.

The court's ruling on the plea of limitation was also correct. Appellee was, as the pleadings show, a married woman at the time her cause of action accrued, and continued under that disability until the trial of the case. Section 2525, Kentucky Statutes, provides that if a person entitled to bring any of the actions mentioned in the third article of the chapter, except for a penalty or forfeiture, was at the time of the cause of action a married woman, the action may be brought within the like number of years after the removal of such disability that is allowed to a person having no such impediment to bring the same after the right accrued. Under the third article of that chapter is included section 2519, above mentioned. The exception in favor of married women is unequivocal, and does not at all depend on whether they might or might not have sued, notwithstanding the fact that they were married. Their ability to maintain the suit under the Code, or under the act of 1894, is not a test of whether the statute runs against them. The sole test is whether or not they are married women. The legislature had the power to enact a general statute applicable to all of a class. Having done so, and providing for a suspension of the statutes of limitation during a designated condition of that certain class, there is nothing left for the courts to do but to apply the statute as enacted. It is to be noted that the statute does not read that the married woman must be under the disability of marriage from bringing a suit before she will have the benefit of the statute, but it says that if she be a married woman, or if such person be an infant or of unsound mind, the statute is suspended in their behalf. The words "disability of such person" occurring later in the statute does not mean disability to sue, but is merely descriptive of the condition of the person. Second, the argument that appellee's share of the fund in court was her general personal estate, which her husband had the right to receive, and convert it to his own use even without her consent, and, therefore, had the right to collect it, and the right being his, the statute of limitation would run against it. (Hargis v. Sewell, 87 Ky., 62.) The answer is, that it appears from the record that the fund was derived from the sale of land which was sold, because it was not susceptible of division without materially impairing its value. It was a sale under subsection 2 of section 490, Civil Code. Subsection 3 of section 497 of the Civil Code expressly provides: "The proceeds when received by a married woman shall be her separate property." By subsection 6 of section 494 of the Code such proceeds, until they are actually received by the married woman, descend as real estate. The proceeds are treated as real estate so far as the rights of the husband therein are concerned. Therefore, the husband had no right in this case to receive the proceeds independent of his wife's permission, and consequently the statute of limitation could not have run against such right.

Perceiving no error in the record the judgment is affirmed, with damages.

UNION CENTRAL LIFE INSURANCE CO. v. SPINKS.

(Filed December 9, 1904.)

This suit was upon a ten-year life policy for $10,000, issued February 1, 1894. Three annual payments for $396.80 each had been paid and a note for the fourth executed, due in six months, with interest. The policy contained the following provisions: "All premiums or notes, or interest on notes, given the company shall be paid on or before the days upon which they became due, etc. Upon the violation of any of the foregoing conditions this policy shall be void without action on the part of the company, or notice to the insured or the beneficiary, etc. The contract of insurance between the parties hereto, is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing, signed by the president, vice-president or secretary of the company, whose authority for this purpose can not be delegated. No suit to recover on this policy shall be brought after one year from the death of the insured." This suit was not brought until more than a year after the death of the insured. The last note was due June 15, 1898, was sent to the bank for collection June 21, 1898, and a health certificate demanded of the insured July 7, 1898. Insured died September 14, 1898. The insured had been in the habit of executing notes to the company for his premiums and of paying them some time after maturity, and so far as the record shows they were always received without question. Held—

1. Forfeitures—Nonpayment of premium—Election of company—It is a well-settled law of this State that if an insurer desires to avail itself of conditions in its policy, to declare it forfeited for the nonpayment of a premium note, it must unequivocally elect to so treat it, and in fact then and thereafter so treat it. It will not be allowed to claim both that it is not bound on the policy, but that the insured is bound on the note. Where it may return the note as evidence of its nonpayment it must not retain it or treat it as an evidence of that much indebtedness.

2. Cancellation on private books—The fact that the insured marked on its private books that the policy was cancelled did not cancel it, if thereafter it continued to assert the note as an enforcible obligation against the insured, thereby evincing to him that it was not cancelled.

3. Upon the more important legal question, whether parties can by contract substitute a period of limitation for the statutes of limitation, enacted by the legislature of this State, we hold: First, that while the statutes themselves make provision for their suspension, it is to be noted that in every instance it is allowed for the purpose of continuing or prolonging a pre-existing right to sue, and never to close the door against suits by any kind of waiver in favor of the obligee. Second, statutes of limitation are expressive of a public policy, and are favorably regarded by the law. They are not in operation by the mere will of the people, but in spite of them; and where the statute is expressive of the public policy, any contract made in contravention of it is ipso facto void. Parties will never be heard to say that they elect to waive the public policy and are willing to abide by their own substituted policy. Third, the strength of every contract lies in the right of the promisee to resort to the courts of public justice for redress for its violation. It is not enough that the parties may have voluntarily agreed, nor that there was a satisfactory consideration, nor that they have contractual capacity, for if one has in such agreement bound himself to forego

some positive right given to him by law, by which justice is secured, he should not be bound, for to do so is to bind oneself to oppression, which is contrary to the well being of society. Fourth, a contract agreeing in advance that the obligee will not resort to the courts for its enforcement after one year, when the statutes of the State allow fifteen years within which to bring the action, is merely an agreement not to resort to the courts in spite of the policy and laws of the State which give the right. To enforce such is to put it in the power of one party to practice oppression and to close the courts against relief. Fifth, statutes of limitation of the State, like statutes of exemption, are enacted, not solely for individual welfare, but for the public well being; they are, under our Constitution, of general application within the State, and are indications of the State's public policy on those objects. Contracts in contravention of them are void.

Robert Ramsey, Maxwell & Ramsey and W. W. Helm for appellant.

L. J. Crawford and Hazelrigg, Chenault & Hazelrigg for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge O'Rear.

This suit was upon a ten-year term life policy issued by appellant upon the life of Charles Spinks for $10,000. The policy was issued Feburary 1, 1894. The annual premium was $396.80. The policy contained the following provisions: "All premiums or notes, or interest upon notes, given the company for premiums shall be paid on or before the days upon which they become due, etc. Upon the violation of any of the foregoing conditions this policy shall be null and void without action on the part of the company or notice to the insured or beneficiary, etc. The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the president, vice-president or secretary of the company, whose authority for this purpose shall not be delegated. No suit to recover under this policy shall be brought after one year from the death of the insured."

The insured paid three of the annual premiums, and on December 15, 1897, executed to appellant a six months' note for $396.80 for annual premium due on that date. The note was not paid at maturity. On the day following the maturity of the note defendant's general agent at Cincinnati wrote the insured as follows:

"Cincinnati, O., June 16, 1898.

"Charles Spinks, Esq., Newport, Ky.:

"Dear sir—Your note of $396.80 ($11.90 interest) on policy 114,386 was due and unpaid on the 15th day of June, 1898.

"Your immediate attention to the above is of the utmost importance to the validity of your policy in the event of sudden misfortune. Please call and arrange to pay the same at once.

"Yours respectfully,

"E. W. JEWELL, General Agent."

The insured made no reply to this letter so far as the proof shows.

On June 21st the general agent sent the note to a bank, with the following letter of advice:

"Cincinnati, O., June 21, 1898.

"Newport National Bank, Newport, Ky.:

"Gentlemen—I enclose you the note of Charles Spinks for collection.

"Note	$396.80
"Interest	11.90
	$408.70

"Yours respectfully,

"E. W. JEWELL, General Agent."

The bank, as agent of the insurance company, presented the note to the insured and demanded payment, but it was not paid. On July 7th following it was returned to appellant; on that day appellant wrote the insured as follows:

"Cincinnati, O., July 7, 1898.

"Charles Spinks, Esq., Newport, Ky.:

"Dear sir—The note given in payment of the annual premium on your policy, 114,386, was due and unpaid June 15th, and according to the rules of the company you must furnish us a satisfactory certificate of good health before settling this note. If you will kindly take the endorsed health certificate to the medical directors of the company they will fill it out and pass upon it.

Yours respectfully,

"E. W. JEWELL, General Agent."

It is claimed for appellant that it about the same time forwarded to its local agent at Newport, where insured lived, a formal notice cancelling the policy for nonpayment of premium, but there is no evidence that it was ever received by the insured. Omitting, therefore, the last-named act from the proceedings, we have, so far as the insured was advised, that the insurance company held his premium note, was endeavoring and intending to collect it in full, which represented the premium on his policy to December 15th following, and had taken no action looking to a cancellation of the policy. As a matter of fact it is testified that the company, immediately upon default when the note was due, marked the policy on its policy register "cancelled."

The insured had been in the habit of executing notes to appellant for his premiums and of paying them some time after maturity. They were always received, so far as this record shows, without question. The insured, however, died on the 14th of September, 1898. This suit is by the beneficiary of the policy, a son of the insured.

It is the well-settled law of this State that if an insurer desires to avail itself of conditions in its policy, to declare it forfeited for the nonpayment of a premium note, it must unequivocally elect to so treat it, and in fact then and thereafter so treat it. It will not be allowed though to claim both that it is not bound on the policy, but that the insured is bound to pay the note. Its action must be consistent. While it may retain the note as evidence of its nonpayment, it must not retain it or treat it as an evidence of that much indebtedness. (Moreland v. Union Central Life Ins. Co., 20 Ky. Law Rep., 482, 104 Ky., 129; Union Life Ins. Co. v. Duvall, 20 Ky. Law Rep., 441; Johnson v. Southern Mut. Life Ins. Co., 79 Ky., 406; Walls v. Home Ins. Co., 24 Ky. Law Rep., 1452.)

In the case at bar appellant not only retained the note after its maturity, but repeatedly endeavored to collect it in full thereafter. It thereby claimed that the insured owed to it $396.80 as an enforcible debt. If he did, then appellant was bound to him as the consideration for it upon the policy of insurance. Even though such provisions in policies of insurance are automatic, they may be waived by the parties, and this waiver may be indicated by conduct as well as by express language. The fact that the insured marked on its private books that the policy was cancelled did not cancel it, if thereafter it continued to assert the note as an enforcible obligation against the insured, thereby evincing to him that it was not cancelled. Upon principle and authority we hold that the evidence here shows a waiver by the insurer of the condition of forfeiture in the policy.

The more important question is that of special limitation of one year provided for by the policy. The suit was not brought till more than one year after the death of the insured. We are aware that this or a similar provision is contained in nearly all insurance policies, fire and life; we are further aware that the provision is upheld by many courts, including the United States Supreme Court (Riddlesbarger v. Hartford Ins. Co., 7 Wall., 386), and is approved by text-writers. This court has also, though with hesitation and misgiving, followed the other courts in approving it. We, therefore, have come to the reconsideration of this question with a deep sense of its importance and difficulty and of our duty in the premises.

The legal question is, can parties by contract substitute a period of limitation binding upon the courts for the statutes of limitation enacted by the legislature? If they can it must be upon some general principle, the breadth and far-reaching effect of which can not logically be limited to mere contracts of insurance, but must incontrovertibly be applicable to all contracts, for if it is a matter of agreement alone between parties competent to contract, the only inquiry that can ever be made is, have they agreed upon it?

Pleas of limitation were allowed long before there was any statute on the subject. The courts applied them upon the theory of a fiction, to the effect that after so long a lapse of time, during which the claimant made no assertion of his rights in a personal demand, a presumption was raised that the obligation had been paid or discharged, and in the case of real estate, that a conveyance had been executed, but lost. The fiction was justified in the reasoning of the courts by the evident justness of its effect, it being argued that one who had so long neglected his rights as to allow the other party to suffer by it, by the loss of evidence and the like, ought not to be heard to disturb a condition he had suffered to come about. But statutes of limitation have come to be enacted everywhere. They are not mere rules of evidence, presumptions of the payment or extinguishment of the obligation sued upon, but are statutes expressive of a public policy, and are favorably regarded by the law. They are not in operation or suspense at the mere will of the parties, but in spite of them. While the statutes themselves make provision for their suspension, it is to be noted that in every instance it is allowed for the purpose of continuing or prolonging a pre-existing right to sue, and never to close the door against suits by any kind of waiver in favor of an obligee.

Many statutory provisions are made for the protection of personal rights, which the parties may avail themselves of or not in their transactions as they may please; but where the statute is expressive of the public policy, any contract made in contravention of it is ipso facto void. Parties will never be heard to say that they elect to waive the public policy, and are willing to abide by their own substituted policy. The public policy, as the term indicates, is impersonal, and essentially of universal and exclusive application within the territory of the authority declaring it. There could be no public policy otherwise, and the whole people would be powerless to enforce any wholesome general rule of conduct in business transactions, where any number chose to ignore or violate it. Statutes of limitation belong to this class. They pertain to the administration of justice by the courts of the State, a subject of paramount concern to the whole public. That there may be a period of repose against stale claims is provided, recognizing the old idea that but for the loss of evidence, death or removal of witnesses, forgetfulness and so on, an apparent condition might have been explained away. The statute means more than that no suit shall be maintained upon the class of claims treated of by it after the lapse of the time fixed by it; it means also that until that time has elapsed the courts are open to hear the claim. The statutes are substituted in lieu of the common law rules of presumptions and practice, and establish the public policy of the State on the subject of limitation of actions. They supersede not only the fictions of the common law, but also supersede the hitherto uncontrolled capacity of parties to themselves limit the time in which either may rightfully appeal to the courts for redress under their contacts. Agreements in advance to waive statutes of limitation altogether are held void on the grounds that such statutes are for the repose, the peace and the welfare of society. (Greenhood on Public Policy, 504; Kellogg v. Dickinson, 147 Mass., 432; Trask v. Weeks, 81 Me., 325; Green v. Goose Bay Wagon Road Co., 23 Fed. Rep., 66.) It is old and familiar doctrine that the courts will not enforce a contract by which the parties have bound themselves not to sue at all, or to leave the difference exclusively to arbitrators. If parties by contract can lawfully provide when the suit shall be instituted (or when it shall not be, which is the same thing), why not let them go further within the same principle and stipulate as to the nature of the action, whether it shall be tried by a jury and what evidence shall be receivable to establish or impeach the right. And, by force of the same logic, why not close the matter consistently by concluding how and out of what estate the execution upon the judgment may be levied, and within what time the judgment of the court may be enforced. If the fact be that by contract one party becomes bound to another, the policy of the law is to regulate in what forums, by what nature of proceedings, by what forms of practice and within what period it may be enforced. An agreement in advance not to apply to any court for redress is admittedly void. An agreement to confer jurisdiction upon a court not provided with it by law is likewise void. An agreement not to avail oneself of the statutes regulating practice would be held void for the same reasons. Now the remaining question, can a party bind himself by an agreement in advance not to sue, not to appeal to the courts having jurisdiction of the matter, for fourteen years of the fifteen which are allowed

by statute, thus confining himself to one-fifteenth of the time the statutes give?

It is difficult, if not inadvisable, to attempt an exact definition of the term "public policy." Story says of it (Story on Contracts, section 546): "It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. This rule may, however, be laid down, that wherever any contract conflicts with the morals of the time and contravenes any established interest of society, it is void, as being against public policy."

In Brooks v. Cooper, 50 N. J. Eq., 761, 35 Am. St. Rep., 795, the subject appears to have been thoroughly considered and exhaustively treated. In summing up a number of considered cases the court wrote: "It has been declared that public policy is a variable quality, but the principles to be applied have always remained unchanged and unchangeable, and public policy is only variable in so far as the habits, capacities and opportunities of the public have become more varied and complex. The relations of society become from time to time more complex; statutes defining and declaring public and private rights multiply rapidly, and public policy often changes as the laws change, and, therefore, new applications of old principles are required." (Davies v. Davies, L. R., 36 Ch. Div., 364.)

"Whatever tends to injustice or oppression, restraint of liberty, restraint of legal right; whatever tends to the obstruction of justice, a violation of a statute, or the obstruction or perversion of the administration of the law; whatever tends to interfere with or control the administration of the law as to executive, legislative or other official action; whenever embodied in and made the subject of a contract, the contract is against public policy, and, therefore, void, and not susceptible of enforcement. When we speak of the public policy of the State we mean the law of the State, whether found in the Constitution, the statutes or the judicial records." (People v. Hawkins, 157 N. Y., 12.)

These citations will serve to show the scope of the principle. Particular instances, by way of illustration and application, will be given further along. We can not hope to reconcile the public policy of this State with that of other States. Each State necessarily establishes its own public policy, confined to its own territory. That they may not be uniform throughout the Union is neither surprising nor discouraging, for what may be deemed inimical by one may be treated as immaterial by another, and indeed may be so.

We will come directly to the question whether statutes of limitation are in this State indications of its public policy. The strength of every contract lies in the right of the promisee to resort to the courts of public justice for redress for its violation. It is not enough that the parties may have voluntarily agreed, nor that there was a satisfactory consideration, nor that they have contractual capacity, or if one has in such agreement bound himself to forego some positive right given to him by the law, by which justice is secured, he should not be bound, for to do so is to bind oneself to oppression, which is contrary to the well being of society. Courts are established at the public expense to redress wrongs, including breaches of contracts. They are open at all times for that purpose; such is the public good. The

knowledge of that fact exercises no small influence upon the conduct of individuals. It is useless for the oppressor to try to get what he knows the courts will not allow, so he regulates his conduct by knowledge of that fact. Stale claims, if allowed, would tend to encourage perjury and fraud, therefore, a statute is passed to restrict their assertion in the courts; on the other hand, claims which are not outlawed for the reason just assigned ought to have a forum in which they may be asserted against an unwilling or dishonest obligee. The existence of that right is of great value to the claimant, but it is likewise of great importance to the public, as by it the weak are assured of their rights against the strong—the sum of all government. A contract agreeing in advance that the obligee will not resort to the courts for its enforcement after one year, when the statutes of the State allow fifteen years within which to begin the action upon it, is merely an agreement not to resort to the courts in spite of the policy and laws of the State which give the right. To enforce such is to put it in the power of one party to practice oppression, and to close the courts against its relief.

Now for the instances in which the principle being discussed has been applied in this State. In Wright v. Gardner, 98 Ky., 454, an agreement in advance waiving the statute of limitation provided for that class of transactions and extending the time beyond the statutory period was held void, because against the public policy of the State. An agreement in a contract between a telegraph company and the sender of a message, limiting the time to which claims should be presented and prosecuted against the former for a breach of the contract to a period shorter than that fixed by statute, was held void as against public policy in Western Union Tel. Co. v. Eubanks, 100 Ky., 604. This was followed and approved in Davis v. Western Union Tel. Co., 107 Ky., 527. It is true that in the Eubanks' case, supra, it was intimated that the contract was void for the additional reason that it violated section 196 of the Constitution, prohibiting a common carrier from contracting against its common law liability. In the later case of Davis, supra, the decision was rested solely on the ground that the stipulation was void because contrary to public policy. It was probably doubted whether the statute of limitation was any part of a common carrier's liability.

A familiar feature of life insurance policies is the provision that after a given number of payments the insured shall be entitled to a paid-up policy proportioned as the number of payments bear to the maximum number required to be made by the policy, provided the insured shall within six months, or some such time, surrender his policy and demand the paid-up policy. In a number of cases it has been held that the provision limiting the time within which to demand the paid up policy was not of the essence of the contract, was in the nature of a forfeiture, and was void. (Montgomery v. Phœnix Life Ins. Co., 14 Bush, 51; Mutual Life Ins. Co. v. Jarboe, 102 Ky., 80, overruling Northwestern Mut. Life Ins. Co. v. Barbour, 92 Ky., 427, and Hexter v. U. S. Life Ins. Co., 91 Ky., 356; Washington Life Ins. Co. v. Miles, 23 Ky. Law Rep., 1705; Manhattan Life Ins. Co. v. Patterson, 23 Ky. Law Rep., 1282; N. Y. Life Ins. Co. v. Warren Deposit Bank, 25 Ky. Law Rep., 826; Manhattan Life Ins Co. v. Savage's Adm'r, 23 Ky. Law Rep., 483; Mutual Life Ins. Co. v. O'Neil, 25 Ky. Law Rep., 988.)

Under section 700, Kentucky Statutes, it is provided that in case of total loss of an insured building by fire the insurer shall pay the amount of its policy, except in case of fraud or deterioration in value since the policy was issued. Contracts attempting in advance of loss to waive the statute, and agreeing upon a different basis of settlement, are held void as being against the public policy evinced by the statute. (Caledonia Ins. Co. v. Cooke, 19 Ky. Law Rep., 651, 101 Ky., 412; Hartford Fire Ins. Co. v. Bourbon Co., 24 Ky. Law Rep., 1850; Thuringia Ins. Co. v. Malott, 111 Ky., 917; Palatine Ins. Co. v. Weiss, 109 Ky., 464.)

A contract in advance waiving the statute of exemption is held void in Moxley v. Ragan, 10 Bush, 156. Agreements to pay attorney's fee in case of suit to enforce a contract are held void because in contravention of the public policy. (Thomasson v. Townsend, 10 Bush, 114; Witherspoon v. Musselman, 14 Bush, 214.)

The Constituton of this State, section 59, prohibits the legislature from passing special or local acts concerning quite a number of enumerated subjects, including "(5) to regulate the limitation of civil or criminal actions. U." Under this provision it has been held that a statute limiting actions against cities of the first class in this Commonwealth to six months, whether based upon torts or contracts, the general law providing different periods, was void. (Gorley v. Louisville, 104 Ky., 372, 20 Ky. Law Rep., 602; Louisville v. Kuntz, 20 Ky. Law Rep., 805, 104 Ky., 584.) In the last-named case it was said: "When the Constitution prohibits the legislature from passing special laws upon any given subject, it means that all laws upon that subject shall operate alike upon all, whether individual or corporate, public or private. It is a safeguard provided by the Constitution for the protection of the weak as well as the strong."

A contract between an express company and a shipper limiting its liability for a breach of its bill of lading to six months, when the statutory period was longer, was held void as contrary to public policy in Adams Express Co. v. Walker, ante, 1025, decided Nov. 22, 1904.

Unless these cases are to be followed, and the principle which governed them applied to all cases, we will have it that everbody, except express and telegraph companies, may by contract abrogate the statutes of limitation by stipulating for a shorter period. Each contract will have its own barrier, which the courts will be bound to observe. And, though the legislature is prohibited by the Contitution from providing any but general and uniform laws of limitation, parties to contracts may have as many different periods as there may be contracts. Railroad operators, merchants, bankers and employers of labor may all contract for such periods as may suit their whim or avarice, to which the other party may be compelled to submit by his present necessities It would make the law a subject of barter and the courts of justice to open or close as the result of a dicker. It seems to us to logically follow that if part of a contract of insurance is not forfeited by a failure to comply with a stipulation in the policy, that it will be unless it is claimed within six months, that all of the policy will not be forfeited by a similar failure to sue for it within one year according to the stipulations of the policy to that effect. In each instance the essence of the proviso in the policy is to work a forfeiture of the vested interest, a property right, because the

person entitled to it does not sue for it within an agreed time, less than the statutory period of limitation. The statutes of limitation of this State, like statutes of exemption, are enacted, not solely for individual welfare, but for the public well-being; they are, under our Constitution, of general and universal application within the State, and are indications of the State's public policy on those subjects. Contracts in contravention of them are void.

In Owen v. Ins. Co., 87 Ky., 571, the policy contained a provision that suit upon it must be begun within one year from the accrual of the cause of action. The question presented for decision was whether the year had gone. The court decided that it had not, as the last day of the year fell on Sunday, which was excluded by the court so as to allow the 365th day to fall on a secular day, when the suit could be filed. Having decided that the year had not run, it was not necessarily involved whether thhe stipulation was valid. The court, for the purposes of the case, assumed that it was, and this it might have done whether it was or was not valid.

In Kentucky Mutual Security Fund Co. v. Turner, 89 Ky., 665, a policy of life insurance contained a similar clause limiting the cause of action to one year should a cause arise. A cause of action did accrue upon it. Demand was made of the insurer within one year, and it made a partial payment upon it. Failing to pay the balance suit was brought upon the policy to recover it. The insurer pleaded the contract limitation. The replication in avoidance was that the partial payment had operated to start anew the period of limitation within which suit might be brought. The question presented for decision and decided was that a partial payment within the year did operate to start anew the limitation period. A recovery was allowed. Counsel for the plaintiff admitted that the one-year provision was valid. The court likewise assumed that it was. There was no controversy about it in the case. It was passed over in the opinion without citation of authority or statement of reason for its support. Like in the case of Owen v. Ins. Co., supra, it was obiter dictum.

In Lee v. Union Central Life Ins. Co., 22 Ky. Law Rep., 1712; the question was directly presented, and was finally decided on rehearing by an equally divided court.

In Smith v. Herd, 110 Ky., 56, 22 Ky. Law Rep., 1596, the question was again squarely presented, and was decided in conformity to the reasoning in Riddlebarger v. Ins. Co., supra, and citing Owens v. Howard Ins. Co., supra. The gist of the reasoning advanced in the Riddlebarger case, and in the text-books which have adopted it, is that it is essential to the insurer to have the claim promptly presented and adjusted, as by a great lapse of time the circumstances of the transaction are apt to fade from the memory of disinterested witnesses, or the evidence will be lost, and the insured or beneficiary being on the ground would have an undue advantage which might be turned into the fabrication of evidence and the like to support unmeritorious claims. The argument when presented to the legislature might justify that body's enacting a general law of limitation for this class of contracts different from that applied to ordinary written obligations But it is not a good reason why the statute now in force and applicable to such contracts, the statute of fifteen years (section 2514, Kentucky Statutes), should not be applied by the courts. Beside, the condition of the law in this State

does not warrant the application of the reasoning, for here we enforce the provision of the contract requiring that the insured or beneficiary furnish promptly notice and proof of loss as a condition precedent to his right to sue. This puts before the insurer the fact that it is claimed to be liable on the policy and the circumstances and names of witnesses by which it is proposed to establish it. (Ætna Life Ins. Co. v. Milward, 26 Ky. Law Rep., 589.) It is then open to the insurer to protect itself, if it deems the claim unfounded in merit, in two ways: First, to proceed under the Code to perpetuate its evidence, so that whenever the action may be brought against it, it has lost nothing by deaths and removals of witnesses; or, it may sue at once to be relieved of the liability claimed, on the ground that it has been discharged or that the contract has terminated, or for whatever reason. And it may thus at once force a trial of the matter, getting such advantages as accrue from that fact.

While recognizing the great ability of the justices of the Supreme Court and the learning and wisdom of the courts of final resort of the States that have adopted a different policy, yet we feel constrained to declare that the public policy of Kentucky is a matter peculiarly for her own construction and application. The reasoning applied to uphold the distinction made in favor of insurance contracts to us is unsatisfying, while the objections to the principle on which it rests are insuperable. The Supreme Courts of other States have come to the same conclusion at which we have arrived. (Barnes v. McMurtry, 29 Neb., 184; Georgia Masonic Ins. Co. v. Davis, 63 Ga., 471.) And there may be others. Smith v. Herd, 110 Ky., 56, is overruled. Lee v. Union Central Life Ins. Co., supra, will not longer be considered authority on this point.

We conclude that the provision in the policy, that no suit should be maintained upon it unless begun within one year from the death of the insured, was in contravention of the public policy of this State, and is void.

It follows that the judgment of the circuit court having been in conformity to this conclusion, is affirmed, with damages.

The whole court sitting, Judge Paynter dissenting.

MONTZ v. SCHWABACHER, &c.

(Filed December 9, 1904.)

1. Judgment—Sale decreed—Report filed—Death of party defendant—Revivor—Where a judgment has been executed by a sale of the property decreed to be sold and report of sale filed, but before confirmation one of the defendant title holders died, it was proper to revive the action against the infant children of the deceased defendant, under section 507 of the Civil Code, instead of reviving the judgment under subsection 3 of section 407 of the Civil Code.

2. Deceased married women—Heirs—Legal presumption—Proceeding to enforce mortgage on her land—The legal presumption is that every decedent has heirs, and in a proceeding to enforce a mortgage lien on the land of a deceased married woman, an unsupported allegation in the petition that she left no heirs or kindred, on either her paternal or maternal side, and that her property descended under the statute to her husband, is not suffi-

cient to divest the heirs at law of such decedent of title to real estate left by her, in the event that such heir should hereafter assert title thereto.

8. How to proceed—Purchaser—Proceeds of sale—The only legal way in which a purchaser of property, belonging to a deceased married woman, who left "no known kindred," can be protected in his purchase at a sale to enforce a mortgage lien thereon is that the unknown heirs of decedent should be proceeded against under the provisions of the Civil Code, and upon proper showing that decedent left neither paternal nor maternal kindred, the chancellor would be authorized to permit a withdrawal of any surplus which might be realized from a sale of the property to satisfy the mortgage debt, and in such case the purchaser would be protected even in the event it should subsequently develop that decedent was actually survived by kindred.

Strother & Hardin for appellant.

Goldsmith for appellee Schwabacher.

B. F. Washer for Isham Miller, guardian.

Lafon Allen for appellee, Mary Miller.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice Burnam.

On the 21st day of September, 1895, Eliza Miller and her husband, Chess Miller, executed a mortgage to Helen Schwabacher upon a small house and lot belonging to Eliza to secure the payment of a note for $250, which was executed for loan money. On the 25th of February, 1897, Eliza Miller died intestate. Shortly after the death of Eliza, Chess Miller married again, and occupied the property with his third wife until his death on the 19th of December, 1902. He was survived by his third wife and a daughter, Sallie Bethel, a daughter of his first wife, who was in nowise related to his second wife, Eliza Miller. After the death of Chess Miller, Helen Schwabacher brought this action against the surviving widow, Mary Miller, and the daughter, Sallie Bethel, and her husband to collect her debt, and asked an enforcement of the mortgage lien which had been executed to her to secure its payment. In addition to the usual allegations of such petition the plaintiff further alleged "that Eliza Miller left no heirs or kindred of any kind or degree surviving her, and that the property descended under the statute to her husband, Chess Miller." The defendants filed no answer, and in July, 1903, a judgment was rendered directing the sale of the property to secure the plaintiff's debt and also several tax liens due the city of Louisville. At the sale which was made pursuant to this judgment the appellant, W. S. Montz, bought the property at the price of $775. After the sale, but before the confirmation thereof, Sallie Bethel died, leaving surviving her four children. Her death was suggested and motion made to revive the action against her infant children. Shortly thereafter Isham Miller qualified as guardian of the infants, and entered their appearance to the motion and consented to a revivor. To all of which the purchaser, Montz, objected. The purchaser, Montz, thereupon filed in writing exceptions, based upon a number of grounds, to the confirmation of the sale, which was overruled and the sale confirmed; and he has appealed and asks a reversal, first, on the ground that the judgment was not properly revived against the

infant heirs of Sallie Bethel; second, because the averments of the petition were not sufficiently full and definite to authorize the conclusion that the property owned by Eliza passed to her husband at her death under the statute, and also for lack of proof to rebut the legal presumption of heirs.

In support of the first exception our attention is called to the fact that the order was to revive the action against the real representative of the defendant, under section 507 of the Civil Code, whilst the contention is made that it should have been to revive the judgment under subsection 3 of section 407 of the Civil Code. We can not agree with this contention. The judgment had been executed by a sale of the property and the report of the master commissioner to the court, and no further step was to be taken under it. The question was as to the revivor of the action, and we think the order to revive the action was properly had, as directed by section 507 of the Civil Code. The second exception raises a more serious question. The only claim of the defendants to the real estate left by Eliza Miller is as heirs at law of the husband, Chess Miller, and he did not inherit the property under the statute except under the bare contingency that his deceased wife did not leave surviving her kindred in either paternal or maternal line, however remote in degree such relationship may have been. The legal presumption is that every decedent has heirs, but this presumption may be rebutted either by a lapse of time, accompanied by the nonappearance of heirs, or by proof of the fact. (22 A. & E. En. of Law, 1241.) In the case at bar there is neither proof of the fact alleged nor such lapse of time as would rebut this presumption. It rests alone upon the allegation of the petition that Eliza Miller left no heirs or kindred of any kind or degree surviving her. Whilst we can not agree with the contention of appellant that the form of the averment on this point as made in the petition is a mere legal conclusion, and that it is necessary to state specifically that Eliza Miller left neither paternal nor maternal kindred, this unsupported allegation is not sufficient to divest the heirs at law of Eliza Miller of title in the real estate left by her in the event such person should hereafter assert title thereto. Neither of the defendants answered the petition, and the judgment of sale went by default because it was plainly their interest that the averment of the petition should be taken as true.

The only way in which a purchaser of property situated as this is can be protected in his purchase is that the unknown heirs of the deceased wife should be proceeded against under the provision of the Civil Code. If these steps are properly taken and a sale had, the purchaser would be protected even in the event it should subsequently develop that the decedent was actually survived by kindred, and upon proper showing made by the defendant claimants that the deceased actually left neither paternal nor maternal kindred, the chancellor would be authorized to permit a withdrawal of any surplus funds which might be realized from the sale of the property to satisfy the mortgage of appellee.

For reasons indicated the judgment is reversed and cause remanded, with instruction to sustain the exceptions of appellant to the confirmation of the sale and for such additional proceedings as may be deemed necessary to conform to the suggestions made in this opinion.

KENNEY CO. v. ANDERSON, &c.

(Filed December 9, 1904—Not to be reported.)

Burnam & Moberly and W. S. Moberly for appellant.

Chenault & Chenault, H. C. Hazelwood and J. Tevis Cobb for appellees.

Appeal from Madison Circuit Court.

Judge Nunn delivered the following response to petition for rehearing:

If appellees misconstrued the effect of the judgment of the lower court, as appears in the petition for rehearing, and disposed of the engine, they should be made to account for the value thereof at the time of such disposal, and this amount to be credited to appellant.

SOUTHERN RAILWAY NEWS CO. v. FIDELITY AND CASUALTY CO. OF NEW YORK.

(Filed December 9, 1904—Not to be reported.)

Corporations—Employer's liability insurance — Limitation — Pleading—In this action by appellant against appellee to recover judgment for the amount of judgment appellant paid to the Kansas City, Memphis & Birmingham Railroad Co. in satisfaction of a judgment recovered against it in favor of an employe of appellant, who was fatally injured by one of the railroad company's trains, the basis of this action being an employer's liability policy of insurance issued to appellant by appellee, it is held that the provision in the contract that the company shall not be liable for the recovery of a claim under the policy, unless the suit to recover upon it is commenced within two years after the accident, which is the cause of action has occurred, is not a good defense for the reasons stated in the opinion in the case of the Union Central Life Insurance Co. v. Spinks, ante, 1205, delivered December 9, 1904, and for the reasons stated in this opinion the demurrer should have been sustained to the part of the answer setting up and relying upon the special contract of limitation aforesaid. The demurrer to the reply should have been overruled because appellee accepted in full satisfaction of renewal premium the sum of $100, in addition to the original premium paid, which latter sum was the consideration for the continuance of the policy in force for a period beyond that provided for in the original policy

Barnett & Barnett and Chas. F. Taylor for appellant.

Forcht & Field for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge O'Rear.

The appellant, Southern Railway News Co., is a corporation engaged in the sale and supplying of books, newspapers, periodicals, refreshments and other articles and goods on railways, stages, steamboats and other conveyances in the United States, and along the lines or ways of same.

The appellee, Fidelity and Casualty Co., of New York, is a corporation engaged in the issuing of policies of insurance, insuring employers against liability for injuries to persons in their employment.

On February 11, 1890, appellee issued to appellant an employer's liability insurance policy, in consideration of $150 premium, insuring the news company for one year against injuries to its employes, for which it might become liable in damages, subject to the limitation that its liability should not be more than $5,000, in respect to an accident which would cause the death or injury of any one person. If any legal proceedings should be taken against the insured to enforce a claim for indemnity for such injuries, the insurer engaged at its own cost and expense to have the absolute conduct and control of defending the same throughout in the name and on behalf of the insured, but if the insurer should offer to pay the insured the full amount insured, then it should not be bound to defend the case, nor be bound for any costs and expenses which the insured might incur in defending it. It is also agreed that upon the occurrence of an accident, in respect of which a claim might arise, notice thereof should be immediately given to the insurer at its office in New York, and appellant should furnish full information in relation to it. The period covered by the policy, it was agreed, was fixed on the assumption that the amount of the estimated yearly pay roll to the employes of the insured would not exceed $30,000, and the premium paid was based on that amount. "Therefore, as soon as the said amount of wages shall have been paid, this policy shall terminate as if the said period had expired, unless it shall have been continued for a further period by the payment and acceptance of a further premium in respect thereof."

The insurer's officers were granted the right at any reasonable hour to inspect the books of the insured so far as they related to the wages paid to employes. The 7th clause of the agreement reads thus: "The company shall not be liable to a suit in any court for the recovery of a claim under this policy unless the same is commenced within two years after the accident, which is the cause of action, has occurred."

On December 28, 1899, about two months previous to the date of the above-named policy, appellant entered into a written contract with the Kansas City, Memphis & Birmingham Railroad Co., by which the railroad company, in consideration of a stipulated sum, granted to the news company the privilege of selling upon its regular passenger trains during the year beginning January, 1890, periodicals, newspapers, books, etc., under certain conditions and regulations therein set out, including the following: "In consideration of the foregoing grant and the privileges therein specified said news company releases said railway company from any right of action, claim or demand which may accrue to it by reason of the loss of any of its property while being transmitted on any of the trains of the railroad company under the terms of the contract, and further agrees, for such consideration, to indemnify said railroad company and save it harmless from all claims, demands, damages, actions, costs and charges to which the railroad company may be subject, or which it may have to pay, by reason of any injury to any person or property, or loss of life or property, suffered or sustained by any agent or employe of the news company while in, upon or about any of the stations, platforms, cars or other premises of the railroad company, whether such injuries or loss arise from the negligence of the employes of said railroad company or otherwise."

Under that contract the railroad company carried the news company's

agents upon its trains, including one George W. Davis, who, in the course of his employment as news agent of appellant, on October 21, 1890, at the company's station, at Birmingham, Alabama, sustained a fatal injury from one of its trains, and he lingered some weeks before he died. Appellant promptly notified appellee of the fact, and called upon it to take such steps as it deemed proper under the policy to protect itself. The administrator sued the railroad company in a court of Alabama having jurisdiction of the matter, and recovered a verdict and judgment for $5,000 and his costs, which the railroad company paid. Neither appellee nor appellant defended that suit. The railroad company on October 14, 1891, demanded payment of the news company of the $5,000, and the further sum of $528.85, which the railroad company had paid for hospital expenses and doctor's services rendered to Davis. The news company failing to pay, the railroad company sued it in the circuit court of Jackson county, in the State of Missouri, which suit resulted in a judgment in favor of the railroad company for $5,528.85. The news company contested its liability under the contract, and its defense was disallowed. The judgment of the circuit court of Jackson county was affirmed on appeal to the Supreme Court of Missouri on June 14, 1899. The case, which is reported, may be found in 45 L. R. A., 380.

On November 18, 1899, appellant filed his petition in equity in the Jefferson Circuit Court of this State against appellee, in which petition it substantially set forth and pleaded the facts above stated, and prayed judgment against appellee for the sum of $7,609.57, with interest from July 27, 1899, which was the aggregate of the judgment paid to the railroad company, and the further sum of $1,560.19, with interest, being the costs incurred by the news company in defending the action. The defenses interposed to this action were: First, the special contract of limitation contained in the 7th provision in the policy, and above quoted; the next was that the amount of the estimated pay roll, namely, $30,000, was exceeded prior to the occurrence set forth in the petition, and that before any payment of premium was made extending or renewing or continuing said policy the accident and occurrence set forth in the petition occurred, and that by reason of these facts the policy had terminated, and was not in existence at the time of the accident. It was pleaded by the reply that as soon as said amount of wages, $30,000, should have been paid the policy would terminate unless it was continued in force for a further period by the payment and acceptance of a further premium; that the insurer knew that appellant compensated its employes by paying them a percentage or commission on the amount of their sales, which commission was indefinite and uncertain and varied from time to time, all of which was explained to the insurer at the time of the application; that on November 29, 1890, appellee, in writing, notified the news company that the policy would expire on February 11, 1891, and on December 8, 1890; it further notified appellant that its pay roll or commission paid by it to its employes, from the date of the policy to December 1, 1890, amounted to $45,870.63, and, in addition to the premium of $150 paid February 11, 1890, the plaintiff then, on December 8, 1890, paid to the appellee the further sum of $100 as renewal premium, which was accepted in full satisfaction of such renewal due it from or about August 8, 1890. A demurrer to this paragraph of the reply was sustained.

The court overruled appellant's demurrer to the plea of the special contract of limitation contained in the 7th paragraph of the contract sued on. Appellant declining to plead further, his petition was dismissed, from which it prosecutes this appeal.

As to the plea of limitation it was not good. The reasons therefor will be found in the opinion this day delivered in the case of Union Central Life Insurance Co. v. Spinks, ante, 1205. The demurrer should have been sustained to that part of the answer.

We are also of the opinion that the demurrer to the reply should have been overruled. The pleadings sufficiently show, and the contract shows, that the insurance was for a term of one year; that the rate of premium was based upon an estimated pay roll; that when the pay roll, which was indefinite and uncertain, should exceed the estimate upon which the premium was based the policy would terminate unless an additional premium was paid. Appellee with full knowledge of its probable liability to the insured on account of the injury to its agent Davis, accepted a premium covering the insurance, embracing the date of Davis' injury. The insurance was not only against loss, but it was against liability and loss that resulted from liability. As the liability attached in this case when Davis was injured, although it was not consummated until it was fixed by judgment of a court of competent jurisdiction and paid, and although the loss actually occurred after the expiration of the policy, yet as it was the direct and natural consequence of an injury and liability incurred during the term of the policy, appellee was liable under its contract. Appellant, after having notified appellee that the liability had been incurred by reason of the injury, was bound to make the loss as small as possible, so far as it reasonably could, although appellee did not avail itself of the provision in the policy to personally conduct the defense to the suit. Appellant might have compromised the claim, so that it acted in good faith and with reasonable prudence, such as a prudent person similarly situated would have done for himself. This would have bound appellee to pay to it the loss actually sustained, of which the compromise, if one was effected, as is charged, may have been taken into consideration as evidence of the actual loss sustained, but, of course, not conclusive evidence of it. Other evidence might also be admitted to show whether it was or was not a judicious and fair settlement.

Where the policy limits the amount of recovery upon the death of a person the costs and expenses incurred in defending suits the insurer should have defended or settled, and interest thereon, are recoverable under the terms of this policy. (Mandell v. Fidelity & Casualty Co., 170 Mass., 173; Mercantile Trust Co. v. South Park Residence Co., 94 Ky., 379.)

The suit against the railroad company by Davis' administrator was for $20,000. The news company was bound for all of it by its contract with the railroad company. Unless settled, it must have been defended. As appellee failed to defend, as it agreed to do unless it paid the $5,000 stipulated in its policy, it was incumbent upon appellant to defend. This defense was primarily for the benefit of appellee, though incidentally it might serve also as a protection to some extent for appellant from additional liability above $5,000 to the railroad company. The hospital expenses being above $500, and not included in the expenses of defending the Alabama suit, are not

part of appellee's liability, nor is appellant's expenses and costs in defending in the Missouri courts its own liability on its contract with the railroad company.

For the reasons indicated the judgment is reversed and cause remanded for further proceedings not inconsistent herewith.

GREEN v. COMMONWEALTH.

(Filed December 13, 1904—Not to be reported.)

1. Verdict—Any evidence—This court has time and again held that it will not, in the absence of error of law occurring at the trial, disturb the verdict of a jury if there was any evidence to support it.

2. Confessions—Although a confession made by the accused to the officers, who had him in custody, made under fear of being mobbed was properly excluded from the jury as incompetent, yet a subsequent confession made to another person in the jail when there were no officials about, and accused was not then in fear, was competent to go to the jury.

3. Witness—Inability to state all the conversation—Where a witness in detailing a confession states that he can not state everything accused said to him, but does undertake to tell the substance of what was said, the evidence is competent.

4. Errors not excepted to on trial—Although there may have been some complaint of threatened mob violence during the trial, that fact having been brought to the attention of the court for the first time on the motion for a new trial, this court is not allowed under section 281, Criminal Code, to take cognizance of it.

5. Applause in court—Slight applause at humorous statements of counsel in his argument to the jury and similar manifestations upon and after reading the verdict of the jury, both being rebuked by the court, though highly improper, were not prejudicial to appellant, the first not being hostile and the last coming after the verdict, could not have influenced the jury.

6. Change of venue—Complaint that appellant was tried in Daviess county can not be considered, as no motion or effort for a change of venue was made by appellant before trial.

7. Instructions—As there was no eyewitness to the killing except the slayer, it was proper for the court in giving the instructions to the jury to include those relating to voluntary manslaughter and self defense, but the fact that the court gave an unnecessary instruction on involuntary manslaughter did not in any way prejudice the appellant.

8. Same—The court having admitted the confession of appellant, made to the witness, Horton, it was not improper for the court to tell the jury in a separate instruction that in arriving at a verdict they must not consider any confession the accused may have made "under fear of punishment, offer or hope of reward, promise of immunity, threat or inducement."

9. Sufficiency of evidence—Where the corpus delicti was sufficiently established, independent of appellant's confession, it is not proper for the court to instruct the jury that the confession of the accused will not warrant his conviction in the absence of other proof that the crime was committed.

Hays, Wells & Johnson for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Settle.

Upon the evening of August 1, 1904, the dead body of a man was found in a booth, forming a part of an eating stand, at the fair grounds, near the city of Owensboro. The body was identified by persons acquainted with him as that of James Coomes, a resident of Webster county, who had been on a visit of a week or ten days to his cousin, Charles Brown, of Owensboro.

It was apparent that the deceased met a violent death, for his head and face had been badly beaten with a piece of plank in the hands of some person, who, in addition to inflicting the wounds mentioned, ran the pointed end of the plank through his neck, and left it sticking in the wound.

The appellant, Roy Green, was indicted for the murder of Coomes, and in the trial that followed the jury by their verdict found him guilty, and fixed his punishment at death. The facts connecting him with the murder were in substance as follows: On Saturday, July 30th, Coomes and his kinsman, Brown, were both drunk; they continued their spree through the night and into Sunday, July 31st, and after sleeping awhile on Sunday, Coomes, as stated by Brown, got up between two and three o'clock in the afternoon, and left his house. At that time Coomes had a twenty dollar bill, a five dollar bill and another, the amount of which was unknown to Brown.

After leaving Brown's, Coomes went to Monarch's saloon in company with Roy Green, the appellant, and it was admitted by appellant upon the witness stand that he met and accompanied Coomes to the saloon and there took a drink with him, and that while in the saloon Coomes told him he wanted to be taken to a bawdy house, and that he complied with his request by conducting him to the house of Mary Patterson.

James Bellew testified that upon leaving Monarch's, Coomes and appellant passed through his stable about two and a half o'clock Sunday afternoon, and Coomes stopped and commenced to tell him of a difficulty he had with Charles Brown, and that he had left Brown's to keep out of trouble, when appellant kept saying to Coomes "come on," and they soon left together.

It appears from the testimony of Mary Patterson, and also from the admissions of appellant upon the trial, that Coomes and appellant reached her house that afternoon between three and four o'clock, and that Coomes went into the house and appellant to the back door, where he remained until Coomes came out.

The Patterson woman also testified that Coomes then had a bottle of whisky, a twenty dollar bill, three five dollar bills and some silver besides, and that he and appellant left her house between four and five o'clock. They were next seen by one Staples, on Triplett street, at the crossing of the Illinois Central railroad. He said the white man was then drunk and the colored man with him, whom he (Staples) afterwards identified as the appellant, offered to bet the white man a dollar that he did not have a dollar, or five dollars that he did not have five dollars; they then went in the direction of the fair grounds.

It was also admitted by appellant in his testimony that he went with Coomes from the Patterson house to the fair grounds, and that when they got there Coomes said he was sleepy and wished to go into the fair grounds and lie down; that they had some difficulty in getting over the gate, but finally succeeded, and upon getting inside they went into the eating room, where Coomes laid down and appellant sat upon the counter. Appellant further testified upon the trial that he left Coomes asleep in the eating room and went to his brother's, where he changed his clothing, and that night at 8:53 o'clock took the train for Evansville, to visit his sister.

After leaving the fair grounds Sunday evening appellant met Allison Jones, at an ice cream parlor. Jones testified that "he came by and called me out; he had some dirt on him, and blood on one of his coat sleeves." Jones then made some remark about his appearance, and appellant in response said: "He had been in a fight with a white man at the fair grounds;" Jones then observed, "yes, and you got whipped," to which appellant responded, "no, I didn't either; this is what I got," at the same time showing some paper money.

Beural Edwards, another witness, testified that he was not far from Jones and appellant during this interview, and saw them talking, though not near enough to understand the conversation. He heard appellant say: "He had a fight, and that he had something," but the witness could not see what he had.

Appellant's explanation upon the witness stand of the blood upon his sleeve was that it got there by the wiping of his nose upon it; that his nose was hurt and caused to bleed by a fall from the gate at the fair grounds which occurred as he and Coomes were climbing it to get into the fair grounds. After taking the train for Evansville appellant bought of the newsboy, Muckinfuss, a paper, and handed him a dollar out of which to get the price of it, and he then had other money that was seen by the newsboy. Appellant left Evansville and went to Louisville, and was shortly thereafter arrested by LaPelle, a police officer of that city. When approached by the officer and asked his name he said it was Albert Webber, and later told the same officer that it was Albert Johnson. He was then asked if his name was not Roy Green, and he said it was. LaPelle pushing the investigation further, asked him why he left Owensboro, and he replied that the police were after him, but that he did not know anything about the killing of the man at the fair grounds. Down to the time of his making this statement nothing had been said by the officer to appellant of the cause of his arrest.

In testifying upon the trial appellant denied that he gave an assumed name to the arresting officer, or that he then said or knew anything about the killing of Coomes.

One J. L. Horton, who saw appellant in the Henderson jail the day following his incarceration therein, testified that he asked him if he killed the man, and he said "yes." Witness then asked him who was with him and he said "no one."

Upon being asked by the Commonwealth's attorney to state as nearly as he could all that appellant said, witness replied: "He said he struck him over the head three or four times with a stick, and then stuck it through

his neck and pushed it against the wall, and took $28 out of his pocket, and went home and then to Evansville." The statements of this witness were also denied by appellant, but no effort was made to otherwise contradict him, nor was there any attempt to discredit or impeach him. There can, however, be no doubt from the evidence that the deceased was killed in the manner indicated by Horton. With the exception of certain evidence in regard to the identity of the body of the deceased, to which reference will be made further on in this opinion, the foregoing statement presents the salient facts relied upon by the Commonwealth to convict appellant, and they seemed sufficient to remove from the minds of the jury all doubt of his guilt. Except his own denial of guilt and the testimony of his mother and brother that the visit to his sister in Evansville had for some time been in contemplation, and that he then had and was accustomed to save his money, there was no evidence introduced in appellant's behalf that militated against that of the Commonwealth.

The appellant was refused a new trial by the lower court, and he now complains of certain alleged errors upon the part of that court which he insists entitle him to a reversal of the judgment of conviction. The grounds for a new trial filed in the lower court manifest the alleged errors complained of. They are as follows: First, the verdict of the jury is against the law and the evidence; second, the court did not properly instruct the jury; third, incompetent evidence was admitted upon the trial; fourth, the appellant did not have a fair trial because of threatened mob violence and the presence during the trial of persons whose demonstrations of hostility toward appellant, together with the applause given the argument of the county attorney by some of them overawed the jury and influenced their verdict; fifth, because of the inability of appellant to procure the affidavits of persons not of kin to, or counsel for, him in order to obtain a change of venue to another county.

We think the first ground urged for a reversal is wholly untenable. This court has time and again declared that it will not, in the absence of errors of law occurring at the trial, disturb the verdict of a jury if there was any evidence to support it, and after a full review of the evidence in this case we are not prepared to say that it was not sufficient to warrant the verdict.

It is, however, contended by counsel for appellant that there was evidence that conduced to prove that one White is the guilty party. It appears from the testimony of White and Chamberlain that they were at the fair grounds together on Sunday afternoon on July 31st. White stated that he on that occasion saw the feet and legs of a man lying in the eating room, but did not then learn that it was a dead body. It is probable that in his intoxicated condition he was at the time unable to understand whether the body was that of a live or dead person. But at any rate, on the afternoon of the following day, about six and a half o'clock, he and Chamberlain were again near the fair grounds, and he then told the latter that there was a dead negro in the grounds, and when Chamberlain insisted upon going to see the body, White tried to dissuade him from doing so, but failing in this, went with him to view it; they saw it and thought it was a negro, which was a natural mistake, as Coomes had been dead about twenty-four hours, and owing to the mangled condition of the head and face, and the decom-

position resulting from the warm weather, the complexion had doubtless changed to a darker hue. Upon leaving the fair grounds they notified others of the presence of the body there, and it was thereupon taken in charge by the authorities. The conduct of White, and his disinclination to have Chamberlain see the body, or tell others about it, which doubtless arose out of his fear that suspicion would fall upon him, rather than from a feeling of guilt, had the effect to cause his arrest, and but for the subsequent development of the facts connecting appellant with the crime the suspicion against him might have ripened into a belief upon the part of the public authorities of his guilt; but the evidence upon which the jury found appellant guilty was evidently insufficient, in their opinion, to fasten guilt upon White, and we have no cause to dissent from that conclusion, even if we had the right to do so. It is also insisted for appellant that the body found in the fair grounds was not identified as that of Coomes. This also was a question to be determined by the jury, and that there was evidence to justify their finding the following facts will show: Beyond doubt Coomes was seen by several persons at and on the way to Monarch's saloon with appellant on the afternoon that the person whose body was found at the fair grounds was killed. He was likewise seen to leave the saloon with him, and no doubt exists from the evidence that Coomes was carried by appellant to the house of Mary Patterson, or that they left the house together and appellant testified that he went with Coomes into the fair grounds, and left him there that afternoon; furthermore, Coomes has not been seen alive by his family or acquaintances since he was with appellant on July 31st, nor has any information been received by any one that he is living. Though the face of the corpse found at the fair grounds was disfigured by wounds and somewhat discolored by decomposition, Brown, the cousin of Coomes, and others who saw the body gave it as their opinion that it was that of Coomes.

The wife of Coomes at the trial positively identified some of the clothes that were taken from the dead body as those worn by her husband when he left home. Charles Brown identified the clothes, except the white shirt, as those worn by Coomes, but said he had on a red shirt when he saw him last. Mary Patterson saw the clothes at the undertaker's, and identified them as those of Coomes, and in addition testified that Coomes had on a white shirt when at her house. It is quite probable, and must have been true, that Coomes changed his shirt before he left Brown's, or thereafter, and before he went to the house of Mary Patterson. Such a change would have been natural and customary.

Milt Rollins testified that the body looked like that of the man who had been introduced to him as Coomes.

When Coomes left Mary Patterson's Sunday afternoon he had a bottle of whisky and more than $20 in money. A bottle of whisky was found with the body at the fair grounds, but no money. Appellant exhibited to Allison Jones Sunday evening after leaving the fair grounds, and also to the newsboy on the train that night, a quantity of money that apparently equalled in amount what Coomes had when he was killed. Finally the confession of appellant made to Horton that he had killed Coomes left no doubt of the identity of the deceased.

It is, however, further insisted for appellant that the court erred in admitting proof of the confession to Horton, because it was made during the appellant's confinement in jail, and was superinduced by fear and certain improper assurances from the officers of the law on the previous night, while he was in their custody and on the way to Henderson to avoid the vengeance of a mob at Owensboro. It appears from the evidence that some of the officers of Daviess county met at Hawesville the train upon which appellant was carried from Louisville to Owensboro, and that after telling appellant that there was danger of his being mobbed at Owensboro, they advised him to confess his guilt, if guilty, in which event the examining trial could be held upon their arrival at Owensboro, without taking him from the train, and he could then be carried on to Henderson on the cars, and there confined in jail to await final trial in the circuit court; that pursuant to this advice appellant did confess his guilt, and waiving an examination before the county judge on the train, was held without bail by that judicial officer to answer the charge of murder, and carried on to Henderson and there lodged in jail. The confession made to the officers was properly excluded by the circuit court from the consideration of the jury as it was improperly obtained from the appellant, but we do not for that reason think the confession made by appellant to Horton incompetent. It was made on the day after appellant's arrival in Henderson, and at a distance of thirty miles from Owensboro. Horton was not an officer, and did not have the appearance of one, and the appellant testified upon the trial that he thought himself safe in the Henderson jail. None of the officers to whom he had made the confession on the previous night, nor other officer, was then present. The supposed or real danger through which he passed the night before was over, and after hours of reflection he again confessed his guilt under circumstances that left him free to act without fear or restraint. There was, therefore, no error in its admission by the court.

In Roberson's Criminal Procedure, volume 2, section 957, it is said: "Although an original confession may have been obtained by improper means, yet subsequent confessions of the same or like facts may be admitted if the court believe from the length of time intervening, or from proper warning of the consequences, of confession, or from other circumstances, that the delusion, hopes or fears, under the influence of which the original confession was made, were entirely dispelled." (Bishop's Criminal Procedure, section 1289; Laughlin v. Commonwealth, 18 Ky. Law Rep., 640; Whitney v. Commonwealth, 24 Ky. Law Rep., 2524; Dugan v. Commonwealth, 102 Ky., 241; Portwood v. Commonwealth, 20 Ky. Law Rep., 680.)

It is also contended by counsel for appellant that the confession made by appellant to Horton ought to have been excluded because the latter in answer to a question upon cross-examination said that he could not state everything that was said by appellant at the time of making the confession. This answer of the witness did not indicate that he failed to remember or state the substance of what was said by appellant. Upon the contrary, the witness had previously been questioned by the Commonwealth's attorney upon the direct examination in a manner that required a full disclosure from him of all that was said by appellant, and the answer of the witness as to what was said by him was so full and complete that it left no doubt of its being the

substance of all that appellant said in the conversation, for it explained where the crime was committed, the instrument used, the manner of its use, the taking of the money of the murdered man by appellant and the subsequent flight of the latter. In other words, the answers of the witness to the questions of the Commonwealth's attorney gave the details of the crime and obviously left nothing of further consequence to tell, therefore, it was necessarily the substance of what was said to the witness by appellant. While the appellant had the right to have the witness tell the whole of what was said by him at the time of making the confession, nevertheless what the witness told was competent if it contained the substance of the conversation. (Roberson's Criminal Procedure, volume 2, pages 1067-1068.)

In the cases cited by counsel for appellant (Berry v. Commonwealth, 10 Bush, 15, and Mullins v. Commonwealth, 3 Ky. Law Rep., 686) it will be found that the witnesses by whom proof of confessions of the accused was attempted to be made were confessedly unable to give the substance of what was said, hence their testimony was properly held to be incompetent.

As to the complaint of threatened mob violence during the trial, we think it sufficient to say that as the matter was brought to the attention of the court for the first time on the motion for a new trial, this court is not allowed to take cognizance of it. (Section 281, Criminal Code.) However no threatened violence from a mob, or even disorderly conduct on the part of those attending the trial, appears from the bill of exceptions, except some slight applause from a few of the audience at certain humorous statements of the county attorney in argument to the jury, and similar manifestation upon the return and after the reading of the verdict of the jury. In both instances the applause was instantly stopped and rebuked by the court and its officers, with threats of punishment if repeated. We do not think these manifestations were prejudicial to the appellant, though highly improper. The first was not hostile, and if the last can be so regarded, it could not have influenced the jury, as it was after the return of their verdict.

As to the complaint of appellant that he was compelled to submit to trial in Daviess county, we can only say that the trial court was not to blame for his failure to obtain a change of venue. Appellant made no application for such a change, and without such application by petition, accompanied by the necessary affidavits required by the statute, the court was powerless to give him a trial in a county other than Daviess.

We do not think the instructions are open to the criticism made by appellant's counsel. They present all the law applicable to the facts of the case. Those in regard to murder and voluntary manslaughter being expressed in the usual terms, are unobjectionable. The court also gave an instruction allowing the appellant the benefit of the law of self-defense, and as there was no eyewitness to the act of the killing except the slayer, it was proper for the court to give the instruction upon voluntary manslaughter and self-defense. We also find in the instructions, separately and as a whole, the usual admonition to the jury to allow appellant the benefit of every reasonable doubt in the matter of determining his guilt or innocence, or if they found him guilty, in determining the degree thereof. We do not think the instruction as to involuntary manslaughter was proper, as there was no evidence upon which to base it. It was not, however, prejudicial to appellant,

as it gave the jury an opportunity to find him guilty of a lesser offense than was commensurate with his guilt, if he killed the deceased, the punishment for which was only fine and imprisonment in jail, or both, in the discretion of the jury.

We are also unable to see that it is assumed by the instructions that the body found in the fair grounds was that of James Coomes. Upon the contrary, they submit to the decision of the jury the question of whether or not the body was that of Coomes.

Counsel for appellant object to instructions 9 and 10, and insist that they were prejudicial to appellant. That they were unnecessary and even improper may be conceded, but they could not have been hurtful to appellant. No. 9 excluded from the consideration of the jury any and all confessions or admissions of guilt made by appellant on the cars and before he was placed in the Henderson jail. The question as to whether such confessions should be admitted as evidence is one of law, and must be decided by the court. In this case it was decided by the court upon the evidence and out of the hearing of the jury, and the decision being adverse to the admissibility of the confession made by appellant before reaching Henderson, there the matter should have been allowed to rest. But in telling the jury, as was done in instruction No. 9, that the confessions in question were incompetent and should not be considered by them, the trial judge was evidently actuated by the belief, or fear, that some part of the excluded confession had reached the ears of the jury in the progress of the trial, and for that reason he took the precaution to inform them that it was to be wholly disregarded by them, and in this view of the matter the instruction was a safeguard to the rights of appellant.

By instruction No. 10 the jury were in substance advised that any confession or admissions that may have been made by appellant about the killing of Coomes, other than those excluded by instruction No. 9, might be considered by them in arriving at a verdict unless they were made "under fear of punishment, offer or hope of reward, promise of immunity, threat, promise or inducement," in which event they should not be considered at all. The only confession that could have been considered by the jury under this instruction was the one made by appellant to Horton in the Henderson jail, and notwithstanding its competency and the decision of the court to that effct, the jury were also given by the instruction the right to pass upon its competency and the opportunity to reject it to the prejudice of the Commonwealth. Manifestly the appellant has no cause to complain of instruction 10.

The final contention of appellant is that the court should have instructed the jury that his (appellant's) confession of guilt made to Horton, if any such was made, did not warrant his conviction in the absence of other proof that the crime was committed. This contention is bottomed upon section 240, Criminal Code, which provides: "A confession of the defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that such an offense was committed."

In Roberson's Criminal Procedure, volume 2, section 963, it is said: * * * "Where a confession made out of court is accompanied with other proof that such an offense has been committed, that is, with proof of the corpus delicti it will warrant a conviction. It is not necessary that the corroborative testi-

mony should tend to connect the accused with the commission of the offense. * * * Where it is doubtful whether, in fact, a crime has been committed, the jury should be told that an alleged confession will not warrant a conviction unless accompanied with other proof that such a crime has been committed. But when, independent of the confessions or admissions of the defendant, there is evidence proving the corpus delicti beyond a reasonable doubt, it is unnecessary to give an instruction concerning the weight to be given confessions." (Patterson v. Commonwealth, 86 Ky., 313; Wigginton v. Commonwealth, 92 Ky., 282.)

In Dugan v. Commonwealth, 102 Ky., 241, the foregoing principle announced by Roberson is approved, and the case of Cunningham v. Commonwealth, 9 Bush, 149, relied on by appellant in support of his contention, is expressly overruled. In the case at bar the corpus delicti (i. e., the fact that the particular crime alleged has actually been committed) was sufficiently proved independent of the confession of guilt made by the appellant out of court, therefore, it was unnecessary to give the instruction asked by him.

A careful consideration of the record convinces us that the appellant was given a fair trial in the court below, and while the penalty imposed by the jury is the severest known to the law, we have been unable to find any legal cause for interfering with its infliction.

Wherefore, the judgment is affirmed.

Whole court sitting.

SMITH, ALIAS WILLIAMS v. COMMONWEALTH.

(Filed December 13, 1904.)

1. Rape—Physical force—Fear—Under Kentucky Statutes, section 1154, and recent decisions of this court, physical force applied to the person of the female is not necessary to constitute the crime of rape; threats of violence or injury constitute force in the meaning of the law.

2. Corroboration—Where the fact of intercourse is admitted by accused; the further evidence that he at once left the neighborhood of his residence for three weeks; that the prosecutrix was in distress the next morning and then complained of the outrage and at once sent the police on his track, and the appearance of the grass where accused concealed himself awaiting the departure of her visitor, afford corroboration of her story.

3. Leading questions—In a prosecution for rape, where from the embarrassment and reluctance of the prosecutrix to state the facts, the indecent character of the transaction, the age and inexperience of the witness, the fact the some leading questions were asked her by counsel and by the court in getting the facts of the outrage, was not improper.

4. Errors not in bill of exceptions—Complaint of alleged improper remarks made by the court to the jury in their deliberations in attempting to impress on them the importance of a verdict, not being shown by the bill of exceptions to have been excepted to at the time they were made, and complained of for the first time on the motion for a new trial, we are not at liberty to consider.

A. L. Trail for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Jefferson Circuit Court, Criminal Division.

Opinion of the court by Judge Settle.

Upon a second trial in the Jefferson Circuit Court, Criminal Division, under an indictment charging him with the crime of rape upon Annie Schemble, "a female over and above twelve years of age," the appellant, Henry Smith, alias Henry Williams, a negro, was by verdict of the jury found guilty and his punishment fixed at confinement in the penitentiary for ten years.

Upon the previous trial he was also convicted, but his punishment was then fixed by the jury at death. He was, however, relieved of that judgment and of the death penalty thereby imposed by a new trial granted him by the lower court; but his motion for a new trial, which was made following his last conviction, was overruled. The girl upon whom the alleged rape was committed was seventeen years of age at the time of its occurrence. She is a white girl, and then living at the home of C. S. Wymond, in the city of Louisville, where she was employed as a house servant. According to her testimony the crime charged against the appellant was committed under the following circumstances: She and a young man by the name of Terhune, who had escorted her home, sat from 7:30 to 9 o'clock in the evening upon the steps of the rear entrance to the Wymond residence engaged in conversation. At or about 9 o'clock Terhune left, after which the girl remained upon the steps long enough to unlace one or both of her shoes preparatory to going into the house and retiring for the night. Then arising she was about to insert the house key in her possession in the lock of the door when the appellant jumped up beside the fence, only a few feet away, and pointing a pistol at her said: "You open that door and I will kill you." She did not open the door, but instead, at a further order from appellant, enforced by the continued pointing of the pistol at her, went to where he was standing, and when she got in reach of him he grabbed her by the hand and pulled her to the fence, which was about five feet high (reaching her chin), and held the pistol to her cheek, saying if she ran or hollered he would shoot her. Continuing to hold her hand he jumped over the fence and asked what business she had out that time of night, and said that he had been watching her all along. He then shoved her against the house, threw her down and had intercourse with her, all the time holding a hand over her mouth to prevent her from making an outcry, which she said she attempted to do. After appellant had accomplished his purpose, and before leaving, he offered the girl $10 to leave the city the next day. After appellant left the girl went into the house and to bed, without telling any one that night of what had occurred.

Early the following morning, according to the testimony of Wymond, Annie Schemble was weeping in his presence, and upon asking the cause of her tears, she informed him of the outrage that had been committed upon her the night before by appellant, and then sent for her mother, to whom she also communicated the entire transaction. Wymond then examined the ground where the girl said appellant arose beside the fence in the adjoining yard, and found the grass mashed down as if some one had lain upon it. No sign was visible where she said he forced her to the ground, as there was a brick pavement at that place.

The appellant was employed some time as coachman by the family living on the lot adjoining that of Wymond, but quit work and left the place on the day of the assault upon the girl, or early the day following, and his whereabouts were not ascertained by the police officer in search of him for the outrage committed upon Annie Schemble until three weeks had elapsed. He was then found in a restaurant on Jefferson street in the employment of one Hess. Upon finding appellant the officer, McAuliffe, asked him if his name was not Henry Williams. He said it was not, but that his name was Smith. In reply to other questions from the officer appellant denied that he had ever worked in the neighborhood of Wymond, or that he knew anybody there, and further declared that he knew nothing about the Schemble girl.

The foregoing evidence presents in the main the facts upon which the conviction of appellant was secured. If she is to be believed, there was in the facts testified to by her sufficient evidence to warrant the belief upon the part of the jury that she was subjected to force and violence by appellant, and through fear and duress yielded to his assault, and was thereby compelled to have sexual intercourse with him. Upon the other hand, appellant testified that he did have intercourses with her upon the occasion complained of, and upon divers other and previous occasions, but that in each instance it was with her consent and most generally for hire. Indeed, if he told the truth, it is apparent that the girl is hardly less depraved than he. He also proved by one Harris that he had seen appellant and Annie Schemble in frequent conversations, and that he had seen her go to the room over the stable where appellant slept. Other witnesses, some of whom were apparently reputable and others, doubtless, not so, testified that the reputation of Annie Schemble for truth and virtue was bad.

It was, however, the province of the jury to weigh the evidence and pass upon the credibility of the witnesses, and they had the right to accept the testimony of the girl as true and reject that of the witnesses introduced in behalf of appellant, and that they did accept her version of the matter and believe him guilty is shown by the verdict returned. As there was some evidence conducing to show the appellant's guilt, this court will not undertake to say that the verdict was unauthorized. Obviously the punishment inflicted is the mildest known to the law, and less than the appellant, if guilty, could have hoped to receive.

The court gave but two instructions. They presented all the law of the case, expressed with brevity and clearness, that left no doubt of their meaning. The instructions asked by appellant were properly refused by the court. They do not present the law of the crime of rape as it is understood and held in this State, but are based upon the decisions of the courts of last resort of other States, which still adhere to the rigid rules of the common law. Under our statute (section 1154, Kentucky Statutes) and the recent decisions of this court physical force applied to the preson of the female is not necessary to constitute the crime of rape. If the prosecutrix is made to yield through fear caused by threats of violence or injury, such means will constitute force within the meaning of the law. (Clymer v. Commonwealth, 23 Ky. Law Rep., 1041; Brown v. Commonwealth, 102 Ky., 227.)

While numerous errors were assigned by counsel for appellant, only two or three of them are relied on in argument. Their chief contention is that th

verdict of the jury is not supported by the evidence we have already disposed of, but the further point made in connection therewith by counsel for appellant, that the testimony of the prosecutrix lacks corroboration, is not, in our opinion, sustained by the evidence. The fact that appellant had intercourse with her is admitted by him; the further facts that he at once left the neighborhood and his then residence and kept out of the hands of the officers of the law for three weeks; that she was in distress early the following day, and then complained of the outrage upon her and at once set the police upon his track, and the evidence furnished by the appearance of the grass where he concealed himself by the fence awaiting the departure of her visitor that he might accomplish his purpose, manifestly afforded some corroboration of her story, and were doubtless given some weight by the jury.

Another alleged error complained of is that the assistant Commonwealth's attorney was permitted to ask some leading questions of the prosecutrix, and was aided by questions put by the court. It is true that some leading questions were asked the prosecutrix by counsel and the court, but they were made necessary by the evident embarrassment and consequent reluctance of the witness to relate the facts. The indecent character of the transaction, about which she was required to testify in the presence of the jury and surrounding audience of curious people, was well calculated to confuse a young and inexperienced girl. Under the circumstances we think the course pursued by the court and counsel in getting from the prosecutrix the facts of the outrage complained of was not improper. Yet another complaint made by appellant is that the trial judge made certain alleged improper remarks to the jury during their deliberations in attempting to impress upon them the importance of reaching a verdict. It is not shown by the bill of exceptions that the alleged improper remarks of the judge were excepted to at the time they were made, and as this error, if any, was complained of for the first time on the motion and in the grounds for a new trial, we are not at liberty to consider it.

Finding the record free of reversible error the judgment is affirmed.

FLETCHER v. SANDUSKY, &c.

(Filed December 13, 1904—Not to be reported.)

Contracts—Liens—Where a contractor sought to enforce his lien for an unpaid balance for building a hotel (20 per cent. of the contract price not having been paid), and it was shown by the defense that the material was inferior to that specified in the contract; that the roof leaked badly; that inferior shingles were used, and the floors were not joined as the contract provided they should be, and other defects appearing, the action of the lower court in dismissing the petition was proper.

J. S Wortham for appellant.

R. Y. Thomas, Jr., for appellees.

Appeal from Muhlenburg Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1900 the appellant entered into a contract with appellees by

which he agreed to furnish the material and erect for them a hotel in Central City, Ky., at the price of $6,600. He agreed to furnish the character of material and perform the labor as set forth in plans and specifications prepared by an architect, and agreed to finish the building by a certain day.

The appellees agreed to pay 80 per cent. of the contract price as the labor was performed, estimated at the end of each week, and were to pay the balance when the building was completed as per plans and specifications..

When the building was completed appellant claims that appellees were indebted to him on the contract price a balance of about $1,100, and for extra work and material not included in the specifications something over $500. Appellees refused to pay same, and he filed a statement of his claim in the county clerk's office and took the steps necessary to create a lien upon the property for the sums claimed, and he brought this action to enforce the lien. The defendants answered, denying the claim for extra work and material, but admitted that they had not paid him the contract price by the sum named in the petition, but alleged that appellant had not complied with his contract; that he had furnished and used inferior material and not such material as required by the contract in the erection of the house, and that the labor in the erection thereof was performed in an unskillful and not in a workmanlike manner, and that they were damaged by reason thereof in the sum of $2,500, and that they did not owe appellant anything, but, on the contrary, he was indebted to them.

The issues were completed and the depositions of many witnesses were taken, and on the trial the court dismissed appllant's action and appellees' counterclaim, and adjudged that appellant should pay the costs of the action. It is fully established by the proof that appellant did not furnish the character of material and labor in the erection of the house; that it was much inferior to that stipulated in the contract, and this applies to almost every piece of material used therein. It was shown that soon after the completion of the building it was discovered that the roof leaked in more than one hundred and fifty places; that instead of the shingles being number one cypress they were about third grade. The floors were not jointed when they should have been under the contract. The inside work was varnished with one coat instead of two; that he used two hundred and fifty sacks of plaster and one hundred and fifty of the sacks were spoiled or rotted; that appellant's attention was called to this fact by his plasterer soon after he began to put it on, but notwithstanding this appellant directed his workmen to still continue to use it.

We feel that it is unnecessary, and without profit, to any one to mention in detail the particulars wherein appellant failed to comply with his contract as shown by the record; but it is sufficient to say that appellee's contention was fully sustained by the proof. Four or more of the witnesses, who were carpenters of twenty or thirty years' experience, who examined the plans and specifications and the building as erected, and stated with particularity the defects in the material and workmanship, and gave it as their opinion that the difference in value of the building as erected and the building if it had been erected in compliance with the contract was $2,500.

In view of these facts we are of the opinion that the lower court did not err in dismissing appellant's petition.

Wherefore, the judgment is affirmed.

KEHR v. COMMONWEALTH.

(Filed December 18, 1904—Not to be reported.)

Constitutional law—Void ordinance—Where an ordinance of a municipality fixed a penalty less than that fixed by statute for the same offense, the ordinance is void pursuant to the provisions of section 168 of the Constitution.

T. L. Edelen and James Sparks for appellant.

E. H. Johnson for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Laurel Circuit Court assessing a fine of $60 against the appellant for the violation of an ordinance of the city of London.

The case was first tried in the police court on a warrant issued for the benefit of the town of London, Ky., and by appeal it reached the circuit court. The ordinance under which appellant was tried is as follows: "That it shall be unlawful for any person, directly or indirectly, to sell or procure for another any spirituous, vinous or malt liquors within the town of London, Ky., except a wholesale dealer, who in good faith, and in the usual course of trade, sells in quantities of not less than five gallons and not to be drunk on the premises, and who has first procured a license from the board of trustees of said town so to do; and that any one so offending shall be deemed guilty of a violation of this ordinance, and, upon conviction, shall be fined not less than sixty nor more than $100 for each offense."

The only punishment provided by this ordinance is a fine of not less than $60 nor more than $100 for each offense. It appears from the warrant that this ordinance was adopted August 18, 1903. The statute (section 2557b, 2) fixes the penalty for the same offense as not less than $50 nor more than $100, or by confinement in the county jail for not less than ten days nor more than forty days, or both so fined and imprisoned in the discretion of the court or jury.

It is apparent that the ordinance above copied, and under which appellant was tried, fixes the penalty less than the penalty fixed by the statute for the same offense, and under the Constitution of the State the ordinance is void. Section 168 of the Constitution provides: "No municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense. A conviction or acquittal under either shall constitute a bar to another prosecution for the same offense."

The appellant presents other reasons why this judgment should be reversed, but it is not necessary to notice them as the one referred to is sufficient.

Whereupon the judgment is reversed, with directions to the lower court to dismiss the warrant.

DURR v. DURR, &c.

(Filed December 13, 1904—Not to be reported.)

Robt. C. Simmons and Rankin & Rankin for appellant.

Walker C. Hall for appellee.

Appeal from Kenton Circuit Court.

Judge Settle delivered the following response to petition for re-hearing:

The petition for rehearing manifests no error in the opinion and raises no question of law or fact that was not fully considered by this court, but in view of the fact that the opinion is not regarded as sufficiently explicit as to whether the appellee, Mary Durr, is to receive the full sum of $150, mentioned therein, or only six-sevenths thereof, we now hold that six-sevenths of that amount is the sum to which she is entitled; and further, that she shall recover no costs expended on the appeal.

With this modification of the opinion the petition for rehearing is overruled.

WHITE v. LAUREL LAND CO.

(Filed December 14, 1904—Not to be reported.)

Strother & Hardin for appellant.

Lane & Harrison for appellee.

Appeal from Owsley Circuit Court.

Judge Paynter delivered the following response to petition for rehearing:

It necessarily follows, if the sale was regular in all respects, the appellant has no right to redeem the land.

LESZINSKY, FOR USE, &c. v. LEGRAND.

(Filed December 14, 1904.)

Taxation—Sale of real estate for taxes—Affidavit required—Under Kentucky Statutes, section 4151, as amended May 12, 1897, providing that "no levy or sale of real estate (for taxes) shall be valid * * * until the sheriff shall have made affidavit in writing, and filed the same with the clerk of the county court of the county in which such lands are situated, showing that the persons from whom such tatxes are due, and whose real estate is to be sold, have no personal estate out of which said taxes can be made," a sale made by a sheriff of real estate without having filed such affidavit is invalid, although the levy was made before the act took effect requiring such affidavit to be made.

Claude Mercer and N. McC. Mercer for appellants.

Morris Eskridge for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Paynter.

This case involves the question as to the validity of a tax sale of the property in controversy. It was owned by Charles Dabelstein and J. C. Leszinsky. Leszinsky had by parol contract sold his interest in it to Dabelstein. Thus the matter stood until 1894, when it was assessed for taxation in the name of Leszinsky for the year of 1894. The taxes under the assessment were due in 1895. S. A. Pate was sheriff of Breckinridge county, and in 1898 he sold it for the taxes of 1895 and procured one Frank Board to become the purchaser at the price of $3.08. After the expiration of Pate's term as sheriff Board assigned to Pate the certificate. Pate secured a deed from his successor in office and sold the land. Before the sale Leszinsky became insane and was in the asylum at the time the sale was made. Dabelstein was a nonresident, but his agent had reported the land to the assessor for assessment, but the assessor having forgotten his name, made the assessment in the name of Leszinsky. Subsequently Pate sold the land to appellee. The sale is sought to be set aside on several grounds, but we deem it unnecessary to state all of them as one is sufficient to invalidate the sale.

The plaintiff averred that the sheriff failed to file the affidavit with the county clerk, as required by section 4151, Kentucky Statutes, as amended May 12, 1897, which reads as follows: * * * "Provided, however, no levy or sale of real estate shall be valid, and no fees for making same, or credit for taxes in sales of same, shall be allowed sheriffs until said sheriffs shall have made affidavit in writing and filing same with clerk of county court of county in which such lands are situated, showing that the persons from whom taxes are due, and whose real estate is to be sold, have no personal estate out of which said taxes can be made. And such affidavit shall be certified to the auditor, who shall in no case allow credit to sheriff for taxes on land sold and bought in for the State of Kentucky until after such affidavit has been so certified to him."

The pleadings in effect admit that the affidavit required by this section was not filed by the sheriff. The levy seems to have been endorsed before the act took effect requiring the sheriff to file the affidavit. But the sale was not made for more than a year after the act had taken effect. It will be observed that this act declares invalid sales of real estate for taxes made in violation of it. It expressly says that no levy or sale shall be valid where such affidavit is not filed. If the taxpayer had personal property at the time the sale was made subject to the taxes it was the duty of the sheriff to sell it to satisfy them. If he wanted to subject the land too the payment of the taxes it was essential that the affidavit should be made. As the affidavit was not filed, the prima facie effect given a tax deed by section 4030, Kentucky Statutes, was overcome. There are other reasons why the sale is invalid not necessary here to be considered in view of the conclusion we have reached.

The judgment is reversed for proceedings consistent with this opinion.

SCHROEDER, &c. v. BOHLSEN, &c.

(Filed December 14, 1904.)

Wills—Death of devisee before testatrix—Effect—The ninth clause of Maria Bohlsen's will is as follows: "If Joseph Schroeder, now in the lunatic asylum, shall be restored to his right mind and shall be discharged as cured; in that event I will him the sum of $2,000." The residuary clause is as follows: "I also devise and bequeath to Abel Bohlsen all the remainder of my estate, real or personal, of every description whatever." The devisee, Joseph Schroeder, died in the asylum before the testatrix, and the devise having thus been defeated, we are asked to decide whether it passed under the residuary clause or as in case of intestacy. Held—Kentucky Statutes, section 4843, provides that "unless a contrary intention shall appear by the will, such real or personal estate, or interest therein, as shall be comprised in any devise in such will, which shall fail or be void or otherwise incapable of taking effect, shall not be included in the residuary devise contained in such will, but shall pass as in case of intestacy." As there is nothing in the will which indicates an intention that in case the devise to Joseph Schroeder should fail it should go to the residuary devisee, rather than under the statute, we hold that it passed under the statute as in case of intestacy.

Lieber & Lincoln and Bodley, Baskin & Flexner for appellants.

J. D. Reed for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice Burnam.

The ninth clause of the will of Maria Bohlsen reads as follows: "If Joseph Schroeder, brother of said George Schroeder, now in the lunatic asylum, shall be restored to his right mind and shall be discharged as cured, in that event I give him the sum of $2,000."

The devisee, Joseph Schroeder, died in the asylum without being restored to his right mind before the death of testatrix, and the devise having been thus defeated, we are asked to decide whether it passed under the residuary clause of her will which reads as follows: "I also give, devise and bequeath to said Abel Bohlsen all the remainder of my estate, real or personal, of every description whatever." Or passed, as in case of intestacy, under section 4843 of the Kentucky Statutes, which reads as follows: "Unless a contrary intention shall appear by the will, such real or personal estate, or interest therein, as shall be comprised in any devise in such will, which shall fail or be void or otherwise incapable of taking effect, shall not be included in the residuary devise contained in such will, but shall pass as in case of intestacy."

It is contended for appellees that as it was a condition precedent to the vesting of the bequest to Joseph Schroeder that he should be restored to his right mind and be discharged as cured, and that as his death in the life of testatrix rendered it impossible for these conditions to be realized, the devise to him failed, and remained a part of the estate of the testatrix and passed under the residuary clause of her will, as provided by section 4839 of the Kentucky Statutes, which reads as follows: "A will shall be construed with reference to the real and personal estate comprised in it, to speak and

take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

On the other hand, it is claimed by the appellants that the devise to Joseph Schroeder failed solely by reason of his death, and passed under the statute supra as in case of intestacy. Under the rule of common law, as it existed in this State before the adoption of the Revised Statutes, a legacy which lapsed by the death of the legatee in the lifetime of the testator, or by the nonperformance of a condition precedent, passed into and became a part of the residuary estate and passed to the residuary legatee, unless a contrary intention appeared on the face of the will; but it devolved upon such legatee to show that such lapse had occurred in order to establish his right as legatee. (Maddox v. Allen, 58 Ky., 495.) But this rule of the common law was changed in this State by the adoption of the Revised Statutes in 1854, by which it was provided that all legacies which were void or failed, or were incapable of taking effect for any reason, should not go to the residuary legatee as under the rule of the common law, but should pass as in case of intestacy, unless a contrary intention should appear by the will, and since 1854 this has been the rule as to lapsed devisees in this State. The statute was first considered in Cunningham's Devisees v. Cunningham's Heirs, 57 Ky., 16. The will in that case was dated February, 1851, and the testator died in 1858. The will bequeathed to the wife one-third of the personal estate and the other two-thirds to residuary legatees. The bequest lapsed because of her death before testator. It was held that the property bequeathed to the wife became, under the common-law rule then in force, a part of the residuum and passed to the residuary devisees. On this question Judge Simpson said: "In order to determine this question it will be necessary to decide whether the construction and legal effect of the will are to be governed by the Revised Statutes or by the pre-existing law. The will is dated February, 1851, and the testator died in 1858. It was made before the Revised Statutes took effect, and by section 26 of the chapter on Wills, page 697, it is expressly declared that the preceding sections of that chapter shall not extend to any will made before the chapter takes effect, but the validity and effect of such will shall be determined by the laws previously in force. Section 20 of that chapter is the one relied upon to sustain the proposition that the estate devised to the testator's wife is not included in the residuary devise, but passed, as in case of intestacy. And it is contended that this section has no operation on the validity and effect of a will, but only on its construction, and is not, therefore, embraced by the provision contained in section 26. It is sufficient answer to this argument to say that the effect of a will must, in a great measure, depend on its construction, and, therefore, that any law which changes a rule of construction that applies to and governs any of its provisions, does, to that extent, determine the legal effect of the will. The object and design of section 20, however, was not merely to fix a rule of construction, but it was to alter the legal effect of a residuary devise, so that where a legacy should lapse it should not belong, as heretofore, to the general residuary devisee, but should pass as in case of intestacy."

Prior to the adoption of the Revised Statutes the general residuary legatee was entitled in that character to whatever personal estate that might fall into the residue, after making the will by lapse, invalidity or other

accident. (Williams on Executors, 1250; 4 Kent's Commentaries, 541; 1 Jarman on Wills, 304.) Other sections of this statute were fully and carefully considered in Dunlap v. Schreve's Ex., 68 Ky., 336, and Chenault v. Chenault, 88 Ky., 88. And in these cases it was held that the intention of the statute was to reverse the common-law rule as to survivorship, and to substitute the heirs at law to the residuary devisee where there were descendants of testator whose legacies or devises had lapsed.

The only remaining question, therefore, to be decided is whether the will of testatrix contains any language which indicates an intention that in case the devises to Joseph Schroeder should fail for any purpose that it should go to the residuary devisee rather than under the statute. The will itself contains no provision for such a contingency, and there is no request over. If testatrix had died before Joseph Schroeder it would have been the duty of her executor to have set aside this bequest for the benefit of the devisee, and the residuary legatee would have been limited to the surplus estate after payment of debts, cost of administration and the various legacies, including the $2,000 to Joseph Schroeder. As there is in the will nothing which indicates that the bequest in the 9th clause should constitute a part of the residue, we are of the opinion that it passed under the provisions of the statute as in case of intestacy.

For the reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

PREWITT, COM'R v. SECURITY MUTUAL LIFE INSURANCE CO. THE TRAVELERS INSURANCE CO. v. PREWITT, COM'R.

(Filed December 15, 1904.)

1. Foreign insurance companies—License by insurance commissioner—Authority to revoke—Kentucky Statutes, section 631, making it the duty of the insurance commissioner of this State to revoke all authority to any foreign insurance company doing business in this State, if such company shall, without the consent of the other party to a suit brought by or against it, remove said suit to any Federal court, is a reasonable regulation and not in conflict with the Constitution or laws of the United States.

2. Exclusive privileges—The reason for the statute is not distrust of the Federal courts, but the practical denial of justice that results in trying a case one or two hundred miles from where the parties and witnesses reside. Domestic insurance companies enjoy no such immunity, and the State says to the foreign insurance company: "I will withdraw my license if you insist on privileges not enjoyed by home companies."

3. Authority to grant license—Implies authority to revoke—The license which the State grants is purely a matter of grace, and may be revoked by the licensor at pleasure. The revocation of the license interferes with no legal right of the licensee, for when he takes it he does so subject to revocation. He can not question the reason of the licensor for revoking the license, as the State may exclude foreign corporations from doing business in the State with or without reason.

N. B. Hays and J. H. Hazelrigg for Insurance Commissioner.

Wm. Marshall Bullitt and F. W. Jenkins for Security Mutual Life Insurance Co.

Pirtle, Trabue, Doolan & Cox and Wm. Bro. Smith for Travelers Insurance Co.

Appeals from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Hobson.

In the first of the above cases the Security Mutual Life Insurance Co. filed its petition in equity, alleging that in the year 1900 it began business in Kentucky, having complied with the requirements of the statutes of the State applicable to foreign insurance companies, the plaintiff being a corporation organized under the laws of the State of New York; that the commissioner then granted it permission to transact the business of life insurance in this State, and it employed a large number of agents, established a large number of agencies throughout the State, expended large sums of money in advertising its business and acquired a large and profitable business in the State; that in June, 1904, it removed to the Circuit Court of the United States for the Eastern District of Kentucky, without the consent of the other party, a suit brought against it in one of the circuit courts of the State, and that on September 29, 1904, the defendant, Prewitt, as insurance commissioner, revoked its authority to do business in the State for the sole reason that it had removed the suit referred to to the Circuit Court of the United States, and refused, and still refuses, to set aside the revocation. It prayed an injunction requiring the commissioner to annul the revocation of its license and to continue its authority to transact the business of life insurance in the State. The defendant demurred to the petition, his demurrer was overruled and he declining to plead further, a judgment was entered as prayed in the petition. In the other case the petition is very similar, except that it is there averred that the commissioner has not yet revoked the plaintiff's license, but that he threatens to do so, and unless enjoined by the court will revoke it, to the plaintiff's irreparable injury, it being a foreign corporation created under the laws of the State of Connecticut. The defendant demurred to the petition; his demurrer was sustained, and the plaintiff declining to plead further, its petition was dismissed. Both the appeals raise the same question, and will be considered together.

By section 633, Kentucky Statutes, licenses to agents of foreign companies must be renewed annually, and any person acting as the agent of such a company without procuring a license, or after the license has expired, or has been suspended or revoked, shall be guilty of a misdemeanor, and fined not less than $50 nor more than $100 for each offense. By section 634 every foreign insurance company before transacting any business in this State must return to the commissioner a copy of its charter or organic law, and the comissioner upon being satisfied that the company has complied with the laws of the State and is possessed with the legal reserve, shall furnish to such agents as the company directs a license to transact business as agents for the company, under the seal of the insurance department. By section 657 foreign life insurance companies, in addition, must file statements annually of their condition on the 31st of December of the year preceding, and certain evidences of their deposits, securities, etc. By section 694 insurance companies other than life, not incorporated under the laws of this State, upon complying with the provisions of the statute may be authorized

by the commissioner to transact business in the State. By section 761 the fees to be charged by the commissioner are regulated.

Section 631, Kentucky Statutes, is in these words: "Before authority is granted to any foreign insurance company to do business in this State it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; but if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

The validity of the latter clause of the section is the only question to be determined upon the appeal. It is insisted that it is in conflict with the Constitution of the United States. Three decisions of the United States Supreme Court are relied on. In Home Insurance Co. v. Morse, 20 Wall., 445, the statute of the State required the foreign insurance company to sign an agreement not to remove any of its cases to the Federal courts. The company signed the agreement, and afterwards filed a petition seeking the removal of a suit brought against it to the Federal court. The State court refused to remove the case, but on appeal to the United States Supreme Court the judgment of the State court was reversed, and it was held that the agreement in advance not to exercise a right guaranteed by the Constitution did not prevent the defendent from removing the case to the Federal court. The opinion was written by Judge Hunt, and goes no further than the question actually before the court.

The next cases relied on is Doyle v. Continental Insurance Co., 4 Otto, 535, the opinion being also written by Judge Hunt. In that case there was a State statute corresponding to section 631, above quoted, and the State officer under it was about to cancel the license of the insurance company.

The plaintiff made in substance the same allegations as are made in the case before us, and prayed an injunction as in these cases. The Supreme Court reversing the court below, dismissed the bill. After distinguishing the case from the Morse case, the court said: "The cases of Bank v. Earle, 13 Pet., 519; Ducat v. Chicago, 10 Wall., 410; Paul v. Va., 8 Wall., 168, and Insurance Co. v. French, 18 How., 404, establish the principle that a State may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper, that are not repugnant to the Constitution or laws of the United States. The point is elaborated at great length by Chief Justice Taney in the case first named and by Mr. Justice Field Curtis in the case last named.

"The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always re-

vocable. (Rector v. Philadelphia, 24 How., 300; People v. Roper, 35 N. Y. 629; People v. Commissioners, 47 N. Y., 501.) The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. (Humphrey v. Pegues, 16 Wall., 244; Tomlinson v. Jessup, 15 Wall., 454.)

"License to a foreign corporation to enter a State does not involve a permanent right to remain, subject to the laws and Constitution of the United States. Full power and control over its territories, its citizens and its business belongs to the State.

"If the State has the power to do an act, its intention or the reason by which it is influenced in doing it can not be inquired into. Thus, the pleading before us alleges that the permission of the Continental Insurance Co. to transact its business in Wisconsin is about to be revoked, for the reason that it removed the case of Drake from the State to the Federal courts.

"If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it can not be impeached. The acts of a State are subject to still less inquiry, either as to the act itself or as to the reason for it. The State of Wisconsin (except as its connection with the Constitution and laws of the United States alters its position) is a sovereign State, possessing all the powers of the most absolute government in the world.

"The argument that the revocation in question is made for an unconstitutional reason can not be sustained. The suggestion confounds an act with an emotion or a mental proceeding which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion which can not be applied to the affairs of life. If the act done by the State is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law.

"In all cases where the litigation of a State has been declared void, such legislation has been based upon an act or a fact which was itself illegal."

After discussing certain previous decisions, the court added:

"It is said that we thus indirectly sanction what we condemn when presented directly, to wit: That we enable the State of Wisconsin to enforce an agreement to abstain from the Federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. It gives the company the option. This is justifiable because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and without reference to the injustice, the prejudice or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed, and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court."

It is conceded by counsel that if this case is still authority, these actions

must fail. But it is insisted that in Barron v. Burnside, 121 U. S., 186, this case was in effect overruled. In Barron v. Burnside there was a State statute requiring every foreign corporation to have a license before engaging in business in the State. The license, by the terms of the statute, was not to be issued except upon the application of the company by a resolution of the board of directors or stockholders authorizing it, and containing a stipulation that the permit should be subject to each of the provisions of the act, one of which was that the permit should be void if the corporation removed a case to the Federal courts. Barron was arrested under the statute for doing business for a foreign corporation without complying with the statute, and obtained a writ of habeas corpus, which was sustained by the United States Supreme Court. The court, after quoting the statute and discussing it at some length, said: "This proceeding is a unit. The filing of the articles of incorporation and the provision in regard to service of process are to be authorized by the same resolution which requests the issue of the permit, and this request or application is to contain the stipulation above mentioned. These various things are not separable."

Then after some further discussion of the statute the court concludes with these words: "In view of these considerations the case falls directly within the decision of this court in Home Insurance Co. v. Morse."

It then proceeds, after showing what was decided in the Morse case, to discuss the Doyle case in these words: "The case of Doyle v. Continental Insurance Company, 94 U. S., 535, is relied on by the defendant in error. In that case this court said that it had carefully reviewed its decision in Home Insurance Co. v. Morse, and was satisfied with it. In referring to the second conclusion in Insurance Co. v. Morse, above recited, namely, that the statute of Wisconsin was repugnant to the Constitution of the United States, and was illegal and void, the court said in Doyle v. Continental Insurance Co. that it referred to that portion of the statute which required a stipulation not to transfer causes to the courts of the United States. In that case, which arose under the statute of Wisconsin, the foreign insurance company had complied with the statute, and had filed an agreement not to remove suits into the Federal courts and had received a license to do business in the State. Afterwards it removed into the Federal court a suit brought against it in a State court of Wisconsin. The State authorities threatening to revoke the license, the company filed a bill in the circuit court of the United States, praying for an injunction to restrain the revoking of the license. A temporary injunction was granted. The defendant demurred to the bill, the demurrer was overruled, a decree was entered making the injunction perpetual, and the defendant appealed to this court. This court reversed the decree, and dismissed the bill. The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in Insurance Co. v. Morse, supra, must be regarded as not in judgment."

We do not understand this to overrule the Doyle case, for certainly if the State can not withdraw the license it has once granted, any court of com-

petent jurisdiction may so decide. If the State statute withdrawing the license was unconstitutional and void, the Supreme Court of the United States had the same power to declare the statute in that case unconstitutional as it had to declare the statute unconstitutional in Barron v. Burnside.

Our statute is not liable to the objections made to the statute in either the Morse case or the Barron case. Under our statute the foreign insurance company is at liberty to remove its cause to the Federal court whenever it sees proper. It is required to sign no stipulation or agreement interfering with that right. The regulation is reasonable that the State, for the protection of its citizens against unsafe insurance companies, should require them before doing business in the State to obtain a license from the insurance commissioner, and to furnish him such evidences of their solvency as will protect insurers in this State before he is authorized to grant them a license.

The license which the State grants is purely a matter of grace, and, like any other license, may be revoked by the licensor at pleasure. The revocation of the license interferes with no legal right of the licensee, for when he takes it he takes it subject to revocation. He can not question the reason of the licensor for revoking the license, as the State may exclude foreign corporations from doing business in the State with or without reason. If I have license to cross my neighbor's lot and he revokes it because I brought a suit against his son, I can not enjoin him from revoking the license on the ground that I had a constitutional right to go to the courts for relief, and that my exercise of a constitutional right was no just reason for his revoking the license he had given me, for he had an absolute right to revoke the license, and the fact that he did it out of spite, or for a bad reason, is immaterial.

The State, by her statutes above referred to, in effect says to the foreign insurance companies: "I will license you to do business here on the same plane as domestic corporations, and if you come here you must stand on no more favorable ground than the domestic insurance companies. If after you come you refuse to so stand, I will withdraw my license." The reason for the statute is not distrust of the Federal courts, but the practical denial of justice that results in a sparsely settled State like ours, if the case must be tried one or two hundred miles from where the parties and witnesses reside. Domestic insurance companies enjoy no such immunity, but must try their cases in the vicinage. The State simply says to the foreign insurance companies: "I will withdraw my license if you insist on privileges not enjoyed by home companies." If the State on the day before these suits were filed by legislative act had withdrawn all licenses to foreign insurance companies, reciting in the preamble to the act that it was enacted inasmuch as the two cases above referred to had been removed to the United States Circuit Court, could these plaintiffs have complained? If not, how are they affected by the fact that the State acts by an executive officer, and not by a special statute? Certainly they can not complain that the license of certain other companies was not revoked.

The case of Commonwealth v. East Tennessee Coal Co., 97 Ky., 232, did not involve the revocation of a license granted by the State, but was in effect similar to Barron v. Burnside, above cited, being a proceeding to impose a fine on the defendant after it removed a case from the State courts.

The naked question presented here is, may the State, without cause, revoke a license it has once granted, for a bad reason is no worse than none at all. The distinction is a narrow one, but none the less sound, unless the whole doctrine that the State may grant or withhold a license as it sees fit is to be abandoned. It is juggling with words to say that a State may at will prohibit foreign corporations from doing business in the State (Hooper v. California, 155 U. S., 650), and yet that it may not at will withdraw a license which it has once granted to such corporations.

It seems to us that the Boyle case rests on sound principles, and that the Barron case in nowise conflicts with it, for that case is by the court expressly put upon the ground that the statute there, when properly construed, fell within the rule laid down in the Morse case. (6 Thompson on Corporations, sections 7466 67; 13 Am. & Eng. Ency. of Law, 867; People v. Pavey, 151 Ill., 101.)

The judgment in the first case is, therefore, reversed for further proceedings consistent herewith.

The judgment in the second case is affirmed.

The whole court sitting.

Chief Justice Burnam and Judge Barker dissenting.

BURKHARD v. COMMONWEALTH.

(Filed December 15, 1904.)

Criminal law—Maliciously shooting at a passenger coach—Under Kentucky Statutes, section 1116, making it a felony for any one to maliciously and willfully shoot at a railroad passenger coach, on or in which were passengers or employes of the railroad company, if the railroad train upon which there were passengers consisted of one or more cars, whether or not they were what are known among railroad men as passenger coaches, they would be in fact passenger coaches, so far as the purposes of this act extended, and the firing at such a train is within the statute when done willfully and maliciously.

Sutton & Hurst, J. B. White and T. C. Johnson for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was indicted and tried on the felonious charge of shooting at a railroad passenger coach in which were passengers and employes at the time of the shooting.

The only question made that is material is whether the instructions of the court properly submitted to the jury the matter at issue. The court told the jury that "if they believed from the evidence, beyond a reasonable doubt, that the defendant willfully, unlawfully, maliciously and feloniously, with a gun or pistol, shot at a railroad train, in which the employes of said road and passengers were in and on said train, they should find the defendant guilty, and fix his punishment at confinement in the penitentiary for a period not less than one nor more than five years.

Section 1166, Kentucky Statutes, makes it a felony, with the punishment stated in the instruction just alluded to, for one to shoot at "a railroad passenger coach," on which or in which were either passengers or employes of the railroad company. That part of section 1166 pertaining to the shooting ot and into any railroad passenger coach or steamboat, is an amendment of the statute approved February 26, 1894. There is another statute on this same subject so similar to section 1166 that it might be doubted whether one does not in some part repeal the other, and that is section 794, found in the chapter of Kentucky Statutes under the head of "Private Corporations." It provides that any person who shall recklessly, wantonly or maliciously throw any stone, stick, club or other missle at or into, or shoot at or into, any engine of any railroad train in this State, or any car attached thereto, on or in which engine or car there may be any passenger or other person, the offender shall be deemed guilty of a misdemeanor, punishable by fine or imprisonment.

Appellant's criticism of the instruction at bar is that it submitted to the jury only the question whether he had fired at a railroad train, without reference to whether it was or was not a railroad passenger coach, and that it thereby authorized the jury to find him guilty of a felony for an offense which was at most a misdemeanor.

Section 794 of the Kentucky Statutes was in effect at the time the amendment of February 26, 1894, to section 1166 was enacted. If the two are in conflict the latter must be held to repeal the former. Manifestly it was the purpose of the legislature to punish by section 1166, by a very stringent law, the firing at railroad trains carrying passengers, because of the great danger to human life from that practice, and the fact that those who were liable to be injured by it were generally utterly helpless to defend or protect themselves against such assailant. It could scarcely be possible that it was the coach or character of car in which the persons were that was intended to be protected by the statute. The primary object of protection being the persons, it is not so material in what kind of a car they were situated at the time. Therefore, if the railroad train, upon which there were passengers, consisted of one or more cars, whether or not they were what are known among railroad men as passenger coaches, still they would be in fact passenger coaches, so far as the purposes of this act extended, and the firing at such train is manifestly within the mischief sought to be prevented by the statute. When such an act is done maliciously and willfully it is a clear violation of section 1166. Whether a similar act, if done only recklessly or wantonly, is or is not embraced exclusively by section 794 of the statutes, is not necessary to be here decided. The fact is in this case that the train which the jury found that appellant fired at was exclusively a passenger train, made up of passenger coaches, in which passengers and employes of the railroad company were at the time riding. There can be no sort of doubt that if appellant is guilty at all he is guilty under section 1166, Kentucky Statutes, the one under which he was indicted.

The evidence for the prosecution tended to show that the shot was fired at the train willfully; that it was not accidential or unintentional. The train was nearby, and the purpose of firing the shot under the circumstances that it was fired, being without excuse or provocation, may well have been found

by the jury from these circumstances to have been done maliciously. That it was done maliciously was not only found by the jury, but was required by the court in the instruction to be ascertained as a fact before a verdict of guilty could be returned.

Perceiving no error in the record, the judgment is affirmed.

THE WESTERN BANK v. COLDEWEY'S EX'TX, &c.

(Filed December 15, 1904.)

1. Banks and banking—Loans to insolvents—Liability of officials—Where a bank president allows the funds of the bank to be appropriated by a customer or customers, who are known to be insolvent or whose assets or business would not justify a prudent person similarly situated to extend them such credit, he will be liable to the bank as for a neglect of duty where loss results from it.

2. Same—Where power is not delegated by the board of directors of a bank, or by the advisory committee thereof, to the president and cashier to loan the bank's funds otherwise than upon the advice and consent of said board or committee, such loan so made is a direct breach of the plain duty owing by these officials to the bank and its stockholders and creditors, and said officials should be, and are, liable to the bank for the damages.

3. Right to sue one or all derelicts—That the bank has not seen proper to proceed against the cashier by action does not lessen the liability of the president for his breach of duty, and the further fact that some of the board of directors were culpably negligent in the matter will not excuse the president as the bank's right of action is for the tort against all its derelict officers, and it may sue one or more.

4. Estoppel—In the matter of estoppel pleaded by appellees, Held—That before a matter can operate as an estoppel in pais it must be shown that the party pleading it has been prejudiced in some right of his by the act complained of; that he would have done something which he could not have done but for the act, or that he was induced to do somsthing that he would not have done but for it.

O. A. Wehle and Henry L. Stone for appellant.

Pirtle, Trabue, Doolan & Cox for widow and children of A. F. Coldewey.

Chas. H. Shields for W. G. Coldewey's trustee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge O'Rear.

This is an action by the Western Bank of Louisville, Kentucky, against the estate of its late president, Anton F. Coldewey, to recover damages for about $35,000 sustained through the conduct of the president by personally permitting his son, William G. Coldewey, to overdraw his account with the bank without the knowledge and consent of the board of directors, an advisory committee of which board was daily on hand to pass on loans applied for, and in concealing such overdrafts from the board and its members.

It is charged that the conduct of Anton F. Coldewey complained of was the result of negligence on his part, wherein he neglected to discharge his duties to the bank, from which the damage stated has resulted, and it is also charged that his conduct was fraudulent as to the bank.

The facts necessary to an understanding of this case are, that it appears that Anton F. Coldewey had been the president of the bank since its organization some forty years ago, until his death in April, 1900. The capital stock of the bank was for many years before the death of Anton F. Coldewey $250,000, and the surplus something over $50,000. The bank had a board of directors who met monthly as a body to consider the affairs of the institution. The board was an active one in the management of the business affairs of the bank so far as they were brought to its attention. The by-laws provided for an advisory committee, and the custom prevailed from the beginning to the death of president Coldewey to have an advisory committee from this board, the president being ex officio one of its members; the other two were taken in rotation, serving for one week out of each month, there being eight other directors beside the president. This advisory committee was required to meet, and did meet, when the bank was open for business, and when there was business necessitating it, every morning at 11 o'clock in the banking house of appellant. Their duties included their examining and passing upon all applications made to the bank for loans and for discount of notes and other paper to the bank. They kept what were called application books, on which they supposed, and on which it was presumed, that every note offered to the bank for discount, and in which all applications to borrow its money were entered for the inspection and approval of the advisory committee.

In 1898, William G. Coldewey, who was a son of the president, Anton F. Coldewey, and who was engaged in the wholesale liquor traffic at Louisville, bought out an establishment of that nature which had been conducted by his uncle, August Coldewey, lately deceased. It was bought on credit entirely for the consideration of about $10,000. He continued the business bought from his uncle under the name of August Coldewey & Co. Upon buying this business he opened an account with appellant bank by borrowing from it $2,000, evidenced by his personal note for that amount, without collateral or other security. The proceeds of the note were placed to his credit, against which he checked. This note was not put on the application book, nor was it laid before the advisory committee or board of directors. With this start William G. Coldewey personally and in the name of his firm, August Coldewey & Co., has drawn checks at his own discretion against appellant bank without any previous arrangement with the bank or its directors that he might do so, and although he had no funds there against which to draw the checks. The proof is conclusive that when these checks were presented to the bank to the individual book keepers through the clearing house these book keepers carried them to the president, Anton F. Coldewey, who kept an office in the bank, and was there almost daily in the management of its affairs, and asked him whether the bank should pay the checks, notifying him at the same time that the accounts were overdrawn at times as high as $10,000 or more. The invariable response was a direction to the clerks to pay the checks, which was done. On some occasions when the president was absent the clerk would report the checks to the cashier, who directed them to be paid. By this proceeding something like $35,000 was drawn out of the bank in excess of what was put in by way of deposit and notes discounted by William G. Coldewey in his own name, and

the name of the business concern he was conducting under the style of August Coldewey & Co. That this fact was known to the president and consented to by him, and in fact directed by him, the record leaves little or no room for doubt. During all this time William G. Coldewey was indebted and involved apparently as much or more than he owned, and after the first few months from the beginning of this business was insolvent. Shortly after his father's death he made a deed of assignment for the benefit of all of his creditors. His estate, including that inherited from his father, would not pay much upon his indebtedness.

Anton F. Coldewey received a salary of $2,000 per year from the bank as its president. He was the active head of the institution, participating personally in the daily management of its business affairs. It was he who laid before the advisory committee the paper that was to be passed upon by them. Notwithstanding the facts above enumerated, he did not tell them at any time that his son was being permitted to overdraw his account so extensively, or at all, nor did he bring to the attention of the committee a number of notes given by his son to the bank without security, which were credited upon his overdrawn account, reducing it apparently to that extent. The directors testified that they did not know, and had never heard, of William G. Coldewey having overdrawn his account to the extent that he did do it, nor had they heard that he had overdrawn it at all until after the death of Anton F. Coldewey. That certain of the directors, including the president, overdrew their accounts at times and that other persons were allowed to overdraw their accounts at times is not material here. The practice in a bank of allowing its customers to overdraw their accounts without prearranged security is a matter at least to be determined by the governing body of the bank, its board of directors, or if the board sees proper to delegate that matter, and does delegate it, to its president or cashier, then by those officers. (Pryse v. Farmers Bank, 17 Ky. Law Rep., 1056; First National Bank v. Reese, 25 Ky. Law Rep., 778.) But if the practice as a business course is allowed by the bank at all, whether by direct action of its board of directors or whether by its cashier or president under the authority delegated to them by the board of directors, the property of allowing particular overdrafts is one that addresses itself to the business judgment and discretion of the officers having that matter in charge. If they act prudently and honestly they will not be held responsible for losses that occur from it. On the other hand, if they allow the funds of the bank to be so appropriated by a customer or customers who are known to be insolvent, or whose assets or business would not justify a prudent person similarly situated to extend them such credit, they will be liable to the bank as for a neglect of their duty where loss results from it. We might stop this case here on the facts, for, even if this overdrawing of accounts by a customer of appellant bank was a practice expressly allowed by authority of its board of directors, and was left by them as a matter of business discretion to the president and cashier, in this case the facts show that the line of credit extended to William G. Coldewey was far beyond what his business and property justified. It was a reckless employment of the bank's funds, more than negligent, for which both the president and cashier would be liable to the bank as for a neglect of their duties and a breach of their trust. To go

further, as the case has been prepared and presented on this line, we find that the power was not delegated by the board of directors, or by the advisory committee, to the president and cashier to loan this bank's funds otherwise than upon the advice and consent of the advisory committee or of the board of directors. The loans that were made, for such is the effect of the overdrafts of William G. Coldewey, were not by the consent of, nor were they known to, the directors nor to the advisory committee. It appears rather that they were concealed from them. This was a direct breach of a plain duty owing by these officials, the president and cashier, to the bank and its stockholders and creditors, for which they should be, and are, liable to the bank, damage to it having resulted therefrom. That the bank has not seen proper to proceed against the cashier by action does not at all lessen the liability of the president for his breach of duty. We find, however, that several thousand dollars of these overdrafts occurred after March 13, 1900, the last time Anton F. Coldewey appears to have been at the bank acting as its president. After that he was confined to his home by sickness, from which he died. For the overdrafts created after March 13, 1900, he is not liable, for he did not authorize them, nor, so far as the record shows, did he know that they were being created, nor was it within his power at that time to have prevented it. For allowing these it appears that the cashier alone is responsible.

A matter is pleaded in defense by way of estoppel against the bank, which is, that on September 12, 1900, William G. Coldeway made a deed of trust to Gustave D. Coldewey of all the assets of August Coldewey & Co. and of his individual assets, including his share in his father's estate, in trust for the payment of his business creditors, and that the bank, together with other business creditors of August Coldewey & Co., then agreed in consideration of that conveyance not to sue William G. Coldewey, but to look only to the assets so conveyed to the satisfaction of its claims against William G. Coldewey, and that by this conduct the bank had estopped itself from making any claim against Anton F. Coldewey for losses by his breach of trust as president.

Before a matter can operate as an estoppel in pais it must be shown that the party pleading it has been prejudiced in some right of his by the act complained of; that he would have done something which he could have done but for the act, or that he was induced to do something that he would not have done but for it. It is not shown in this case that Anton F. Coldewey's estate was injured in any way by the matter pleaded as an estoppel. Suppose William G. Coldewey, being insolvent, had determined or threatened to avail himself of the bankruptcy act, and was induced to forego that in the bank's favor by the agreement of the bank not to sue him upon these debts for a definite time, as it is charged. How could that have injured Anton F. Coldewey's estate? In the first place, making the deed of assignment did not prevent William G. Coldewey from taking the benefit of the bankruptcy statute. In the next place, the deed of assignment did not give to William G. Coldewey anything of his own estate that he was not entitled to under the law without regard to that deed, except the immunity from suit for a certain time. As Anton F. Coldewey was not the surety of William G. Coldewey, nor his guarantor, nor otherwise bound for him by con-

tract on these matters, if Anton F. Coldewey had a right of action against William G. Coldewey, he still had it. If Anton F. Coldewey's estate had such right it could not be affected by the agreement between the bank and William G. Coldewey. Again, if the bank derived any benefit or advantage from the assignment and the collateral agreement, that advantage went to reduce William G. Coldewey's indebtedness to it, and to the extent that it did reduce that indebtedness, Anton F. Coldewey's liability to the bank was correspondingly reduced. Therefore, instead of being a detriment, it was an advantage to Anton F. Coldewey's estate that the agreement was made. There was no privity between Anton F. Coldewey, William G. Coldewey and the bank in this matter. William G. Coldewey was bound to the bank upon his implied contract to repay it the money had and received by him. Anton F. Coldewey was bound to the bank for his tort wherein he, in neglect of his duty or in fraud, suffered his son to withdraw the funds of the bank without consent of the board of directors or the advisory committee and without collateral or other security, whereby the bank sustained the loss. This is not such a relation as that a release of one of the parties bound would release the other. (Brannin v. Loving, 82 Ky., 377.)

It may be true, as claimed by appellees and as indicated by the opinion of the learned chancellor who tried this case, that the cashier was more culpable in the matter of allowing these overdrafts than was the president. It may furthermore be true, as claimed, that others of the board of directors were culpably negligent in the matter, though if these facts were all so, the bank's right of action is for the tort against all of its derelict officers who have occasioned its loss. The action may be against all, or it may be against one or more. The bank's legal right to recover the loss indicated by this opinion against Anton F. Coldewey's estate appears to be clear in law. The unsecured notes executed by William G. Coldewey in part settlement of his overdrafts after they had been created are to be treated as the overdrafts are. These settlements were not a loaning of the bank's money by its board of directors, but simply reduced to definite form the evidence and amount of the liability to it previously created by the overdrafts wrongfully permitted by the president and cashier.

The judgment of the circuit court to the contrary is reversed and cause remanded, with directions to enter judgment in conformity with this opinion.

ILLINOIS CENTRAL R. R. CO. v. ROSS.

(Filed December 15, 1904—Not to be reported.)

1. Appeals—Jurisdiction—In an appeal by the defendant from a judgment for less than $200 rendered in an action for rent of land in which the tenancy is denied and the ownership of the land is claimed by the defendant, the Court of Appeals has jurisdiction of the appeal as the judgment determines the status of the land.

2. Assumpsit—Use and occupation—In an action upon a contract for rent if the plaintiff fails to show that the defendant holds as tenant he may recover in assumpsit for use and occupation, but in order to recover for use

and occupation the plaintiff must make out his title just as he would in ejectment.

8. Patent—Interference—Possession of lap—Where a party is in possession of a picee of land occupying and claiming it adversely, the fact that another party laid a land warrant on a tract including the strip so occupied, and obtained a patent and took posession of the land named in the patent outside of the said strip, he does not thereby oust the possession of the party occupying and claiming such strip unless he also takes possession of the lap.

Pirtle, Trabue, Doolan & Cox, J. M. Dickinson and Bush & Grassham for appellant.

Hendrick & Miller and J. C. Hodge for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Hobson.

Appellee Ross filed this suit against the Illinois Central R. R. Co., alleging in his petition that he was the owner, and for many years had been in the possession, of a strip of ground about eighty feet wide and one hundred feet long, which was particularly described in his petition; that the land had been, by his consent and agreement, used by the railroad company as his tenant, part of it being used for a stock pen and part of it for a loading yard; that the company promised to pay him a reasonable rent therefor; that the company had used the land as his tenant since July 6, 1896, and it promised to pay him the rent, but had not paid any part of it. He prayed judgment for the rent, $518.50, with interest and costs. The railroad company filed an answer aptly denying all the allegations of the petition. It also alleged that the strip of land was condemned by the Elizabethtown & Paducah R. R. Co. as part of its right of way about the year 1870; that this company held the land from that time until the year 1882, when it sold all of its property to the Chesapeake, Ohio & Southwestern R. R. Co., which held it until the year 1896, when it sold out to the Chicago, St. Louis & New Orleans R. R. Co., which sold it to the Illinois Central R. R. Co.; that since its condemnation it had been held in actual, adverse possession to a well defined and well marked boundary by the defendant and those under whom it claimed. It also pleaded that the title under which plaintiff claimed the land was champertous. A reply was filed denying the affirmative allegations of the answer. The case was submitted on the law and facts to the court, a jury being waived, and judgment was entered against the defendant for $132 and costs under a special finding that the land was held as tenant, and the company appeals.

A motion is made in this court to dismiss the appeal on the ground that the amount recovered being less than $200 the court is without jurisdiction. By section 950, Kentucky Statutes, no appeal may be taken to the Court of Appeals from a judgment for the recovery of money "if the value in controversy" is less than $200, exclusive of interest and costs. The judgment here is for less than $200, but it does not follow from this that "the value in controversy" is less than $200, for the judgment fixes a status. It determines that the defendant holds the strip of land in controversy as tenant of the plaintiff under an agreement to pay him a reasonable rent therefor. It

therefore, determines that the defendant does not hold the land in its own right. In another action for rent accruing since the rendition of the judgment appealed from the defendant would be estopped to set up that it did not hold the land as tenant or to say that it held the land in its own right. The judgment is also conclusive that the defendant's possession of the land was not adverse to the plaintiff. One who enters as tenant can not while remaining in possession deny the landlord's title, and, therefore, if this judgment stands the defendant, in order to set up its own title to the land against the plaintiff, must first surrender the possession of the property to him. If it should surrender the possession it could not rely in a suit to recover the land on adverse possession of the land while held by it as evidence of title. The value in controversy, therefore, on the appeal is not only the amount of money adjudged against the defendant, but the possession of the property itself, and the right to hold adversely. In other words, the judgment by necessary implication settles important rights in the land itself, and, therefore, these rights are involved on the appeal no less than the sum of money adjudged against the defendant. For these reasons the motion to dismiss the appeal must be overruled.

The facts in regard to the title to the property are in brief as follows: The Elizabethtown & Paducah R. R. Co. condemned it as part of its right of way in a proceeding against Isaac Rucker's heirs and took possession of it at the time, and it and its vendees have been in possession of it ever since. But it turned out that the Rucker patents did not adjoin as was supposed, and that there was a strip between the two. The lot in controversy is a part of this strip. So the railroad company, as appears, did not acquire the title to the land by its proceeding condemning it. Whether it has since acquired title by adverse possession we need not determine in this action.

About the year 1873, and after the railroad had taken possession, a man named Sullivant conceiving that there was vacant land between the two Rucker patents, obtained a land warrant from the county court for one hundred and twenty four acres of land. Sullivant obtained no patent for the land, but lived on it for several years. After he left it one Crocksdain lived there, and after him one Richardson, who bought it from Crocksdain and sold it to T. O. Russell. The Rucker heirs sued Russell and recovered all of the land but twenty-four acres, but the twenty-four acres includes the strip in controversy. An execution was issued against Russell for the costs in that case, and the plaintiff, Ross, is the assignee of the purchaser at the execution sale at which the twenty-four acres were bid in for less than the amount of the debt. The sheriff subsequently made him a deed. This was about the year 1885. In the year 1890 Ross made to Yancey a quit-claim deed for part of the land which includes part of the strip in controversy. The sheriff's sale was made while the Chesapeake, Ohio & Southwestern R. R. Co. was in possession of the land claiming it under the condemnation proceedings. Ross was the agent for the railroad company from about the year 1886 to the year 1890, but was not connected with it after that. The Illinois Central R R. Co. came into possession in 1896, holding under its lease from the Chicago, St. Louis & New Orleans R. R. Co., which had a deed from the Chesapeake, Ohio & Southwestern R. R. Co., which likewise

had a deed from the Elizabethtown & Paducah R. R. Co. All of these deeds were with warranty and were recorded. It is not shown that Sullivant ever by any writing transferred such title as he had to Crocksdain, and no transfer from Crocksdain to Russell is shown, at least no writing is produced.

There is no evidence of the renting of the land by the defendant or any agreement to pay rent, except the testimony of the plaintiff, Ross. His testimony is that in 1888 or 1889, when the property was in the possession of the Chesapeake, Ohio & Southwestern R. R. Co. and it was building a stock pen on the lot, he had a talk with the agent, who it was he did not know. His statements are as follows:

"Q. Mr. Ross, I will get you to state about when the railroad entered upon that lot, if it ever entered upon it?"

"A. They placed the stock pen on it about, I think, in '90. Let me see. I don't know whether I have got the dates right or not; maybe '98 or '99."

"Q. You mean '88 or '89?"

"A. Yes, sir; '88 or '89."

"Q. Well, did you have any contract with the agents or persons representing the road after they entered upon it?"

"A. My recollection is that something was said about it by some of them, asked me if I had any objection."

"Q. Who was that?"

"A. I don't know."

"Q. Asked if you had any objection to placing a pen there?"

"A. Yes, sir."

"Q. What did you say?"

"A. I said I would be glad for them to have a stock pen there if they needed one."

In his cross-examination this occurs:

"Q. You say that way back yonder some representative, as you style him, of the railroad company operating that road at the time, came to you to get permission, if I understand you, to put this cattle pen on this property?"

"A. About the time it was built I think I had a conversation with some foreman, or he had with me, that wanted to build stock pens and depots, and when he went to build it, or before he commenced to build it, he asked me if I had any objection. I told him no; I would be glad to have the stock pen there."

"Q. You told him that you owned the property?"

"A. I don't think I told him anything about it."

"Q. Did he know that you owned the property?"

"A. I don't know that he did; I claimed it."

"Q. Then you told him that you had no objection; did he then build the pen there?"

"A. Yes, sir."

"Q. You say you don't know who that party was?"

"A. No, sir; foreman of the gang of men that built these things."

It does not appear from this that the man, whoever he was, had any authority to speak for the railroad company, or that he undertook to make any contract for it. Elsewhere in his testimony it appears that Ross lived

near the station, and had a store there. He was the agent of the company at the time and the man building the pen would naturally ask him if the location suited him. It is not shown that any demand was ever made on the Chesapeake, Ohio & Southwestern R. R. Co. for rent, or that that company ever paid any rent, or understood that rent was expected from it. After the Illinois Central R. R. Co. came into possession in 1896 no claim was made upon it for several years. Finally, the plaintiff had a talk with some of its men. He testifies as to it as follows:

"Q. Mr. Ross, by permission of his honor, I will ask you a question I overlooked on your direct examination. I will ask you to say whether or not the defendant has ever tried to purchase this tract of land from you. If so, tell when and through whom?"

"A. One time it was through two of their men, I never did know who they were, sent there by the company; I was over at my residence, and they came over there and tried to make a deal, but could not; and another time they sent Mr. Washington."

"Q. Can you recall the names of the two men that came over to see you first?"

"A. No, sir, I can not; young men both of them, occupying his position."

It further appears from the proof that about a year before the suit was filed the plaintiff made a demand on the company for the rent on the ground, and when this demand was made the company sent Mr. Washington, who was an engineer in its employment, to make a survey of its ground and learn the nature of the demand which the plaintiff was setting up. He had no authority to do anything but make a survey. The other two men occupying his position are not shown to have had any more authority than he had. Besides all this, an effort to buy peace would not constitute the railroad company a tenant, or in any way sustain the allegations of the petition.

The circuit court in its finding of fact did not find that the Illinois Central R. R. Co. held the land as tenant or agreed to pay rent, but his finding was that the company succeeded to the obligations of the Chesapeake, Ohio & Southwestern R. R. Co., and that it held as tenant. But the evidence does not warrant the finding that the Chesapeake, Ohio & Southwestern R. R. Co. held as tenant. What we have quoted above is all the evidence in the record to sustain it. In order to establish a tenancy it was incumbent on the plaintiff to prove not only a contract to this effect, but that the agent of the corporation with whom it was made had authority to make it, or that it was within the apparent scope of his authority. The proof wholly fails to show either of these facts.

This brings us to consider whether an action may be maintained although the plaintiff fails to show that the defendant held as tenant. The rule is that assumpsit lies for the use and occupation of land although there is no express contract of renting or agreement to pay for the use of the land. (Logan v. Lewis, 80 Ky., 8; Jones v. Tipton, 82 Ky., 295; Burnam v. Best, 49 Ky., 297.) It has also been held that where the plaintiff sues upon an express contract to pay at a particular time or in a particular way he can not recover upon a quantum meruit without amending his petition. (Newton's Ex'or v. Field, 98 Ky., 186.) In the case before us the express contract stated in the petition is precisely what the law would imply in the

absence of a contract, and if the plaintiff failed to establish an express contract, and did establish the rest of his allegations, we would simply have a case where the plaintiff had shown facts sufficient to warrant a recovery although he had not established all the facts which he alleged. To illustrate: If the plaintiff sued for personal services, alleging that they were worth $100 a month and were performed at the request of the defendant, and that it had promised to pay him that sum therefor; but simply showed services rendered for the defendant at his request worth $100 a month, he might recover although he failed to prove the express contract to pay. The same rule must be applied in a suit to recover for the use and occupation of land where the express contract alleged is the same as the contract which the law would imply from the facts stated. But in order to recover for the use and occupation of the land in assumpsit, where the relation of landlord and tenant is not shown to exist, the plaintiff must make out his title just as he would in ejectment, for the foundation of the action is the appropriation by the defendant to its use of the plaintiff's property. Whether the plaintiff sues for the land or for damages for its detention or for its use and occupation the rule in each case is the same. He must recover only on the strength of his own title where his title is denied and the relation of landlord and tenant does not exist.

In the case before us the railroad company was in the actual occupancy and possession of the entire strip of land which it condemned, holding to a well defined boundary when Sullivant laid his land warrant and settled on his boundary; but his settlement was not within the lap and did not oust or break the prior possession of the railroad company. The same is true of the holding of Crocksdain, Richardson and Russell. So far as appears Sullivant never had the legal title to the land he took up, and there is no showing that Russell had the legal title to the land which was sold at the execution sale under which Ross held. The sheriff's deed is the only evidence of title produced by Ross. So the evidence on the trial failed to show that he was the owner of the strip in controversy, or to show an adverse possession of it by him or those under whom he claims.

Judgment reversed and cause remanded for further proceedings consistent herewith.

WARD v. COMMONWEALTH.

(Filed December 15, 1904—Not to be reported.)

1. Homicide—Evidence—Powder burn—On the trial of one for murder, where the evidence shows that at the time of the killing there were four shots fired, two out in the yard where appellant and deceased were, and two from the front door of a house thirty-three feet from where deceased was killed: that two bullet holes were found in the breast of deceased and his clothing and flesh were powder burned, it is conclusively shown that deceased was not killed by the shots fired from the door of the house.

2. Admissions of accused—Competency—On the trial of one for murder admissions of the accused on cross-examination tending to show his intimacy with two girls who were witnesses for the Commonwealth, his connection with their departure from and keeping them out of the State, renting them a house in West Virginia, and taking them to Ohio, were competent

evidence and were properly admitted, but to the extent that such admissions tended to prove improper relations between accused and the girls that would subject him to prosecution, though only for a misdemeanor, they were incompetent.

W. S. Harkins for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge Settle.

This is an appeal from a judgment of the Johnson Circuit Court entered upon a verdict finding the appellant, Jeff Ward, guilty of voluntary manslaughter and fixing his punishment at confinement in the penitentiary for ten years for taking the life of William Wright, colored, on the night of December 24, 1908.

The indictment charged appellant with the crime of murder, but in the opinion of the jury the evidence showed the killing to have been done in sudden heat and passion and without previous malice, and the fact that the punishment inflicted was much less than the maximum limit for voluntary manslaughter indicates that the jury must have found in the evidence some cause for mitigating the punishment. The facts of the homicide were in brief as follows: On the night in question there was gathered at the house of Louis Salmons, himself and wife, two daughters of the latter by a former husband, known as Alti Musick and Stella Musick, James Salmons, William Wright and Asberry Davis, the last two being colored men who had shortly theretofore been in the employ of James Salmons. It appears that James Salmons had that day provided himself with a gallon of whisky which he took to the house of his brother Louis. All present partook of the whisky and also of some brandy which was in the possession of Wright. Wright played the banjo for the entertainment of the company, and the music being heard by appellant, Jeff Ward, Bish Ward, Dick Wells, and two or three other persons who happened to be passing the Salmons' residence that night, they went to the window of the house and looked in. Being observed by some of the family they were invited to enter the house, which they did, and the entire company drank of the whisky.

When appellant and his party entered the house James Salmons had upon his person a pistol, with a holster and belt, seeing which appellant took off a pistol he was carrying and handing it to James Salmons, said: "Take this, and you will have a pair." James Salmons took the offered pistol and attached it to his person with his own. About this time several of the company began to dance to the music of the banjo. While the dance was going on Dick Wells went to the negro, William Wright, took off his hat and began to "knuckel" him on the head. The negro objected to this treatment, and some words arose between them. At this juncture Louis Salmons called the attention of James to the conduct of Wells, and James went at once to Wells, seized him and shoved him back against the bed, and told him that if he did not let the negro alone that he would whip him. The appellant then sprang toward James Salmons and jerked the latter's pistol out of the holster instead of his own. Salmons thereupon drew from the holster on his person the pistol that appellant had given him when he en-

tered the house and "broke it down" to see if it was loaded. Appellant then handed his pistol back to him and asked for his own, which Salmons gave him.

After appellant obtained his pistol he invited the negro, Wright, to go out into the yard with him, and the two went out together. In a minute or two after they left the house two pistol shots were fired in the yard. Upon hearing which Jim Salmons ran to the door, pointed his pistol, with the muzzle elevated, and fired it twice while standing in the door. Immediately afterwards appellant entered the house holding his pistol in his hand by his side, and told Salmons that he (Salmons) had killed the negro. Salmons replied that he had not killed anybody, but had elevated his pistol when it fired. The Salmons then ordered the appellant and his party to leave the premises, which they did.

The dead body of Wright was found at the front gate at a distance of thirty-three feet from the door where James Salmons stood when he fired the two shots. An examination of the body of the dead man showed that he had received two bullet wounds two or three inches apart, both near the left nipple. It was later discovered by a physician who made the examination of the wounds that one of the bullets had entered the heart, causing instant death. The entrance of the bullet into the heart, together with the fact that the deceased held in his hand and across his breast a paling which he had evidently pulled off the fence about two feet away, would seem to indicate that he fell where he was shot, and that death was, therefore, instantaneous. The examination of the body disclosed the further fact that the deceased's clothing around the bullet holes, and also the flesh where the bullets entered his body, was badly powder burned, thus demonstrating that the shots were fired by some one standing near him at the time.

The foregoing facts were made to appear from the testimony of the witnesses of the Commonwealth, viz., James and Louis Salmons, the wife of the latter, her two daughters, the negro Asberry Davis, and Dick Wells. Upon the other hand appellant, while agreeing in many particulars with the other witnesses as to what occurred before he and Wright went out of the house, testified that he did not have his pistol with him when he went out in the yard with the negro, and that he did not shoot the negro or fire off a pistol while in the yard, but that Wright was shot by James Salmons from the door, and the two shots fired by Salmons was the only shooting done on that occasion. He further testified that he did not get his pistol from James Salmons until he re-entered the house after Wright was shot by the latter. He was corroborated by several of the party by whom he was accompanied to the Salmons house that night. It may be said, however, that the evidence introduced in behalf of the Commonwealth strongly conduced to prove that appellant got possession of his pistol from Salmons before Wright was shot, and that when the two left the house together appellant had his pistol in his right hand. In other words, the testimony of the Commonwealth was to the effect that Wright was killed by the appellant; while the testimony introduced in appellant's behalf tended to show that the killing was done by James Salmons.

As to two questions of fact there seems to have been no conflict, that is, all the witnesses agreed that James Salmons stood in the door when he fired

his pistol, and of the witnesses who examined the body of Wright after he was shot all agreed that his body and clothing were powder burned. One of the witnesses testified that his shirt was burning when he got to the body. The conclusion, therefore, is inevitable that the shooting could not have been done by James Salmons, as he was thirty-three feet from the place where the body of Wright fell when he fired his pistol from the door. It is equally conclusive that whoever shot Wright did so by putting the pistol well nigh, if not actually, against his body, and of all the persons who were at the Salmons house that night, according to the evidence, appellant alone was so situated as to be able to fire the shots which caused the death of Wright.

No satisfactory proof of a motive for the killing is shown by the record. The most reasonable solution of the conduct of the appellant is that in his intoxicated condition he took offense at Wright from something that passed between him and Wells in the altercation in the house, or that he became angered at something that was said or done by Wright while they were out in the yard. The record discloses the usual attempts by each party to contradict and discredit the witnesses of the other, and some testimony was introduced to impeach the Musick girls by showing that their reputation for virtue is bad. There were also some contradictions of the testimony of James Salmons, such as one or two declarations upon his part made after the homicide which tended to exculpate appellant, but it is rather apparent that if any statements of that nature were made by him they amounted to expressions of sympathy for appellant rather than admissions of guilt upon his part. Appellant and some of his witnesses were also contradicted in several material matters; but, taking the evidence as a whole, it can not be said that it was not sufficient to support the verdict. Numerous grounds were presented in support of the motion for a new trial made in the court below, but as only one of the grounds there relied upon is now urged for a reversal, we think it unnecessary to notice the others, except to say we have found them wholly untenable.

The one ground insisted upon is the alleged error of the trial court in admitting incompetent testimony. The testimony objected to is that elicited from the appellant upon cross-examination, and consists of certain admissions made by him in regard to his relations with the Musick girls, Alti and Stella, after the homicide. The admissions in question were in the main to the effect that he had rented for them a house in Barbourville, West Virginia, and that he paid the house rent while it was occupied by them; and further, that when their father went to Barboursville to get and bring them back to their home in Kentucky, appellant got them to evade and escape from their father by leaving Barbourville for Huntington, West Virginia, from which place he (appellant) took one or both of them to Ironton, O. The purpose of the testimony in question was to show that appellant was trying to remove the Musick girls from the jurisdiction of the courts of this State, and thereby prevent them from testifying against him in the trial under the indictment for the murder of Wright. They, however, finally returned to this State and gave their testimony against appellant. It is in the bill of evidence in the record, and was manifestly hurtful to the appellant as it conduced to show his guilt.

To the extent that the admissions of appellant tended to show his intimacy with the Musick girls, his connection with their departure from, or keeping them out of, this State, his providing them a house in West Virginia, and taking them to Ohio, they were competent, and the court did not err in admitting them; but to the extent that such admissions tended, as they did in one or two particulars, to prove improper relations between him and the Musick girls that would subject him to prosecution, though only for a misdemeanor, they were incompetent, and should have been excluded. But as so little on that score was admitted by him, and so much of what he said was competent as showing a purpose on his part to suppress the testimony of the girls, we are of opinion that his substantial rights were not prejudiced by its admission. Though no objection has been made to the instructions, we have carefully read them and find that they are free from error.

The record as a whole manifesting no error that could, in our opinion, have operated prejudically to the substantial rights of appellant, the judgment is affirmed.

ALDERSON, &c. v. ALDERSON'S GUARDIAN.

(Filed December 15, 1904.)

1. Decedents' estates—Settlement of—Action for—Statutory lien—Creditors—Under section 2087, Kentucky Statutes, a lien is placed upon the real estate of a decedent for six months after his death for the payment of his obligations, and the heir can not alien the estate, nor can any liens be created thereon that will defeat this statutory lien during this period of six months. Under Civil Code, section 428, a representative, legatee, distributee or creditor of a deceased person may bring an action in equity at any time for a settlement of the estate, which, if brought within the six months, it continues the statutory lien until the estate is settled; or if the action is brought after the six months, and before alienation or before any liens are created on the property, it would create a lis pendens and protect the rights of the creditors and heirs of decedent.

2. Judgment creditor of heir—Action to subject interest in ancestor's estate—Lien—Effect—On the failure of a representative, distributee or creditor of a decedent to bring an action for a settlement of the estate within six months after his death, the statutory lien given by section 2087, Kentucky Statutes, to distributees and creditors, lapsed or ceased, and an action by a judgment creditor of one of the heirs of the decedent, setting up his judgment and return of "no property found," having been filed three days after the death of decedent to subject such heirs' one-fifth interest in said estate to the payment of said judgment, thereby acquires a lien on said heirs' interest therein, and in the settlement of said estate such heirs' one-fifth interest should be taken from the net proceeds of the decedent's estate, after first satisfying the lien creditors, before there is any distribution to the general creditors, and, after paying the general creditors, the balance, if any, should be distributed to the other heirs.

W. P. McClain, Montgomery Merritt and Dorsey & Stanley for appellants.

T. E. & E. C. Ward for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Nunn.

A short history of the matters involved will be necessary to a clear understanding of this case. In the year 1898 a judgment for $1,350 was rendered in the Henderson Circuit Court on appeal against J. W. Alderson in favor of Lola Green, infant daughter of Rosa Green, on a writ of bastardy. Execution on this judgment was returned "no property found."

During the pendency of that prosecution J. W. Alderson was indicted for the seduction of Rosa Green. He defeated that prosecution by marrying her. After twelve months had elapsed from the time of the marriage, they never having lived together, J. W. Alderson sued his wife for a divorce. During the pendency of this action for divorce, and on the 1st of February, 1900, J. J. Alderson, the father of J. W. Alderson, died leaving five children, his only heirs and his widow, Carrie Alderson, surviving him. On the 8d of February, three days after the death of Alderson, the Ohio Valley Banking and Trust Co., as guardian for Lola Green, instituted an action in the Henderson Circuit Court against J. W. Alderson and the widow and all the children of J. J. Alderson, deceased, describing the real estate, which consisted of several tracts, and sought to subject the one-fifth undivided interest of J. W. Alderson therein for the satisfaction of the $1,350 judgment due Lola Green, and also for the purpose of setting aside a conveyance made by J. W. Alderson to his father, J. J. Alderson, for a one-half interest in seventy-four acres of land. It was alleged that this was a fraudulent conveyance; that it was executed for the purpose of defeating this child from the collection of its judgment. This case was consolidated with the one brought by Alderson against his wife for a divorce. The court on the trial of these cases adjudged that J. W. Alderson was entitled to a divorce from his wife, and decreed that she should pay the cost and refused her alimony. And in the same judgment the court decreed that the appellee herein had a lien on the undivided one-fifth interest of J. W. Alderson in the real estate of his father, and directed that this lien be enforced. In these consolidated actions J. W. Alderson sought to defeat the claim of appellee upon the ground, as he claimed, that his marriage with the mother of appellee legitimatized the child and satisfied the judgment. The court refused to give him relief upon this ground, and he appealed to this court. This court determined that the marriage did not satisfy the judgment, and also that there was no error in enforcing appellee's claim upon the one-fifth undivided interest which he owned in his father's estate. (24 Ky. Law Rep., 595.)

While the actions referred to were pending in the Court of Appeals, and on the 11th of April, 1902, Carrie Alderson, as administratrix of J. J. Alderson, instituted an action in the Henderson Circuit Court to settle the estate. She made defendants to this action of appellee the children of decedent and such of the creditors as she had information of. On the return of the mandate in the two consolidated cases they were consolidated with this one, and the court made an order referring them to the master commissioner for a report and settlement, and also directed a sale of all the land after setting apart thirty acres as dower for the widow. The commissioner sold the land, except the dower, which it appears from his report brought $5,215.03, from which was deducted $1,484.19, the amount of the claims of two creditors who held mortgages on the land, leaving about $3,731 for the general cred-

itors and the children of J. J. Alderson, deceased. The lower court, without regard to the interest of the general creditors, whose claims amounted to between $900 and $1,000, and the brothers and sisters of J. W. Alderson, gave appellee a judgment for one-fifth of this balance of $3,731, after deducting the cost of $195, and from this judgment the appellants have appealed.

The appellants contend that the general creditors should have also been paid out of this fund before dividing it into fifths; that by the action of the lower court they have erroneously been compelled to pay or contribute to the payment of J. W. Alderson's debt to his child, Lola Green. In other words, they have been compelled out of their interest in the property to pay all the general creditors, leaving the interest of J. W. Alderson free from the payment thereof. It is true this is a hardship upon the brothers and sisters of J. W. Alderson, but it results from their own laches. To have prevented this they should have brought an action under section 428 of the Civil Code, which provides as follows: "A representative, legatee, distributee or creditor of a deceased person may bring an action in equity for the settlement of his estate."

The action authorized by this section might have been brought immediately after the death of J. W. Alderson (101 Ky., 98; 5 Ky. Law Rep., 606), and should have been brought within six months from his death to have protected and saved themselves from this loss. At common law the heirs or devisees took the realty by descent from the ancestor free from the ancestor's debts; took the fee-simple title thereto. (3 Bibb, 23; 2 Bibb, 229, 17 B. Mon., 584; 97 Ky., 206; — Ky., 71; Kent's Commentaries, volume 4, page 420.) This rule obtained except where the ancestor expressly charged or bound the heirs or deivsees for the payment of his debts. This common-law rule was changed by statute near one hundred years ago, and which has been in existence in this State from that time and is embodied in section 2087, Kentucky Statutes, which provides: "When the heir or devisee shall alien, before suit brought, the estate descended or devised, he shall be liable for the value thereof, with legal interest from the time of alienation, to the creditors of the decedent or testator; but the estate so aliened shall not be liable to the creditors in the hands of a bona fide purchaser for valuable consideration unless action is instituted within six months after the estate is devised or descended to subject the same."

Under the provisions of this section there is a lien placed upon the real estate of the ancestor for the term of six months after the death of the ancestor for the payment of his obligations, and the heir can not alien the estate within that time nor can any liens be placed thereon that will defeat this statutory lien during this period of six months. (105 Ky., 71; 97 Ky., 206; 22 Ky Law Rep., 552.) If the suit provided for by section 428 is brought within the six months, it continues this statutory lien until the estate is settled, provided the action be prosecuted with reasonable diligence; or if the action be brought after the six months, and before alienation or any liens are created on the property, it would create a lis pendens and protect the rights of creditors and heirs of decedent. The suit provided by section 428 of the Code not having been brought in this case within six months, but being instituted two years or more after the date of the death of J. J. Alderson, the lien provided by section 2087 in favor of the creditors of the

decedent lapsed or ceased, and appellee, the banking company, having obtained a valid lien by this action on a return of nulla bona against the interest of J. W. Alderson, it was properly adjudged the one-fifth interest of J. W. Alderson in the real estate of his father after the payment of the mortgage liens which were prior to this lien of appellee.

Counsel in this case seem to be in error with reference to the effect of the report of the commissioner. They contend that the whole indebtedness of J. J. Alderson's estate, including the mortgage deeds, amounting to about $2,300 or $2,400, should be deducted from the $8,731, and the balance divided in fifths between the children. But the report of the commissioner shows that the land was sold and the mortgage creditors satisfied, leaving a balance of about $8,731, of which, after deducting costs, the appellee is entitled to one-fifth. Then the claim of the general creditors should be deducted from the balance, and this sum divided between the four brothers and sisters of J. W. Alderson.

Wherefore, the judgment of the lower court is affirmed.

FINK v. METCALFE, &c.

(Filed December 16, 1904—Not to be reported.)

Wills—Devise to trustee for use of wife—At her death trust to continue for use of son—Where a testator wills all his property, real and personal, to a trustee for the use of his wife, and at her death the trustee to hold the same for use of his son, there being no devise after the death of the son, on the death of the wife the trust will be vacated on the demand of the son, and the trustee required to convey to him the legal title.

Marion W. Ripey and Sam W. Green for appellant.

Bennett H. Young for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Barker.

The appellant, Adeline M. Fink, by written contract, agreed to purchase a lot of land, with the improvements thereon, situated in Louisville, Ky., from the appellees, J. H. Metcalfe and M. F. Coomes, his trustee, the title to be "a good, fee simple, marketable title, free from and clear of all incumbrances." * * * Becoming uneasy, after examination, lest the vendibility of the title of appellees to the land was questionable, she declined to accept the proffered deed or to pay the agreed consideration, whereupon the vendors instituted this action to enforce the contract.

The question presented by the record is whether or not the appellees have a vendible fee simple title to the land, and this depends upon the construction to be placed upon the will of C. K. Metcalfe, the father of appellee, who devised it to him. So much of the will as is pertinent to the subject in hand is as follows:

"1st. I will to Dr. M. F. Coomes all my real and personal property of every description, in trust for the benefit of my wife, Jemima A. Metcalfe,

during her natural life; after her death to hold the same for the benefit of my son, John H. Metcalfe.

"3d. I will that my wife have the free use of the rents of the property; also the care and management of the same. After her death my son have the same rights and privlieges.

"7th. I will that Dr. M. F. Coomes at his death choose his successor, if need be."

The widow is dead, and the trustee and the cestui que trust, J. H. Metcalfe, are holding the property in question under the terms of the will. As C. K. Metcalfe owned the property in fee simple at his death, and there is no devise after the death of John H. Metcalfe, or other manifestation in the terms of the devise that a less estate was intended by the testator, he and his trustee, between them, hold the fee-simple title to the property. (Section 2342, Kentucky Statutes.) Dr. Coomes under the will exercises no control of the property whatever, holding it in what is called simple or dry trust, and the rule is well settled that such a trust will be vacated upon the demand of the beneficiary, and the trustee required to convey to him the legal title. (Wooley v. Preston, 82 Ky., 415; Adams' Trustee v. Adams, 21 Ky. Law Rep., 1756; Bisphams Equity, 4th edition, section 54; Dembitz on Land Titles, volume 1, section 20, page 133; Page on Wills, section 615; Perry on Trusts, 5th edition, section 920.)

As the trustee is willing to join in the conveyance to appellant, it is manifest that she would thereby obtain a valid title to the property under consideration. The chancellor's judgment being in accord with this view, it is affirmed.

HILES v. HILES.

(Filed December 16, 1904—Not to be reported.)

Montgomery & Lee for appellant.

W. S. Kelley for appellee.

T. T. Hedgen for guardian, &c.

T. L. Edelen for infant appellees.

Appeal from Scott Circuit Court.

Judge Barker delivered the following response to petition for rehearing:

While it is true the defendant, Lee Hiles, filed an answer in the suit of W. D. Jones v. T. B. Hiles, he did not make his answer a cross petition against T. B. Hiles, and no judgment could have been rendered in his favor against T. B. Hiles on the pleadings in that action, or against the heirs at law of T. B. Hiles. In the other suit Lee Hiles filed no pleadings personally at all.

Petition overruled.

McMILLAN v. BAGBY.

(Filed December 16, 1904—Not to be reported.)

Land—Execution sale—Statutory redemption—M. purchased the land of B. at execution sale for less than two-thirds of its appraised value. B. procured H. to redeem it by giving H. a mortgage thereon for the money, and H. within a year paid the redemption money and interest to M., and took his receipt therefor. After the year was out H. demanded a deed of B. for the land, which B. refused to give, thereupon H. returned the receipt to M. and received back the redemption money, and then M. sold the land to P. In an action by B. against M. and P. for the land and for all equitable relief, Held—That P., who was a bona fide purchaser of the land without notice, was entitled to hold it, but B. was entitled to recover from M. the value of the land less the redemption money and interest.

Leslie T. Applegate for appellant.

John H. Barker for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Hobson.

In the year 1897 a tract of land belonging to appellee Bagby, containing one hundred and twenty acres, was sold under execution and purchased by appellant McMillan for about $155, which was less than two-thirds of its appraised value. Before the end of the year allowed for the redemption of the land Bagby made an arrangement with his brother-in-law, Hall, to redeem the land for him, and executed to Hall a note for $200 and a mortgage on the land securing the note. After this was done, and within the year, Hall went to McMillan and paid him the money and took from him a receipt. Some time after the year allowed for redemption had expired Hall demanded of Bagby that he sign a deed which Hall presented to him, and upon his refusing to do this Hall went to McMillan and returned to him the receipt which he had given him, and McMillan paid back to Hall the money he had received from him. Hall told McMillan it was his money, and he wanted to rescind the trade. Some time after this Bagby wrote McMillan a registered letter asking information about the matter, but McMillan did not answer the letter. In the spring of 1901 Bagby tendered to McMillan the amount of his purchase money, with 10 per cent. interest. McMillan refused the tender, having in the meantime sold the land to George Printy. Bagby then brought this suit against McMillan and Printy to recover the land and for all equitable relief. Printy answered that he was a bona fide purchaser without notice and the action as to him was dismissed, but judgment was given against McMillan for $600 and costs.

The sheriff had made a deed to McMillan for the land, and as he had title of record and Printy had no notice of Bagby's equity the court properly dismissed the petition as to Printy. The statute allows the owner of the land to file the purchaser's receipt with the clerk, or to pay the money to the clerk where the purchaser declines to take it, but this was not done, and so far as the record shows when Printy purchased the land McMillan's title was regular of record.

Hall had accepted Bagby's note for $200 and had accepted the mortgage securing the note before he paid the redemption money to McMillan; at

least the weight of the evidence sustains this conclusion. But, however this may be, he had no right to redeem the land except for Bagby, for only the owner had the right of redemption. This McMillan knew, or is charged with knowing. When Hall paid the money to McMillan and took McMillan's receipt for the redemption of the land the redemption was complete, and the title revested in Bagby. This title could not be taken out of Bagby thereafter by any action of Hall and McMillan. Therefore, Hall's going back to McMillan and giving up the receipt after the year allowed for redemption was out had no effect on the title, this having been done without the knowledge or consent of Bagby; and if the land was still in the hands of McMillan, Bagby should recover it. But as the land has found its way into the hands of an innocent purchaser and can not be recovered, Bagby may follow its proceeds in the hands of McMillan. The rule is that where property is sold to a bona fide purchaser the owner of the property may in equity follow the proceeds in hands of the seller, or as long as its identity can be traced. McMillan has received that which represents the land and should not in equity be allowed to retain it as against the true owner of the land. The proof fully warrants the conclusion that McMillan realized from the land more than the amount of the judgment and the redemption money, with interest.

We do not see that the petition is defective or that there was any such laches on the part of Bagby as to defeat his rights. He had redeemed his land and so far as appears he did nothing to mislead McMillan, but, on the contrary, the registered letter which he sent to him was sufficient to apprise him that he was standing on his rights.

Judgment affirmed.

GOFF v. JANEWAY & CARPENTER.

(Filed December 16, 1904—Not to be reported.)

Wilfred Carrico and Little & Slack for appellant.

Powers & Anderson for appellees.

Appeal from Daviess Circuit Court.

Judge Barker delivered the following response to petition for rehearing:

There is no doubt as to our meaning when we say in the opinion that "the petition is defective because it fails to allege notice by appellee that it had accepted the guaranty of appellant." We were dealing with the pleadings as they now stand, and we declined to accept the waiver of notice contained in the written guaranty in lieu of the omitted allegation of notice, because it was not pleaded. The opinion clearly shows that the petition, in order to state a cause of action on the guaranty of appellant, must either allege notice of its acceptance or a waiver thereof.

SMITH, &c. v. HARDESTY, &c.

(Filed December 16, 1904—Not to be reported.)

1. Fiduciary—Judicial sale of land—Appeal—Failure to prosecute—Where land has been sold under a will by the executor under a decree of the circuit

court, and thereafter two nonresident infant heirs appeared in court by counsel and asked for a new trial under section 414, Civil Code, which was refused by the court, to which they excepted and prayed an appeal, but failed to prosecute the appeal, they are bound by the proceeding and judgment of the court.

2. Collateral attack on judgment—Where land is sold in a proceeding in the circuit court by the executor of a decedent, for destribution of the proceeds under the provisions of the will, the fact that two of the heirs who were nonresident infant defendants received none of the proceeds does not render the sale void, but only erroneous, and having entered their appearance and excepted to the judgment and failed to appeal they can not collaterally attack the judgment and proceedings thereunder.

3. Action against surety—Limitation—In an action against a surety on the bond of an executor, brought by heirs for the failure of the executor to account to them for their distributive share of the proceeds of land sold by him under a decree of court, the heirs, who were infants at the time of the judgment and sale, have five years in which to bring their action against such surety after they arrive at age, under section 2550, Kentucky Statutes.

Hazelrigg, Chenault & Hazelrigg and W. E. Seligman for appellants.

W. C. McChord and T. Scott Mayes for appellee, S. G. Hardesty.

N. W. Halstead and John W. Lewis for appellee, F. M. Hardin.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Nunn.

In the month of October, 1888, the will of William Hardesty was probated in Washington county, Kentucky, and appellee, John T. Hardin, duly qualified as executor thereof, with appellee, F. M. Hardin, as his surety.

By this will Hardesty devised to his daughter, Lucy Sale, a tract of land, describing it, and directed that it be valued (without stating by whom), and this valuation charged to her, and if it did not make her equal with his other children, then she should be made equal out of the balance of his estate. The other clauses of his will are as follows:

"Item 2. My will is that all the balance of my land is to be sold at my death on one and two years' credit, with interest from date, and all the resi due of my estate to be sold.

"Item 3. I want all the charges that I have made against my heirs to stand as advancements against them as part of their interest in my estate.

"Item 4. I want all these advancements counted up against those of them that I have charged, and then an equal division to be made of my estate among all of my heirs, counting the advancements that I have made as part of their interest of my estate.

"Item 5. I do hereby appoint John T. Hardin to be my whole and sole executor of my estate."

The executor instituted an action in the circuit court for the purpose of having Lucy Sale's land valued and charged to her and a sale of all the balance of the testator's land, and for the purpose of having all of the heirs equalized and a distribution of the estate as provided by the will. A sale of the land was made by order of court, and appellees, S. G. and J. J. Hardesty, became the purchasers. The sale bonds were made payable to the executor, J. T. Hardin. The master commissioner, without any order of

court, but by the direction of Hardin, collected these bonds, and it appears paid the portions due all of the heirs except the portions due these appellants, to wit, $251.86 each, and they have never been paid any part thereof.

These appellants are children of Sarah Smith, deceased, who was the only child of Mary Gray, also deceased, and who was a daughter of the testator, William Hardesty. At the time John T. Hardin became such executor these appellants were infants and nonresidents of this State, and were the joint owners of Mary Gray's interest in the estate of William Hardesty.

In the month of March, 1899, these children, appellants, appeared by counsel in the Washington Circuit Court, and took the necessary steps provided by section 414 of the Civil Code to obtain a new or retrial of that action, they having been proceeded against as nonresidents and never having appeared in the action. The court refused to redocket the case and grant them a hearing. They excepted and prayed an appeal, which was granted, but they never prosecuted an appeal from that judgment, and they are now bound by the proceedings and judgments therein. In the same month and year, and after the court refused to reopen that case and grant them a new trial, the appellants each brought an action in the Washington Circuit Court against appellees, S. G. and J. J. Hardesty, the purchasers of the land at the commissioner's sale, and alleged that the sale was void and passed no title; that appellants were still the owners of their interests therein. They set forth in their pleadings many defects in that proceeding. It is unnecessary to refer to them in detail, as the defects, if any, did not make the judgment void, but only erroneous, and they should have appealed from that judgment and have had the errors corrected; but failing in that they can not in this action collaterally attack that judgment and the proceedings therein.

During the progress of this proceeding against the Hardestys appellants filed an amended pleading making F. M. Hardin, the surety of the executor, a party defendant, and asked the court, in the event they could not recover their interest in the land, then they be given a judgment against the executor and his surety for their part of the estate as fixed by the judgment in the former action. The appellee, Hardin, pleaded the statute of limitations in bar of their right of recovery as against him. The court on the trial dismissed appellants' consolidated actions as against all the appellees. The action of the court was proper as to the appellees, Hardesty, but we are of the opinion that the court erred in dismissing the action as against appellee, F. M. Hardin. He was the surety on the bond of the executor which bound the executor to faithfully discharge his duties as such and to pay to appellants their portion of his estate, which duty he failed to perform. But appellee Hardin says appellants did not bring their action within twelve months after their arrival at the age of twenty-one years, and for that reason their claims are barred. He is in error, for the statute he pleads as a bar does not apply in a case like this.

It is provided by section 2521, Kentucky Statutes, that the right of action upon the official bond of a personal representative, or of any other person receiving and holding money to be distributed to a ward, distributee, devisee, or other person entitled, who was an infant when such bond was executed, shall not be deemed to have accrued unless otherwise expressed in

the bond, before the plaintiff attained the age of twenty-one. By section 2550, Kentucky Statutes, it is provided a surety for an executor, administrator, guardian or curator shall be discharged from all liability as such to a distributee, devisee or ward when five years shall have elapsed without suit after the accruing of the cause of action, and after the attaining of full age by the devisee, distributee or ward; but the failure to commence action in time by one shall not affect the right of another. By these sections it is clear that these children had five years after their arrival at the age of twenty-one years in which to institute their actions upon this bond of the executor. From this record it is made to appear that each of them brought his action within five years after their arrival at the age of twenty-one years.

For these reasons the judgment of the lower court is affirmed as to the Hardestys and reversed as to appellee Hardin, with directions to the lower court to enter judgment in favor of the appellants against him for $251.86 each, with 6 per cent. interest from the second day of June, 1893, and their costs in the litigation with him expended.

BROWN v. COMMONWEALTH.

(Filed December 16, 1904—Not to be reported.)

1. Murder—Administering poisonous drug—Evidence—Dying declarations—Competency—Upon the trial of accused for murder by administering a poisonous drug, statements made by the deceased while she was able to go about the house as to who gave her a drug to produce an abortion, of which she died, the fact that she then had a mere belief that she could not recover and would ultimately die from the injury does not sufficiently show that she had given up all hope of life as to render such statements competent as dying declarations.

2. Admissions by deceased—Implicating another party—Competency—Evidence offered by defendant on such trial that a few days before deceased died she told a witness that she was pregnant and asked him to get something for her to produce a miscarriage, suggesting ergot; that he refused to get it for her; that she then said she would get her brother-in-law, Pelfry, to do it, and gave some money to Pelfrey to get the medicine, which he took and said he would get it for her, was competent, and should have been admitted.

A. F. Byrd for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Wolfe Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Dodridge Brown, appeals from a verdict and judgment sentencing him to seven years' confinement in the penitentiary under an indictment charging him with the murder of Sarah Perry, by administering to her a poisonous drug. It appears from the testimony that appellant had sustained intimate sexual relations with the deceased for some time

previous to her death, which resulted in her pregnancy, followed by an abortion and the death of the deceased. Her death occurred on a Monday during the month of September, 1901. It is shown by the testimony that the deceased and the accused were together on the previous Tuesday night; that she took sick on Wednesday, and that a miscarriage resulted between Wednesday and the following Monday on which she died. The testimony relied on by the Commonwealth to show appellant's guilt of the charge contained in the indictment is substantially as follows: Martha Perry, a sister of the deceased, testified that appellant visited Sarah Perry after she was taken sick on the following Thursday, Saturday and Sunday; that while present on Saturday he left a half pint of whisky with the witness for the use of the deceased, which she drank; and that whilst there he sat on the bed by the side of the deceased, and they talked together; that shortly before the death of the deceased she told her that she was bound to die. The Commonwealth then asked if the deceased made any statement as to the cause of her death. This question was objected to, the court overruled the objection, and the witness answered that her sister said that Dod Brown had given her some medicine and that it had killed her; that she also said that she had had a miscarriage and had put the fœtus in a hollow stump near the house; that the deceased was able to go in and out of the house until Sunday evening, and that it was on Sunday evening that she said that she had had a miscarriage and that Dod Brown had given her the medicine. This witness also testified that on Monday morning before she died deceased requested that some one go for a doctor and her father. Nancy Bell Perry, another sister of the deceased, testified that she was present on Sunday before the death of Sarah, and the defendant came into the room and sat down on the bed on which deceased was lying and asked her if she had taken the medicine he had left, and she said she had; that he then asked if it had done what they wanted it to do; that she responded that it did, and that she was bound to die; that deceased subsequently told the witness that she had had a miscarriage. The witness, Logan Pelfry, a brother-in-law of the deceased, testified that shortly before her death he asked her what was the cause of her condition, and that she responded that the defendant had poisoned her, and she was bound to die. Similar statements were made by John Perry, a brother. The accused admitted that he had been intimate with the deceased, and that he saw her several times after she was taken sick, and that he had left her a half-pint of whisky, but that the whisky was good, and contained no poison, and was partaken of by several other persons. His testimony on this point is corroborated by several other witnesses. The defendant introduced Grant Faulkner as a witness, who testified that he was present at the house where Sarah Perry died on Friday preceding her death, and had a conversation with her about her condition, and that he also heard a conversation between the witness, Pelfry, and the deceased as to her condition, and as to what she wanted to do. The defendant requested the witness to detail the conversation of Sarah Perry on that occasion. The question was objected to, and the objection sustained. The defendant thereupon avowed that the witness, if permitted to answer, would testify that on Friday before she died he heard the deceased say that she was pregnant, and that she asked him to get her some-

thing for her to produce a miscarriage, suggesting ergot; that he refused to get it for her; that she then said that she would get her brother in-law, Pelfry, to do it, and that she gave some money to Pelfry to get the medicine, and that he took it and said he would get it for her.

It is insisted for appellant that the trial court erred in permitting these various witnesses whose testimony is recited above to testify to the alleged dying declaration of the deceased, that the defendant had poisoned her, for the reason that it was not sufficiently shown that these declarations were made when the deceased had given up all hope of living. A mere belief that one can not recover, but will ultimately die, is not sufficient to render competent statements of this character as dying declarations. It is shown that at the time of these declarations, and subsequently thereto, the deceased was going about and actually went out of the house, and even as late as the morning on which she died she requested that a physician be sent for. In our opinion the evidence does not show sufficiently that the deceased at the time she made these various statements had given up all hope of life, and realized that she was actually in extremis. On the contrary, they seem to have been the offspring of anxiety and apprehension on her part that her sickness might terminate in death, rather than a conviction that it was certain to do so. We, therefore, conclude that the court erred in the admission of this testimony. We think the court also erred in refusing to permit the witness, Faulkner, to testify as to the declaration made to him by the deceased as to her condition, and the alleged conversations between her and her brother-in-law, in which she requested that he purchase ergot for her for the purpose of producing a miscarriage.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

ADAMS v. ROBERTS.

(Filed December 17, 1904.)

1. Pleading—Relevant facts subsequently occurring—In a contested election case where anything occurs since the action was begun and after the time of pleading, but which is a relevant and necessary fact to be shown in aid of the original grounds asserted, but not otherwise, a proper pleading placing the fact in the record ought to be allowed.

2. Commonwealth's attorney—Residence—While under section 100 of the Constitution one elected to the office of Commonwealth's attorney is required to reside in the district in which he was elected, there is nothing in the section which interferes with his right to change his residence at his pleasure within the district.

3. New district—Taking part of old—While it may be held that one assuming a district office takes it subject to the constitutional right of the State to make new districts which may in part affect the territory of the one in which the officer was elected, still such officer continues to be an officer in the old district in which he was elected.

4. Legislature—Power to abolish office—Though the legislature is given the power to abolish the office of Commonwealth's attorney in this State, until it does so it can not abolish the tenure of any rightful incumbent of the office. He might be impeached, but not legislated out of office.

James Andrew Scott, W. C. Marshall, J. M. Beatty, H. T. Beatty and Hurst & Eversole for appellant.

J. B. White, E. E. Hogg, W. S. Pryor and J. H. Hazelrigg for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant and appellee were contending candidates at the November election, 1908, for the office of Commonwealth's attorney for the Twenty-third Judicial District. At that time the district was composed of the counties of Estill, Lee, Breathitt, Wolfe and Magoffin. The election occurred on November 3, 1908. Appellant then resided in Magoffin county and appellee in Lee county, and they had so resided for many years. Each was also otherwise eligible to the office. The precinct election officers of the various precincts in the district certified to their respective county canvassing boards the result of the election in the several precincts. These boards in due course from those certificates certified the results in their respective counties to the State canvassing board, who therefrom, and on the face of the returns, found that appellee had received the highest number of votes for the office, and issued a certificate of his election accordingly, upon which appellee was commissioned. Appellant, within the time prescribed by statute, filed his action in the Lee Circuit Court contesting the election. Numerous grounds of fraud, bribery, intimidation, illegal voting and falsification of the returns after the election and before the vote was certified to the county canvassing boards were charged in general terms and with particularity. From these allegations it appeared as a matter of mathematical deduction, if they were true, the result as certified to the State board was false, and that instead of appellee, appellant was elected to the office. Disposing here of a criticism of the petition, based on its failure to charge in terms that the frauds and other irregularities complained of entered into the result as certified to the State board, it is enough if the necessary import of the charge shows the actionable fact to exist, without reference to the employment of well-chosen terms of art. The petition in this case, construed as its language necessarily required it should be, fairly contains a charge of the fact. Concerning proceedings to prevent frauds in elections, section 1591, Kentucky Statutes, provides: "This chapter shall be liberally construed so as to prevent any evasions of the prohibitions and penalties by shift or device."

Such a laudable purpose could not be thwarted by a different rule of construing the pleadings in a case brought to prevent what the statute was enacted to prevent. The answer denied all the averments of the petition, upon which appellant based his contest, and contained numerous countercharges of frauds and irregularities by appellant and his partisans, which, appellee contended, when corrected would increase his apparent majority. The regular circuit judge declining for personal reasons to preside in the case, a special judge was commissioned to try it. The case was elaborately prepared. The judgment of the lower court was that appellant had received a majority of the legal votes, and had been elected to the office, and that appellee had not been elected. But the circuit court also adjudged that appellant was not entitled to recover the office because of a change of the dis-

trict, by which the county of his residence was taken out of the Twenty-third District and placed in the Thirty-first Judicial District.

Upon the first part of the judgment declaring that appellant had received a majority of the legal votes at the November election, 1903, for the office o Commonwealth's attorney for the Twenty-third Judicial District, and that appellee had not, we concur with the trial judge. It would serve no useful end to set out in detail in this opinion the facts established by the evidence. They are such as to leave no doubt in the minds of the court of the correctness of the conclusions thereon reached by the trial judge. They bring up no new or novel question for decision. Similar occurrences have arisen in other cases which have been before the court, upon which the law has been declared, and about which we entertain no doubt. The trial judge appears to have applied the decisions of this court already reported to the facts evolved. Obviously a principle of law once established, so long as it is adhered to, must apply alike to all similar cases. The statutes regulating the holding of elections have been framed and revised with great care, with the sole end of assuring the great constitutional guaranty of fair and equal elections. All rules of law applied by the courts are to enforce this basic principle of republican government. All that tends to unlawfully thwart the popular will, as expressed by the electorate at the polls, must be disfavored by the courts as it is by all legislative enactments.

The other question is a novel one in this State. After the November election, 1903, and after either appellant or appellee had been elected to the office of Commonwealth's attorney for the Twenty-third Judicial District for the term of six years beginning January 1, 1904, and after this suit had been instituted and the issue was joined, the legislature enacted a statute, which was approved March 21, 1904, creating the Thirty-first Judicial District. (Acts, 1904, page 125.) The county of Magoffin was placed in the new district. There was no emergency clause to the act, hence it did not become a law till June 18, 1904. There was no evidence whatever in this suit whether appellant had continued to reside in Magoffin county or had moved. The original petition, filed December 19, 1903, alleged that appellant was a resident of Magoffin county. An amended petition was tendered by appellant September 23, 1904, before the case was closed, in which he averred that on March 1, 1904, he in good faith removed his place of residence to Beattyville, in Lee county, and had been ever since and was then a resident of that county, and had never ceased to be a resident of the Twenty-third Judicial District. The trial court rejected this amendment, and refused to let it be filed. Doubtless this action was in view of subsection 12 of section 1596a, Kentucky Statutes, regulating proceedings in contested election suits. That subsection requires the petition to set out the grounds upon which the validity of the certified result is assailed, and the time within which it must be filed. The answer must be filed within twenty days after the summons is served upon the contestee, and besides containing a denial of the grounds alleged in the petition, may set out grounds of contest against the contestant. All grounds are required to be specially pointed out, "and none other shall thereafterward be relied on by said party." A reply is allowed to be filed within ten days after the answer, which completes the issue, the section providing then that no subsequent pleading shall be allowed. The

last clause is the one thought to be prohibitory of the filing of the amendment. Whether the expression has reference only to the setting up of new grounds for contest by either party which were in existence when the suit or original pleadings were filed, or to merely note an exception to the civil practice in this State of pleading to an issue of fact by rejoinder and other pleadings subsequent to a reply, it is not necessary to here decide. Nor do we decide whether if a matter attempted to be pleaded is done inartfully, within seasonable time and within the sound discretion of the court, an amendment may be allowed to cure the defect. But the court is of opinion that where anything occurs since the action was begun, and after the time of pleading, but which is a relevant and necessary fact to be shown in aid of the original grounds asserted, but not otherwise, a proper pleading placing the fact in the record ought to be allowed. In this case we decide that if the fact was necessary to be shown that appellant had moved, it might be pleaded as offered under the circumstances, or might have been proved under the general issue though not pleaded.

Section 132 of the Constitution empowers the general assembly, when deemed necessary, to establish additional districts, not to exceed one for each 60,000 of population of the State, exclusive of cities having more than 150,000. It may be conceded then that the legislature, in its discretion, had the right to establish the new Thirty-first District. Some stress has been laid on the fact that the act creating the new district expressly provides that the circuit judge and Commonwealth's attorney in office in the Twenty-third District should continue to exercise the duties of their offices in the latter district. This can not be held to confer any right that did not exist, and while it may evince a purpose on the part of the legislature not to interfere with any rights already attached, it could not have had the effect to interfere with them, though a contrary purpose had been expressed. An office created by the Constitution could not be abolished by the legislature without the express warrant of the Constitution. Though the legislature is given the power to abolish the office of Commonwealth's attorney in this State, until it does so it can not abolish the tenure of any rightful incumbent of the office. He might be impeached, but not legislated out of office. (Cooley on Const. Lim., 482; 6th edition, Black Const. Prohibitions, page 119, section 99.)

By section 100 of the Constitution no person shall be eligible to the office of Commonwealth's attorney who is not at the time of his election a citizen of this State, and who has not resided in the State two years, and one year in the county and district in which he is a candidate. If this be held to require a continued residence in the district, failing which an abandonment of the office for that cause would follow, still there is nothing in the section which interferes with the right of such officer to change his residence at his pleasure within the district. And while it may be held that one assuming a district office takes it subject to the constitutional right of the State to make new districts, which may in part affect the territory of the one in which the officer was elected, notwithstanding such officer continues to be an officer of the old district, the one in which he was elected. The right to make new districts must be exercised in view of other constitutional rights. If its effect be to deprive one of his office, in violation of the terms of the

Constitution which protects him and his constituents who elected him from removal by the legislature otherwise than by impeachment, the act would be void. (State, ex rel. Howard v. Johnson, 101 Ind., 228.)

The right of an incumbent of a district office where he was required by law to reside in his district, to change his residence when his home county has been cut off into another or new district, so as to retain his eligibility to the office to which he was elected, has been up for consideration in other States.

In State, ex rel. Ives v. Choate, 11 Ohio, 511, the effect of such a statute was discussed. It was said: "It is, however, alleged that this rule will enable the legislature at any time, by a general law, to oust from office, without the form of impeachment and in violation of the spirit of the Constitution, many associate judges, and any president judge, of this State, by changing the limits of the counties and of the circuits in which they severally reside, so as to place their residence in some other county or circuit."

While decrying such aspersions upon a co-ordinate branch of government, the court reached the conclusion that "the general assembly, if it should ever attempt so violent a measure as the argument supposes, could not effectually accomplish the object. The judges would in all cases be able to defeat the scheme by a seasonable removal within the newly-prescribed limits of his county or circuit."

In State, ex rel. Attorney General v. Messmore, 14 Wis., 163, the Constitution required a circuit judge to reside in his district. By the creation of a new district the residence of a judge was placed without the limits of the circuit for which he was elected. He was held to be entitled to remove into his old district after the act of removal became effective, and to have a seasonable time thereafter to do so. In that State the Constitution, it is true, prohibited the making of new districts so as to have the effect to remove a judge from office. The court held, though, that the power to create the new district clearly existed, and the removal of the judge who was cut off into it into his old district, saved the constitutionality of the act. But were the question less clear than it is, the proper scope of this action does not go so far as that one private citizen may be allowed to raise the question whether a public officer has abandoned his office. This suit is allowed especially by statute, and is limited (subsection 12 of section 1596a) to a determination of which of two claimants was elected to the office in dispute, or whether either was. Manifestly whether the one elected has since his election done something that might subject him to removal by the proper tribunal is wholly beside the question. This is particularly true in this case. Even if appellant had never removed from Magoffin county to Lee, and if the act creating the new district was valid as to him notwithstanding such failure to move, still that act did not become effective as stated till June 13, 1904. It neither could give nor affect rights till it did become effective as a law. So appellant, if elected to this office in November, 1903, was entitled to its emoluments from first Monday in January, 1904, till such time as he might vacate it, if he did vacate it, before the expiration of the full term. The decision of the case on its merits, as they were when the contest was begun in December, 1903, was the sole matter before the court.

In such an inquiry the question of eligibility affected by events subse-

quent to the election could not at all enter. A trial of the effect of such subsequent occurrences is in an entirely distinct tribunal and action. (Kirkpatrick v. Brownfield, 97 Ky., 558; Low v. Commonwealth, 8 Met., 216; Commonwealth v. Jones, 10 Bush, 725; Brown v. Grover, 6 Bush, 1; Page v. Hardin, 8 Ben Mon., 648-672.)

Appellee has prosecuted a cross appeal from the judgment denying his title to the office. Appellant has moved to dismiss the cross appeal because appellee did not execute a bond. Without deciding whether a cross appeal can be prosecuted or is necessary, or whether it is affected by the provision requiring a bond of the appellant as a condition precedent, it is enough to say here that upon the facts of the case affecting the election we agree with the finding and judgment of the trial judge. It is not deemed necessary to discuss them in detail in the opinion for the reasons given concerning the facts upon the original appeal.

The judgment of the circuit court is reversed and cause remanded for judgment in conformity with this opinion.

Whole court sitting.

FRIEDMAN v. COMMONWEALTH.

(Filed December 16, 1904—Not to be reported.)

Criminal law—Retailing liquor—Where one having a license to sell spirituous liquors by wholesale agreed with a party to give him a quart of whisky for every five gallons he would sell for him, the delivery of the quart to such party for making such sale was a sale to him, the service in making the sale being equivalent to the payment of money for the quart.

B. C. Seay for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Paynter.

The appellant was indicted for retailing spirituous liquors without a license. The appellant was authorized by virtue of a license to sell liquor by wholesale. The evidence tends to show that the appellant made a contract with Tom Taylor to the effect that he would give him one quart of whisky for each sale he made of five gallons of liquor. Taylor procured ten or eleven persons to take five gallons of liquor. It was to be divided among them and each was to pay for the part he received. Taylor went to the appellant and ordered the five gallons delivered to him at a certain place in Mayfield, where the distribution was made.

It is insisted that a case was not made out against the appellant, and that a peremptory instruction should have been given the jury to find for him. The uncontradicted evidence develops the facts detailed above. The effect of the transaction is that the appellant hired Taylor to sell liquor for him, and as compensation therefor gave him one quart of whisky. The delivery of the one quart of whisky under such circumstances was a sale of it, as much so as it would have been if the appellant had sold it to some one else and received the money for it. Instead of paying money for the liquor, he performed services to pay for it.

The judgment is affirmed.

COUCHMAN, &c. v. BUSH, &c.

(Filed December 16, 1904—Not to be reported.)

1. Judgments—Collateral attack—Where none of the steps required by the Civil Code of Practice to vacate a judgment rendered by a court of competent jurisdiction are taken within the time specified in the Code, such judgment can not be set aside by a collateral attack made thereon.

2. Wills—Executors—Effort to probate codicil—Counsel fees—Where the widow of deceased was one of the executors of his will, it was her duty to endeavor to have probated a codicil to his will, and a reasonable allowance to her attorneys in their effort to probate it is a proper charge against decedent's estate.

Beckner & Jouett and Hazelrigg, Chenault & Hazelrigg for appellants.

Geo. B. Nelson, J. M. Benton, J .T. Shelby and D. L. Pendleton for appellees.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Paynter.

Much detail of statement might be made with reference to dates, steps and pleadings in forming the issues resulting from controversies over the will of B. W. Couchman, deceased, but we shall only state the facts we deem essential to show the legal questions presented to the court for solution. B. W. Couchman left a will by which he gave his widow, the appellant, E. J. Couchman, certain moneys and personal property, and also the use of his home place during her widowhood. The will was probated, but the widow believed that there was in existence a codicil which gave her a greater interest in his estate. After the will had been probated and no appeal had been prosecuted from the judgment of probate, a codicil was discovered to have been in existence, and steps were taken to probate it, which resulted in a judgment to that effect. Some time elapsed befcre an appeal was prosecuted from that order. That proceeding finally reached this court, and in Couchamn v. Couchman, 104 Ky., 680, it held the judgment probating the will was final and conclusive until it was reversed or annulled by some of the modes provided by law, and the time in which that might have been done had expired. By the terms of the codicil the widow's interest in the estate was increased. She was given the fee to the home place and the use of the "Curry place" during her life, and in addition it was provided that she was to have a sum equivalent to the rent of the land derived by her from her father's estate, which the testator had received from the time it became her property. The widow brought suit against the personal representatives of the decedent and the devisees under the will for a sum equivalent to the rents of her land, basing her right to recover upon the codicil which had been probated, and recovered judgment for $5,000 against the estate on the claim. Subsequently the judgment was affirmed. (Bush v. Couchman, 18 Ky. Law Rep., 602.) After this court reversed the judgment probating the codicil this action was instituted against the appellant to recover the rents, etc., of the property which went into her hands under the codicil. She then pleaded the $5,000 judgment as a set-off and counterclaim against the estate. The principal question for review is, did the lower court

err in refusing to enforce the judgment in favor of the appellant for $5,000?

She had a strong moral claim against her husband's estate for the rents which he had collected on her land and appropriated to his own use, but it is conceded that she could not have recovered except for the fact that the codicil gave her the right to do so. No steps were ever taken to vacate or set aside the judgment which she had obtained for $5,000. The Civil Code of Practice provides a complete remedy for obtaining relief against judgments rendered by courts of competent jurisdiction. Not one of these steps were ever taken to vacate the judgment. Whether it could have been done if they had been inaugurated within the time specified by the Code it is not necessary to decide, because none of them were taken at any time and the time for doing it has long since expired. This is a collateral attack against a judgment rendered by a court of competent jurisdiction in relation to a subject-matter within its jurisdiction and against parties of whom it had jurisdiction. If the parties had defenses other than those pleaded it was their duty to present them, because the plaintiff therein tendered an issue as to her right to recover the sum claimed. If parties can collaterally attack a judgment which is renderd in an action where the court had jurisdiction of the subject-matter of the action and of the parties, nothing can be certainly adjudicated. The rights of litigants can not be fixed and determined by judgments. This court has repeatedly denied the right of parties to attack judgments collaterally.

In Talbott v. Todd, 5 Dana, 194, this court said: "It is undoubtedly true that the judgment or decree of a court of competent jurisdiction is not only final as to all matters determined by it, but is also, in the general, final as to every other matter incident to the cause which the parties might have put in issue and had litigated. This rule is founded in reason and propriety. It imposes only the exercise of reasonable vigilance; tends to advance the ends of justice; to quiet the contentions of society, and to put an end of vexatious litigation."

In Davis v. McCorkle, 14 Bush, 754, this court said: "The duty of the parties in courts of original jurisdiction is thus correctly stated in Henderson v. Henderson, 8 Hare, 115: 'Where a given matter becomes a subject of litigation in an adjudication by a court of competent jurisdiction the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident omitted a part of their case The plea of res adjudicata applies not only to the point upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.' The learned court speak of the parties, both plaintiff and defendant, and add 'a party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction.'"

Suppose a case where a judgment has been rendered upon a claim where the defendant was unaware at the time of the judgment that he had a valid

defense to it, and the time had expired for obtaining a new trial in the method provided by law, but before the plaintiff in the judgment sought to enforce it the defendant discovered a defense which might have been successfully interposed. It would hardly be contended that he would be permitted to prevent the enforcement of the judgment by showing that it was based upon an invalid claim. The question involved in the supposed case is identical with the one here for consideration. Neither the rule of any other court nor the opinion of any author can justify this court in failing to observe the well-settled doctrines of this court. The conclusive effect of judgments is exemplified by the one probating the will of appellant's husband, for this court in Bush v. Couchman held it was conclusive, and that the court had, in rendering it, exhausted its jurisdiction, and could not, therefore, probate the codicil. In so holding the appellant lost the fee-simple title to the "home place" and the use of the "Curry place" during her life. In addition to that she would have lost the equivalent of the rents of her lands derived from her father, except for the judgment for $5,000 in question. It does not seem that she should be denied the application of the rule in this case, when it was applied against her with such rigor in the case to which reference has been made. We are of the opinion that the court erred in refusing to enforce the $5,000 judgment in favor of Mrs. Couchman.

The widow was one of the executors of the will of B. W. Couchman, and it was her duty to endeavor to have probated the codicil to the will. The sum allowed and paid to attorneys for their services in the effort to probate it was not only reasonable, but a proper claim against the estate. There is some doubt as to the correctness of the judgment in refusing to charge John A. Couchman, one of the executors, with a certain note, but we have concluded to allow the judgment to stand on that question.

The judgment is reversed for proceedings consistent with this opinion.

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13. in an action to recover against decedent's administrator for services in nursing decedent, the plaintiff was a competent witness where the contract was made with the daughter of deceased, who was then alive 649
14. one who has been convicted of burglary is not thereby disqualified as a witness, but such conviction may be proven to discredit his testimony 675
15. the reputation of a witness can not be impeached by proof of specific acts of wrongdoing on his part; and, therefore, an attempt to discredit a witness by proving that he was a defaulter, or that he was arrested for failing to provide for his family, was properly rejected 691
16. communications made to an attorney for the express purpose of being conveyed by him to a third party, and which he was directed to deliver to the other party, are not privileged communications which will excuse the attorney from disclosing, when sworn as a witness, on the ground that they are confidential 691

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17. in a suit on a note to enforce a mortgage lien on land, the defense interposed was that the debt had been discharged by the written release of the mortgagee, which was denied. Held—That any fact tending to prove that the release was not true or genuine, such as an admission of defendant's indebtedness, or an offer to pay it, is competent as an independent admission of fact 691
18. evidence of appellee to the effect that the elevator where his injuries were sustained was defective and unsafe, and had fallen before this accident in the presence of appellants was competent as showing that appellants had actual knowledge of the condition of the elevator..... 784
19. a witness who stated that she knew the handwriting of accused from seeing him write a receipt for her on one occasion, was competent to give an opinion as to whether certain notes written to her after the killing, which tended strongly to establish his guilt, were in his handwriting.... 840
20. evidence that the accused were skilled in the use of rifles was competent where it was shown that out of six shots heard fired from the place of ambush, three of them took effect, the distance being considerable from where deceased was killed 807
21. when four defendants were being tried together for murder, one of them was asked by the attorney for the Commonwealth: "If you, Dan, Bob and Sam, had arranged for Dan and Bob to go and kill deceased by shooting him from ambush, and they had killed him in that way, would you admit it on the witness stand?" Held—That such a question was insulting to the witness, unnecessary and improper 807
22. the defendant can not complain because the Commonwealth's attorney exhibited the clothes of deceased to the jury and commented upon the holes in them which were made by the knife of defendant. The clothes were part of the evidence 1083
23. the sole effect of evidence contradicting what a witness has formerly stated is to impeach the witness, and the jury should be so instructed 1157
24. in estimating damages to land taken for a right of way, evidence that it is suitable for building lots, and the price adjoining lots sold for is competent 1167
25. the finding of the trial court as to the location of a street will not be disturbed under the evidence 1125
26. parol evidence of an agreement between viewers of a road and the owner of the land for the erection of gates across the road is incompetent 1148
27. it is error on the trial of a murder case to admit substantive evidence in rebuttal which was evidence in chief against the objection of the defendant, except it be admitted under the discretion of the court on the ground that it had been overlooked 1157
29. on the trial of one for murder admissions of the accused on cross-examination tending to show his intimacy with two girls who were witnesses for the Commonwealth, his connection with their departure from and keeping them out of the State, renting them a house in West Virginia, and taking them to Ohio, were competent evidence and were properly admitted, but to the extent that such admissions tended to prove improper relations between accused and the girls that would subject him to prosecution, though only for a misdemeanor, they were incompetent 1256

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30. evidence offered by defendant on such trial that a few days before deceased died she told a witness that she was pregnant and asked him to get something for her to produce a miscarriage, suggesting ergot; that he refused to get it for her; that she then said she would get her brother-in-law, Pelfrey, to do it, and gave some money to Pelfrey to get the medicine, which he took and said he would get it for her, was competent, and should have been admitted 1269
31. although the facts testified to by appellee in this action took place on different days, it was competent to prove them because they were all more or less connected 1196
32. although a confession made by the accused to the officers, who had him in custody, made under fear of being mobbed, was properly excluded from the jury as incompetent, yet a subsequent confession made to another person in the jail when there was no official about, and accused was not then in fear, was competent to go to the jury 1221
33. on the trial of one for murder, where the evidence shows that at the time of the killing there were four shots fired, two out in the yard where appellant and deceased were, and two from the front door of a house thirty-three feet from where deceased was killed; that two bullet holes were found in the breast of deceased and his clothing and flesh were powder burned, it is conclusively shown that deceased was not killed by the shots fired from the door of the house 1256
34. where a witness in detailing a confession states that he can not state everything accused said to him, but does undertake to tell the substance of what was said, the evidence is competent 1221
35. evidence of patrnership 840
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1. an execution issued by the clerk of the circuit court on a transcript filed in his office from the quarterly court before recording said transcript, is void 287
2. appellant, under an execution levy and sale bought a tract of land for $75 worth $750, which was at the time in the possession of the appellee, who had bought it by parol from his father, the execution debtor, and had paid him $100 and taxes for ten years, and built a house thereon worth $750. In an action by the execution purchaser to recover the land, Held—That appellant was entitled to subject the land to the payment of his debt, but in view of the parol sale to appellee and his payments and improvements thereon he could not be treated as a fraudulent transferee so as to bring the case within the rule of Scott's Ex'or v. Scott, 85 Ky., 385 857
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2. the fiscal court has a wide discretion in the discharge of its duty apportioning its levy so as to meet current expenses, repair roads, paying overdue indebtedness, keeping the poor, etc 715

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4. under Kentucky Statutes, sections 4313, 4315, 4335, fiscal courts are authorized to appoint a road supervisor for the county whose duties are to be exercised under its supervision, but these statutes do not contemplate that any member of the court should be supervisor for the county or for any district thereof, and so much of the order of the fiscal court as directed any part of the appropriation to be expended according to the directions of each of the four magistrates, and allowing them compensation therefor, is void 906
5. an order by the fiscal court appropriating money to construct and repair the public roads of the county, and authorizing the magistrates of the several districts to have the work done and allowing them $3 per day for supervising the work, is a final order, which the county had the right to enjoin, and also to prosecute an appeal to vacate 906
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2. a reasonable fee should be allowed him for such service.... 188

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4. where it appears that the interest of the infant and guardian are in conflict, it was proper for the court to appoint a guardian ad litem to look after and aid in the protection of the infant's interest 655
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2. the circuit court has no authority to authorize a guardian to borrow money to pay off a lien on property in which the wards have a remainder interest 109
3. it is error in a court to summarily remove a guardian of an infant upon ex parte affidavits filed to the effect that the guardian was not a proper person to be guardian, and such removal was void 654
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2. in an action, by the owner of a homestead, to set aside an execution sale thereof, it was error in the court to adjudge that no lien was thereby created, though such lien was subordinate to the value of the owners homestead and other prior liens, all of whom should be brought before the court that they may be enforced 44
3. a housekeeper is entitled to the proceeds of a sale of a homestead which he had occupied on a credite, as against his creditors 196
4. under a mortgage in which the wife did not join, no lien was created on the homestead 250
5. a widow is not entitled to homestead in a tract of land never occupied by her husband or herself as a homestead 366
6. when a widow abandons a homestead left by her husband, a purchaser from her acquires no title or right of occupancy thereof 1191
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5. the fact that a gift may be made by word of mouth makes it difficult to negative such a claim and it is not a safe rule to place the onus upon the heir of a decedent to prove that the possession of the survivor was not a gift 494
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11. a plea of duress by a wife is not good which fails to allege that the creditor knew of it 553
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13. appellant in a previous suit, having admitted he knew of the deed he made to his son, in trust for his wife, conveying to her the 400 acres of land on which he and his wife and nine children continued to reside until the death of his wife, and in which former suit the deputy clerk testified that the deed was made to the wife at appellant's instance, and was duly acknowledged by him, is not entitled, after the lapse of 30 years, to have the deed canceled as against one holding the title to seven shares of the land purchased by him, from the deceased wife's children, upon the testimony of two subscribing witnesses to the deed, of doubtful veracity, that the deed to his wife was a sham transaction 608
14. in an action by the husband against his wife for a divorce for unchastity, where the evidence is conflicting the judgment of the chancellor dismissing the petition will not be disturbed 652
15. where the wife bought and paid for land out of her separate estate, and by mistake the deed was made giving her a life estate, with remainder to her husband, in an action by her the chancellor properly corrected the deed, and parol evidence was competent to establish the mistake.... 671
16. by the enactment of the married woman's act of 1894, all the property owned by married women became separate estate, and in the revision of the Kentucky Statutes the act of 1868, providing for the joining by the trustee of the wife in the conveyance of herself and her husband, was omitted. 853
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21. where a husband has conveyed land with covenant of general warranty, his widow can not claim dower therein where she is in possession of an estate from her husband worth more than the dower claim. The law rejects her claim, thus avoiding circuity of action 851
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24. where judgment had been rendered divorcing appellant from appellee, and decreeing certain alimony and the use of their dwelling, it was error to adjudge that Anna Zumbeil was the owner of the house (she having purchased it from her co-defendant during the pendency of this action); that her title to it was valid, and granting her a writ of possession 1193
25. the proceeds of land when received by the wife are her separate property. By subsection 6, section 494, Civil Code, such proceeds, until actually received by her, descend as real estate so far as her husband is concerned. Such proceeds are treated as real estate, therefore, her husband had no right to receive such proceeds without her consent, and in such case the statute of limitation does not run against the wife 1203
26. the legal presumption is that every decedent has heirs, and in a proceeding to enforce a mortgage lien on the land of a deceased married woman, an unsupported allegation in the petition that she left no heirs or kindred, on either her paternal or maternal side, and that her property descended under the statute to her husband, is not sufficient to divest the heirs at law of such decedent of title to real estate left by her, in the event that such heir should hereafter assert title thereto 1215
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2. in the absence of an avowal as to what a witness would state, it is impossible for this court to rule on the competency of the evidence 121
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8. although the charge in the indictment is general, it is good, but the Commonwealth on the trial must elect to prosecute for the obstruction on a certain occasion, and can not prove obstructions on different days 672
9. appellant was indicted in this State in 1893 for horse stealing, and left the State before being arrested. After ten years' absence he was brought back on a bench warrant and requisition from another State and tried and convicted. Held—That although the indictment had been filed away by order of court for more than eight years, without a provision in the order itself for its reinstatement, its validity was not thereby affected as against the defendant, who was not before the court, and such an indictment may be reinstated on the arrest of the defendant and a trial had thereon 870
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22. where there is any evidence that will authorize the verdict the court should not give a peremptory instruction, and in this action, if the theory of appellee as to the negligence of appellant was correct, the peremptory instruction asked by appellant was properly overruled 1174
23. where the corpus delicti was sufficiently established, independent of appellant's confession, it is not proper for the court to instruct the jury that the confession of the accused will not warrant his conviction in the absence of other proof that the crime was committed 1221
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3. a life policy can not be made payable to one who has no insurable interest in the life of the insured 577
4. the owner of life policy has the right to change the beneficiary, and to substitute creditors as beneficiaries for their protection, as they would have an insurable interest in his life 683
5. the widow of insured can not complain of the change in the beneficiary, as insured had that right under the contract of insurance 683
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1. one of several heirs buying a tract of land at a judicial sale, at less than its actual value, does not make him liable to have the excess between his bid and the actual value of the land charged to him as an advancement, only in the distribution of any surplus of his parent's undevised estate 42
2. the fact that one bought at public sale an adverse claim to a tract of land in which he and his sister owned a joint interest, will not vitiate the sale in the absence of an allegation of fraud or bad faith in the purchase, although he bought such interest at less than its real value; and the fact that he sold it at an advance of $2,000 a year later proves nothing against the good faith of the purchase 42
3. Kentucky Statutes, section 489, which allows the recovery of costs, fees, etc., by one joint owner against others who did not appear or have counsel in the case, applies to actions brought for the recovery of joint property or the settlement of estates and not to expenses incurred in defending the joint title in unsuccessful suits brought by others.... 42
4. sale made more than twenty-five years ago and deed ordered but not made, and subsequently recognized by the court, held valid 109
5. purchase by an attorney at a decretal sale, at inadequate price, will be set aside 145
6. where it does not appear that a purchaser took any part as to whether a sale should or should not be confirmed, no costs should be recovered against him in a controversy between owner and lien holder 147
7. in the sale of infant's real estate for reinvestment, under section 491, Civil Code, it was error to make the bond payable to a nonresident trustee 294
8. when the interest of any one of the joint owners of real estate sold under subsection 1 of section 490, Civil Code, is worth more than $100 at time of sale, the sale is invalid.. 530
9. remainder interest in land is not "estate in possession," and can not be sold under subsection 2 of section 490, Civil Code 530

JUDICIAL SALES—Continued. Page.
10. where there was no averment or proof as to the value of the infant's interest in land, or that the infant would be benefitted by the sale, it should be set aside..... 557
11. in selling real estate of infants for reinvestment, subsection 2 of section 492, and subsection 3 of section 36, Civil Code, must be strictly complied with..... 557
12. an exception to the report of sale of real property will not be sustained on the ground that parties in interest were not before the court on the pleadings, when they had entered their appearance by their attorney, which was not complained of by them; nor will exception be sustained on the ground that one of the defendants had been adjudged a bankrupt subsequent to the institution of the proceedings 619
13. by the provisions of section 429, Civil Code, there is no power or jurisdiction to sell the real estate of infants to pay debts of their ancestor until the personal estate is exhausted 890
14. this court has repeatedly held that a mere inadequacy of price is not sufficient to set aside a judicial sale 971
15. except upon the grounds stated in section 518, Civil Code, this court is without power to set aside a sale after it has been confirmed 971
16. where land sold at public sale failed to bring two-thirds of its appraised value, and the equity of redemption was ordered to be sold, but the order was not executed, the failure to execute the order until after the expiration of a year from the sale did not prevent the termination of the statutory right to redeem..... 971
17. the owners of property sold at public sale are entitled to its use until the time of redemption expires, or until it is placed by the court in the hands of a receiver..... 972
18. where appellee after purchasing land at commissioner's sale filed exceptions to the sale which were overruled and sale confirmed, to which she excepted, and after paying part of the purchase money and taxes and making improvements thereon, was led to believe the sale was invalid, and took an appeal to the Court of Appeals, which sustained her exceptions and set aside the sale, Held—That she was entitled to recover back the purchase money she had paid, with interest, the taxes paid, and for the improvements to the extent they had enhanced the vendible value of the land; from which should be deducted the reasonable rent of the property during the time she held it, said rents to be regulated by the interest on the consideration and on the value of the improvements made in so far as they have enhanced the vendible value of the land.....1017
19. where the parties to an action for the sale of real estate hold vested interest jointly therein, and there is no adverse holding, the possession of one joint tenant is the possession of all in the meaning of section 490, Civil Code, providing for the sale of land so held.....1060
20. in an action against a surety on the bond of an executor, brought by heirs for the failure of the executor to account to them for their distributive share of the proceeds of land sold by him under a decree of court, the heirs, who were infants at the time of the judgment and sale, have five years in which to bring their action against such surety after they arrive at age, under section 2550, Kentucky Statutes 1267

JUDICIAL SALES—Continued. Page.
21. where land is sold in a proceeding in the circuit court by the executor of a decedent, for distribution of the proceeds under the provisions of the will, the fact that two of the heirs who were nonresident infant defendants received none of the proceeds does not render the sale void, but only erroneous, and having entered their appearance and excepted to the judgment and failed to appeal they can not collaterally attack the judgment and proceedings thereunder 1267
22. where land has been sold under a will by the executor under a decree of the circuit court, and thereafter two nonresident infant heirs appeared in court by counsel and asked for a new trial under section 414, Civil Code, which was refused by the court, to which they excepted and prayed an appeal, but failed to prosecute the appeal, they are bound by the proceeding and judgment of the court... 1266
23. in an action to vacate a judgment directing a sale of land, the failure of the pleader to add to the allegation that the land was susceptible of division among the owners at the time it was sold for indivisibility, the words "without impairing its value," a denial in the answer that the land was susceptible of division without impairing its value, cured the defect in the petition, the denial being as broad in terms as the allegation in the petition should have been 1199
24. where the land was sold for about one-third of its appraised value, and the defendants were infants, without any statutory guardian to look after their interests, such sale was invalid and should be set aside 1199
JUDGMENTS—See Appeals, 6.
1. a judgment rendered by a court of competent jurisdiction and not appealed from, is conclusive between the parties of all matters which are determined or which might have been litigated therein 305
2. while the court can not at a subsequent term modify a judgment previously rendered, it may, in executing the judgment, make such orders as subsequent events render necessary for the proper execution of the judgment according to justice and right 872
3. where the mode of sale directed in a judgment was intended to meet present conditions, when the conditions changed the chancellor may control the execution of the decree to prevent injustice 872
4. a location of a division line by the plaintiff's attorney without their knowledge or consent, by which plaintiffs would lose 300 acres of land, is a case for vacating a judgment rendered thereon 178
5. an attorney has no power to compromise an action without express authority from his client 178
6. where a judgment has been executed by a sale of the property decreed to be sold and report of sale filed, but before confirmation one of the defendant title holders died, it was proper to revive the action against the infant children of the deceased defendant, under section 507 of the Civil Code, instead of reviving the judgment under subsection 3 of section 407 of the Civil Code..... 1214
7. where none of the steps required by the Civil Code of Practice to vacate a judgment rendered by a court of competent jurisdiction are taken within the time specified in the Code, such judgment can not be set aside by a collateral attack made thereon 1277

JURISDICTION—See Appeals, 3, 17, 19, 23. Page.

1. in this action the summons upon the original petition was served upon one of the defendants in Jefferson county, he being there temporarily. Subsequently appellant filed what it termed a "reformed and amended petition in equity" and process upon this was issued and served upon all of the defendants at their homes in Morgan and Magoffin counties. In answering the original petition, appellees expressly stated that they were not answering the reformed and amended petition, because of the question of jurisdiction, and moved that service on the latter pleading be quashed, which motion was sustained by the court and the action dismissed as to it..... 665
2. the general rule is that if an amended petition presents a new and distinct cause of action, there should be service on the amendment, and the action of the court in sustaining the motion to quash the service of process and dismiss the action as to the reformed and amended pleading, was proper, as the lower court was without judisdiction upon the amendment 665
3. In a proceeding by the auditor's agent against nonresident defendants to recover a franchise tax on stock alleged to be owned by them in railroad corporations in this State, and who are only constructively summoned and had not entered their appearance to the proceedings, and no proof was introduced showing that these corporations had failed to pay their taxes, under section 126 of the Civil Code, providing that "every material allegation of a pleading must, for the purpose of the action, be taken as true unless specifically traversed, except allegations against defendants constructively summoned who have not appeared in the action," the proceeding was properly dismissed in the lower court 716
4. under Civil Code, section 419, providing that "no personal judgment shall be rendered against a defendant constructively summoned," where the record does not show that any lien was created on the property of the defendants by attachments or otherwise, the lower court did not have jurisdiction to render a judgment against the defendants or make any order affecting their interest in any way..... 716
5. where B. shot H. in Bullitt county and was arrested on the same day in said county, charged with malicious shooting, and held on bond, and H. was conveyed to Jefferson county, and died there the next day, the fact that the authorities of Bullitt county first took jurisdiction of the offense fixed its jurisdiction as exclusive in the prosecution 867
6. the fact that the accused was first arrested in Jefferson county on the charge of murder, when there was no indictment pending in Bullitt county for murder, does not oust the jurisdiction of Bullitt county previously acquired by the arrest of accused and holding him to bail, as it was competent for the examining court in Bullitt to have changed the charge upon which he was arrested so as to fit the facts of the case at any time pending the inquiry, and the prisoner was no less in the custody of the court because he was on bail 867
7. a circuit judge has no jurisdiction of his own motion to supervise, control or remove trustees of a hospital which he appointed under the provisions of a will for its management, unless such jurisdiction is invoked by some one having a right to institute a proceeding for that purpose.....1141

JUROR—See Criminal Law, 6, 9, 70. Page.
JURY SERVICE—
1. where a jury, upon the trial of an action for damages, was selected from the panel selected for a previous term, upon a motion to discharge the panel and draw a new one as required to do by the statute, it was error in the lower court to overrule the motion..... 1
2. the trial court has and may exercise a reasonable discretion in the matter of ascertaining the fitness of persons for jury service, and though counsel for each party may examine those who are to constitute the jury, they must do so within reasonable limits, by pertinent questions, subject to the court's reasonable control 922
KEEPING LOOKOUT—See Railroads, 25.
KILLING CHILD—See Railroads, 25.
LANDS—
1. the husband occupying land as tenant for one having the legal title, paying rent and holding same as tenant, the wife could not hold it adversely to her husband's landlord, and his holding must govern the possession of the land unless collusion has been shown 8
2. where it is sought to recover possession of land sold by a sheriff under a judgment where the possesion was obtained pursuant to section 1689, Kentucky Statutes, where it is claimed that the judgment was obtained by fraud, the remedy is by action under subsection 4 of section 518, Civil Code, in a proceeding to vacate or modify the judgment, and not by proceeding in ejectment 12
3. where proceedings are had under section 1689, Kentucky Statutes, for the possession of land as between the parties thereto, it is conclusive as to the right of possession so long as that judgment remains in force..... 12
4. where one sold a tract of land representing that he was of age and his mother saying to the buyer that he was of age, and being a married man with two children and a full beard, the action of the chancellor in dismissing his petition seeking to set aside the deed, will not be disturbed.. 48
5. where one sold land to another, his rental of it from the vendee two years after he became of full age, was a ratification of the sale and recognition of title 48
6. where land belonging to H. F. was sold under a judgment against him in favor of the State and bought by the State, and subsequently redeemed by him, and, with his consent conveyed by the State to his son, R. F. F., no use or trust therein results to H. F. under Kentucky Statutes, section 2352 240
7. H. F. having continued to occupy the land by consent of his son and recognized his son's title thereto, did not acquire adverse possession thereof 240
8. the father was estopped to claim the land by consenting to a sale of the mineral rights thereof by his son..... 240
9. the widow of H. F. never having parted with her dower right in the land, was entitled to dower therein, but not to homestead, as homestead can not be claimed against the State.. 240
10. an agreement to sell certain lands at an agreed price is not an option but an agency 243
11. where F. had knowledge of V. W.'s option on land, he was not an innocent purchaser 243
12. the fact that the vendors lived on the lands with their families as homestead will not excuse them from carrying out their contracts 243

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13. F. having made payments on his purchase from the grantors is entitled in equity to be reimbursed out of the sum due his grantors 243
14. in an action to quiet title to land where issue was joined and an order of survey taken, which could not be made by reason of sickness of the surveyor, it was error to try the case without the making of the survey..... 200
15. in a proceeding to condemn land for use of a railroad company, the owner can not prevent the company from taking possession of the land after the damages have been awarded and tendered, by executing a supersedeas bond.. 360
16. where the chain of title to land is not perfect the plaintiffs can only recover by showing a prescriptive right 462
17. possession of a certain boundary of land within a 10,000-acre survey by one acting as agent of the owner of the survey, does not constitute a possession of the part outside of the designated boundary 462
18. one who owns and lives on a tract of land can not be said to be in the actual possession of another tract, claimed by another, by acting as agent for the latter in keeping off trespassers 462
19. the children of a deceased sister can not recover an interest in the land of her brother on the ground of his death where there is no proof of his death or that he was unmarried and left no issue 532
20. where it was not shown that appellees ever held the land as tenant of appellant, and appellees proved that their father claimed and occupied it up to the time of his death, more than thirty-two years, and devised it to his wife and children, it is reasonable to presume that appellant knew of this adverse holding, and the judgment will be affirmed.. 599
21. verbal exchange of lands between brothers, conveyance by one of the brothers to his son, the son can not maintain action for ejectment 663
22. an action in ejectment may be maintained by an owner of land against any number of persons holding separate parcels of land within the same survey in the same action.... 718
23. filing an answer to an action without objection to a misjoinder of parties is a waiver of the right to require an election 718
24. rights acquired by a verbal exchange of land..... 726
25. every entry, survey or patent to land in this State is void so far as it embraces land previously entered, surveyed or patented 773
26. one claiming land under a void patent is not in the constructive possession of the land, and not having actual possession he is without title or possession 773
27. in the absence of any motive or purpose being shown in the sheriff, and it appearing that the appraisers were sworn, the return of the sheriff and report of the appraisers can not be impeached in an action to set aside a sale made by such sheriff after the lapse of nine years from the sale.... 775
28. where the return of the sheriff shows that he levied the execution, the presumption is he made it as required by law.. 775
29. where the return of the sheriff shows that he levied on four tracts of land, and advertised the time, place and terms of sale at the court house door and three other public places in the vicinity of the land, the fact that a small piece of land lay between some of the tracts sold is not sufficient to show that the notices were not placed at public places in the vicinity of the land. Evidence of witnesses that they did not see the notices is of no value 775

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30. a man under twenty-one years of age may act as appraiser.. 775
31. facts showing that heirs to land who are tenants in common thereof can not hold the land adversely to their joint tenants 777
32. by the provisions of section 4846 Kentucky Statutes, the purchaser of land is not bound to look to the application of the purchase money, unless he is required to do so by the deed of conveyance 829
33. where a father conveyed a tract of land to his son, who afterwards returned the deed for another tract which he sold and afterwards got possession of, and had the first deed put to record, the evidence showing that the father had lived on and claimed said tract since 1887, in which claim the son acquiesced, there is nothing to support the son's claim. 884
34. in an action for trespass "quare clausum fregit" the petition should describe the land so that it may be identified and allege title in the plaintiff, and also designate the particular injury or wrong sued for, so that defendant can not avoid pleading to that identical cause of action, but it is not necessary that plaintiff's claim of title should be recited. This is a matter of proof, if denied 989
35. in a controversy as to the ownership of a tract of twenty-three acres of uninclosed land, to which neither party has a possessary title, but from which both have been cutting timber and fire wood, and to which both claim title by patents from the State, the one to whom the first patent was granted is the lawful owner 989
36. a tenant in possession may sue for an injury to real estate which affects its present enjoyment 1053
37. location of certain boundary lines sustained under the evidence 1078
38. where a writing is executed for the sale of "the Vaught farm, containing twenty acres," the fact that it does not show in what county the land lies is immaterial, if it can be shown by parol proof that a farm known as the Vaught farm, containing about twenty acres, lies in the county....1099
39. in an action upon a contract for rent if the plaintiff fails to show that the defendant holds as tenant he may recover in assumpsit for use and occupation, but in order to recover for use and occupation the plaintiff must make out his title just as he would in ejectment 1251
40. M. purchased the land of B. at execution sale for less than two-thirds of its appraised value. B. procured H. to redeem it by giving H. a mortgage thereon for the money, and H. within a year paid the redemption money and interest to M., and took his receipt therefor. After the year was out H. demanded a deed of B. for the land, which B. refused to give, thereupon H. returned the receipt to M. and received back the redemption money, and then M. sold the land to P. In an action by B. against M. and P. for the land and for all equitable relief, Held—That P., who was a bona fide purchaser of the land without notice, was entitled to hold it, but B. was entitled to recover from M. the value of the land less the redemption money and interest.1265
41. where a party is in possession of a piece of land occupying and claiming it adversely, the fact that another party laid a land warrant on a tract including the strip so occupied, and obtained a patent and took possession of the land named in the patent outside of the said strip, he does not thereby oust the possession of the party occupying and claiming such strip unless he also takes possession of the lap 1253

LEADING QUESTIONS—See Criminal Law, 14, 79; Rape, 2. Page.
LEASES—
1. an agreement in writing by which C. agreed with A. to allow A. to build a tramway through the field of C., and use it for three years, is a lease, and authorized the use of the field for three years 587
2. A. having remained in possession for ninety days after his lease expired, is entitled to remain a year longer by paying the agreed rental for the year 587
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LIFE TENANT—See Taxation, 29.
LIMITATION—See Contracts, 10—
1. in an action to settle the estate of Miss Lacey Barnett, who died in 1901, at the age of 18, leaving a considerable estate, a claim filed by Mrs. Adams for keeping her and to whom she was given by her mother, when only three years old, was properly rejected; being clearly barred by limitation and no sufficient reason was shown for the delay in asserting it, and it being manifest that she kept the child without any expectation of compensation 622
2. an endorsement on a note "this note is stayed for twelve months by agreement," in the absence of proof to the contrary, becomes a part of the note and is presumed to have been placed there by consent of the holder as well as the makers, and such extension suspended the statute of limitation as to the surety for the one year 814
3. in an action by the surety to subject property mortgaged to indemnify him from loss which he has paid as surety, which mortgage recites that it was given by the appellee and his wife for the purpose of securing the payment of said sum of $148.50, the fact that the surety paid the debt after he was released by limitation from its payment, will prevent him from enforcing his lien on the mortgaged property for said payment 814
4. parties can not by contract substitute a period of limitation in place of that fixed by the statutes of the State, for five reasons stated 1205
5. under Kentucky Statutes, section 2525, allowing married women the same length of time in which to bring an action for fraud or mistake, after the removal of her disability, as is allowed to persons having no such impediment, one who has continuously been a married woman for more than ten years after her cause of action accrued is not barred from bringing such action by the ten-year statute of limitation provided by section 2519, Kentucky Statutes 1203
LOCAL OPTION—
1. where, by a vote of the people of the entire county, the local option law has been adopted in the entire county, a precinct of a city of the fourth class may, after three years from the adoption of said law, by an election held thereunder, take a vote whether said law shall become inoperative therein 170
2. if a majority of such precinct vote in favor of making the law inoperative in such precinct, the board of council of such city may be compelled to grant a license therein 170

LOCAL OPTION—Continued. Page.
3. to the extent that section 3490, Kentucky Statutes, apparently authorizes the board of council to grant or refuse a license contrary to the vote of the people, it is invalid..... 170
4. the county judge and two justices nearest the court house constitute the contesting board in a local option election contest 332
5. scheme to evade local option law 597
6. one buying whisky to accommodate another and having no interest, does not violate the law.....1038
7. judgments in misdemeanor cases can be reversed only for errors of law apparent on the record.....1038
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1. a circuit court has no jurisdiction upon motion of a party to a record to set aside an order of submission of a case, to allow proof showing that processes were executed on the same parties in a former suit 442
2. if such missing papers were ever a part of the record, their omission should be shown and supplied by a proceeding in the circuit court 442
LUNATICS—
1. where a commissioner's report upon a claim for the services of a lunatic was sustained by the chancellor, it will not be disturbed where the evidence is conflictin 324
2. although an inquest held without notice is void, yet where one is sent to the asylum, and is in fact insane, the asylum is entitled to compensation for keeping him..... 304
3. but in such case where the services of the inmate were worth as much as his keep, there can be no recovery by the asylum 304
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MALICIOUS PROSECUTION—
1. where a defendant in an action for malicious prosecution laid all the facts before a competent attorney and acted on his advice, it is a complete defense to the action..... 98
2. can not be joined with action for slander 99
3. appellant set out in his petition that appellee, by its agents and servants, maliciously caused his wrongful indictment and prosecution under charges of derailing a railway train and of murder, and caused his imprisonment without reasonable or probable cause. It was error for the lower court to require appellant to elect which cause of action he would prosecute, or upon his failing to do so to dismiss his petition, because there was but one cause of action stated, that of malicious prosecution 690
MANUFACTURING ESTABLISHMENTS—
a saw mill is a manufacturing establishment in the meaning of sections 2487, 2488, Kentucky Statutes, which provide that employes of such companies shall have a prior lien on all property owned by them for six months' wages 70
MARRIAGE—
1. children born in a State where common law marriage is recognized as legitimate, must be regarded as legitimate offspring in this State 305
2. in the absence of proof to the contrary, this court will presume that the common law is in force in Ohio..... 305
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MASTER AND SERVANT—See Instructions, 13—
1. a defective leaky box in a laundry allowing water to run on the floor making it slippery and dangerous to walk on, which the master promised to repair, renders the master liable to a servant injured thereby 208

MASTER AND SERVANT—Continued. Page.
2. the servant does not assume the risk of any injury caused to him within such a time, after a promise to repair, as would be reasonable for its performance 208
3. it was improper to peremptorily instruct the jury to find for defendant, where an inexperienced servant was put to work on a joining machine in the use of which he had a finger cut off, where he testified that he did not know the machine was improperly adjusted, or whether it could be out of adjustment, and the foreman knew of his ignorance but did no inform him 498
4. the fact that the plaintiff only alleged that the machine was defective when the proof showed it was a new one and nowise defective, did not authorize the taking of the case from the jury where the answer and proof showed it was not properly adjusted 498
5. in an action by a servant for loss of hand by the use of machinery, where he was inexperienced and put to work in a dangerous place with insufficient light, it was error for the court to give the jury a peremptory instruction to find for the defendant 528
6. evidential facts authorizing a servant to recover damages from the master for injuries received 721
7. statement of a juror after trial 721
8. failure of defendant to introduce a physician who attended the servant 721
9. facts showing that a peremptory instruction should not have been given for defendant in an action for causing the death of plaintiff's intestate in working in a mine 746
10. the rule has been well established by this court that if a party introduces any evidence supporting his claim it is a reversible error to take the case from the jury 746
11. in an action for damages against the owner of a mine for causing death, it was error in the trial court to refuse to permit the plaintiff to prove the description of the mine, and how it could be ascertained whether or not it was safe. 746
12. a master is not liable for words either mischievously or maliciously spoken by his servant, not in the discharge of his duty to his master 865
13. a master may be held in this State for the malicious or mischievous acts of his servant in the line of his duty and in the scope of his authority 865
14. where appellee was employed as a helper in handling molten metal, it is the duty of the master to use reasonable care to see that the vessels in which the hot liquid is carried are in a reasonably safe condition for such use 919
15. where a servant employed as a helper to carry molten metal in a foundry was burned by the escape of such molten metal from the vessel by reason of a defect in the vessel in which it was carried, without negligence on the part of the servant who did not know of such defect, but which was known to the master or to the foreman or could by ordinary care have been known by them, the master is liable for such injury 919
MILITIA—
1. under section 2672, Kentucky Statutes, the governor of the State is the only person to determine whether the State militia should or should not be called into active service, and his determination is conclusive, and the courts can not inquire whether there was sufficient grounds to justify his action 878

MILITIA—Continued. Page.
2. when the militia is called into active service by the governor they are not only entitled to be paid, under Kentucky Statutes, section 2705, but also to be fed, under Kentucky Statutes, section 2707, and the requisition of the adjutant general for supplies, approved by the governor, over his own signature, is a proper charge against the State..... 878
3. the militia having been called into active service by T., who was then the legal governor, and having continued in such service after the legal determination of the contest for governor without notice to disband from either of the officers controlling them, Collier or Castleman, they could not properly disband without being subject to the charge of desertion, therefore the claim for their services and supplies was a just claim against the State up to the time of the public action by the legislature on February 19, 1900, and the payment of said claim by the auditor was a proper payment, although not approved by the legal governor 878
4. the vouchers upon which the auditor paid the money being signed by T., as governor, and Collier, as adjutant general, the disbursing agent, if he was mistaken as to the right to the offices which they were exercising, is not responsible to the State if the justice of the claims which he paid, as debts against the State, is established..... 878
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MISTAKEN NAME—See Street Improvements, 9; Taxation, 21, 22.
MORTGAGES—See Husband and Wife, 1.
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2. an action to recover usury must be commenced in one year after it is paid 79
3. in an action upon a note against a personal representative, the fact that the technical defense that the debt had not been demanded, properly verified, in one year after the qualification of the personal representative, is no evidence of fraud, as demand may be waived 79
4. in an action to enforce a mortgage lien on property, to which defendant pleads fraud in the sale of a machine and asks a cancellation or rescission of the contract, the defendant's motion to transfer the case to the ordinary docket was properly overruled 235
5. where the proof is conflicting and unsatisfactory in an action for breach of warranty in the sale of a threshing machine, the finding of the chancellor will not be disturbed..... 235
6. the Civil Code providing that errors must be disregarded which do not affect the substantial rights of the parties this court will not reverse where it is probable that the result would have been the same on either docket 235
7. one who bids in land at a public sale and transfers her bid to another under an agreement that he shall pay the price bid and certain taxes and water rent, and to reconvey to her the land at a named price, the transferee thereby acquires a mortgage on the property for the sum he has paid 297

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8. statement in a mortgage as "my entire undivided one-tenth interest in about 265 acres of land, also my entire undivided one-tenth interest in the personalty of E. J. Rawlings, deceased, of Harrison county, Ky.," was a sufficient description of mortgagor's property 659
9. mortgage held good on homestead given by husband and wife by using pronouns "I" and "my".....1039
10. where at the time appellants became surety upon the notes sought to be recovered upon in this action appellee had acquired the mortgage lien held by others and owned the debt it was given to secure, there can be no foundation, either in law or equity, to base their claim of substitution to the mortgage lien; and as they had no lien on the property mortgaged, they can have no claim against appellee because it appropriated to the payment of its debt the proceeds it brought under the sale 1201
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1. a city is liable for damages to one falling over a rock left in one of its streets by a contractor..... 582
2. a city is liable for damages to one falling in a hole in a sidewalk that had existed for several months and which was not known to the person injured 609
3. while the plan of improving a street is addressed to the council, it must be done upon a plan not dangerous to life and limb, and this question must be left to the jury where injury has been received 660
4. under Constitution, section 242, where a municipal corporation, in grading a street, injures private property in any way, compensation can be recovered therefor, although there may be no actual invasion of the claimant's property lines 601
5. appellee was injured by falling into a ditch on Third setreet, and awarded damages. The uncontradicted evidence shows that the city had not accepted or improved Third street. The court in its instructions to the jury assumed that Third street had been dedicated to and accepted by the city and that it was its duty to keep it in a reasonably safe condition for travel by the public. This was error..... 602
6. under Constitution, section 180, and Kentucky Statutes, sections 2980 and 2981, no tax shall be levied by a municipality without designating the purpose for which it is to be applied, and in the ordinance fixing the tax rate for any year the general council shall subdivide its levy among other things "for street sprinkling" and a levy for "general purposes," and an attempted deflection of the "general purpose" levy to street sprinkling was illegal and properly enjoined 606
7. under Kentucky Statutes, sections 3210, 3210a and 3210b, the city is clothed with the power to establish and maintain a free public library, and its board of trustees have the right to select their own treasurer, and such treasurer and not the city treasurer is entitled to the funds of such public library..... 611
8. in an action against a city for damages from a fall by reason of a defective sidewalk, evidence of a prior accident at same place was competent to show notice 1154
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no one is liable, civilly or criminally, for an unintentional consequental injury which resulted from a lawful act where neither negligence nor folly can be imputed to him. In

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other words the foundation of defendant's liability in all such cases is negligence, or the failure on his part to exercise that degree of care to avoid making a mistake which an ordinarily prudent man would exercise under the same or similar circumstances.....1046
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2. newly discovered evidence that is merely cumulative and which could have been secured by reasonable diligence, is not sufficient to authorize a new trial..... 780
3. admonition by court to jury not objectionable 780
4. statement by court to jury as to affidavit filed for continuance, while objectionable, not sufficient to reverse..... 781
5. to sustain a motion for new trial on the ground of newly discovered evidence, the evidence should be such as would have a decisive and preponderating effect on the trial of the case 845
6. the fact that appellee was adjudged a bankrupt before the rendition of appellant's judgment was not a fraud that entitled appellant to a new trial 959
7. defendant is entitled to a new trial where judgment is pronounced on him at a special term before the expiration of two days after the trial 1112
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2. the marshal of a sixth class town may make an arrest anywhere in the county without a warrant, where a public offense is committed in his presence 165
3. where a town marshal was cut with a knife in making an arrest in the county outside of the town, he had the right to repel the assault, using such force as was necessary to do so, and to compel the defendant to submit to arrest 165
4. where the county judge holds special terms of court in his own office, or in the clerk's office, of which he fails to give the jailer notice, the jailer is not entitled to a fee for such special terms, though he was daily in attendance upon the courthouse 211
5. the canvassing board has no authority to determine which of the candidates are elected in the case of a municipal officer; their duty is fully performed by certifying the vote to the council 343
6. the board of council whose term expired December 7, 1903, had no authority to determine who had been elected a member of the board for the succeeding term which began December 7, 1903 344
7. in a proceeding to test the title of an alleged usurper, the burden is on the respondent to show title 344

OFFICE AND OFFICER—Continued. Page.
8. in an action against a magistrate on his official bond to recover taxes paid by plaintiffs which were illegally assessed, Held—The magistrates of a county, when acting as a fiscal court, do not act as conservators of the peace or in a judicial function but in a quasi legislative character, for error or mistake, in the performance of which neither they nor the sureties on their bonds are liable in an action for damages 504
9. where one is awarded the certificate of election by the canvassing board, he is entitled to the emoluments of the office until the issual of the mandate in the Court of Appeals in favor of the contestant 614
10. section 4225, Kentucky Statutes, and section 301, Criminal Code, authorize the circuit clerk to issue a capias pro fine on a judgment rendered imposing a fine upon an offender, and in this action the court below properly sustained a demurrer to the petition of appellant seeking to recover damages against appellees for false imprisonment, they being the officers whose duty it was to put into effect the judgment imposed in the prosecution against him 892
11. where the clerk of a county court certified that a deed was acknowledged before his deputy "as appears from the endorsement made on the back of the deed by such deputy," when in fact the endorsement was a forgery the clerk is liable on his official bond to one who was thereby induced to accept said deed and pay the price of the lot named therein to the pretended owner; and the fact that the clerk at the time believed the endorsement to be genuine will not excuse him 943
12. by section 3497 of the Kentucky Statutes arrests may be made for drunkenness or disorderly conduct at any time without warrant, and where one in making an arrest acted in the line of his duty and in good faith and upon reasonable grounds, he is not liable on his bond 960
13. where one was arrested on a Sunday and placed in jail, the jailer was warranted in receiving the prisoner without a mittimus, as the statute authorizes persons arrested to be placed in the county jail until taken before the police court 960
14. under Kentucky Statutes, sections 396 and 1740, no allowance in any case should be made to the commissioner or receiver until he has filed in court a written statement under oath of the number of days he had acted, and he is only entitled to receive $3 per day for each day actually engaged in the consideration of the case, in the absence of an agreement by the parties that a larger sum should be allowed 1016
15. where the records of the court show a reference to the commissioner for report, and he accompanies the report made thereunder by a written statement under oath, reciting the number of days he acted in the case, this is sufficient evidence to establish the fact if not rebutted or the contrary proven by the party excepting 1016
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1. we hesitate to hold that two ordinances relating to the same subject may not be passed by council at the same time, there being no objection thereto by any member of the council 413

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2. while there may be some doubt as to the validity of an ordinance, where there were two ordinances relating to the same subject passed at the same time, yet where work has been done under such ordinance on a public street, without objection by the owner of property which has thereby been benefited, he can not object to paying an apportionment warrant therefor 412
3. an ordinance requiring a tax for using horses and wagons for hauling, embraces one who keeps horses and wagons for hauling, whether he drives himself or hires drivers 701
4. an ordinance appropriating money for a local public library without submission to the voters of the city is unconstitutional 1102
5. taxpayers of a city may maintain an action to have an ordinance declared invalid though no levy has been made under it 1102
6. where an ordinance of a municipality fixed a penalty less than that fixed by statute for the same offense, the ordinance is void pursuant to the provisions of section 168 of the Constitution 1234
7. ordinance providing for fire escapes held valid 202
ORIGINAL ENTRIES—See Evidence, 4, 8.
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PAROL EVIDENCE—See Contracts, 19; Husband and Wife, 15; Railroads, 29, 30; Sale of Lands, 3.
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PATENTS—See Lands, 25, 26, 35.
PARTIES TO ACTION—
1. in this action, which is a proceeding in rem, after the termination of the litigation appellee discovered that appellants held an interest in the property and were necessary parties and were not before the court, and it was not improper to file a supplemental petition and bring the other necessary parties before the court 914
2. the appellants, who are the descendants and heirs at law of John Neal, can not maintain the action seeking to cancel the conveyance because had he lived he could not have maintained it. The appellants stand in his shoes and have no rights which he did not have, and the chancellor properly sustained a demurrer to their petition 962
PARTITION OF LAND—See Attorneys, 8—
where land is unproductive and can not be divided into equal parts without injury to the whole tract, the chancellor properly adjudged a sale of the entire tract and an equal division of the proceeds of sale 267
PARTNERSHIPS—
in this action to recover for building material furnished by a firm to the wife of one of the firm, where it is shown that the wife paid her husband for the lumber, a verdict in favor of the wife will not be disturbed, it being a well-settled principle that a payment to one member of the firm is a payment to all, and if the member misappropriates the funds the firm should lose rather than the payor.....1037
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1. a corporation which carries on business in this State by depositing a lot of buggies, wagons and farm implements with an established buisness firm in this State for sale and who were selling, or offering to sell, such goods as agents for defendant, without first filing in the office of the Secretary of State, the statement required by section 571, Kentucky Statutes, is liable, under section 11, Criminal Code, for the penalty thereby incurred..... 58
2. the defendant can not claim exemption on the ground that it is a foreign corporation, as the statute makes the same requirement of all corporations whether foreign or domestic 58
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PHARMACY COLLEGE—See Taxation, 24, 25.
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PLEADINGS—See Judicial Sales, 23.
1. pleading is defective which, in an action for damages resulting from a boiler explosion, does not allege that the master could have discovered defects in the boiler by the exercise of ordinary diligence 234
2. an allegation by one employed as a surveyor in locating an entry to a coal mine, that by the negligence of the defendant and superintendent in charge of the mine large quantities of slate and stone had become loose and unsafe, and fell on him, injured him, was sufficient to sustain his action 337
3. failure to allege that the defendant knew of the dangerous condition of the mine was cured by the answer which alleged that plaintiff knew of its dangerous condition 337
4. it was not the business of the plaintiff to inspect the mine and he had the right to rely on the defendant to keep it in safe condition 337
5. in pleading a set-off for board against a note owing to a deceased sister, proof that her services were worth as much as her board, the plea must fail..... 348
6. in an action for damages for the wrongful cutting of timber, a judgment for defendants will not be disturbed where the instructions are simple and were not objected to, and there was no demurrer to the answer which was denied by the reply, and where, if there was a defect in the answer, it was cured by the verdict 486
7. where the instructions do not submit the precise issue made in the pleadings, no objection having been made to them and none others asked, the verdict will not be disturbed.. 486
8. in an action on a warranty that the price of goods sold will be paid at maturity of indebtedness, the petition is not defective in that the action was not brought when the debt was due or does not allege notice of amount due, but is bad because it fails to allege acceptance of the seller of the guaranty by appellant 525

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9. the omission of a fact necessary to constitute a cause of action can not be supplied by referring to an exhibit not copied in the petition 525
10. a petition failing to allege a consideration for a promise is demurrable 538
11. an action for money which plaintiff alleges he was compelled to pay to his servant for an injury received by falling on an iron apron to a door, which defendant promised to repair, is not barred until after five years 538
12. where the proceedings on which an action to vacate a judgment is founded are not filed with the petition, and from the petition the court can not tell precisely what the nature of the judgment was, a demurrer to the petition was properly sustained 769
13. in an action for an assault and battery, in which the defendant by answer justifies, the plaintiff has the burden and closing argument 773
14. in a proceeding to set aside a fraudulent conveyance alleged to have been made to defraud creditors, where the answer filed denies fraud and alleges that the contract was made in good faith, and the defendants in their depositions subsequently taken testify that the transaction had been rescinded before their answer was filed, the lower court properly adjudged the conveyance to be fraudulent and subjected the property to the payment of plaintiffs' debt..... 904
16. error in the court in refusing to allow plaintiff to file reply during the trial 935
17. an amended petition pertinent to the issue should not be stricken from the record, though improperly designated as a "reply amended petition" 1096

PLEA IN BAR—
a conviction for operating a pool room in violation of a city ordinance is not a bar to an indictment against the same party for maintaining a nuisance in said city by unlawfully causing and permitting persons to assemble on premises in his possession and there bet, win and lose money on racing, the latter being a common law offense..... 740

PLEA OF NOT GUILTY—
where a plea in bar is overruled and a plea of not guilty entered, though defendant offered no proof, and that of the Commonwealth established defendant's guilt, it was error in the court to give peremptory instructions to the jury to find the defendant guilty, as it is the province of the jury to pass upon the question without coercion from the court 741

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PRESUMPTIONS—See Bill of Exceptions, 2, 3; Bills and Notes, 2; Criminal Law, 13; Husband and Wife, 26; Primary Elections, 6; Railroads, 3; Roads, &c., 4; Taxation, 28; Marriage, 2.

PRIMARY ELECTIONS—
1. in calling a primary election to nominate a candidate for Congress, the district committee, composed of the chairman of the several county committees, is the governing authority of the party calling such primary, and it is the duty of such committee after the primary has been held to meet, count the vote, ascertain and announce the result and award the certificate to the candidate receiving a majority of the votes 487
2. a canvassing board must be composed of a majority of the members of the district committee, who must, in person, and not by proxy, perform their duties under oath previously administered 487

PRIMARY ELECTIONS—Continued— Page.
3. when such committee has performed its work a recount of the vote by them will not be permitted, however erroneous the result reached by them. In such case the wronged candidate must enter a contest for the nomination, but where the canvassing board is composed of less than a majority of the entire district committee its work is invalid 487
4. where a majority of the committee has failed to meet after the primary, for the purpose of canvassing the returns, a mandatory injunction will compel them to act 487
5. the decision of the governing authority of the party holding primary elections is final, and no appeal lies from such decision, and jurisdiction can not be conferred on the courts by a rule of the committee to allow an appeal..... 572
6. where the petition alleges that the committee calling a primary election was not sworn, and this is denied by the answer, the presumption in the absence of proof is that they were sworn as required by the law, but if not sworn it did not invalidate the primary..... 639
7. in calling a primary election a committeeman can not act by proxy, but where three out of four of the committee are present the fact that the fourth member acted by proxy does not make their action invalid 639
8. the committee in calling a primary election has authority to prescribe, as one of the conditions to a candidate's name being placed on the ballot, that he shall pay a due portion of the costs of holding the primary 639
9. the provision of the Constitution that all elections shall be "free and equal" does not apply to primary elections..... 639
10. admitting that the committee had no authority to assess candidates in a primary election, appellant declining to submit and failing to proceed by mandamus to compel his name to be put on the ballot, did not invalidate the election of the nominee of such primary 639
11. allowing minors to vote in a primary who will be voters at the regular election did not invalidate the election..... 639
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Kentucky Statutes, section 3496, part of the charter of cities of the fourth class, which provides that the police jurisdiction of the city shall extend to any point in the county within two miles of the boundary of the city, is in violation of section 143 of the Constitution 863
PRINCIPAL AND AGENT—
1. an agent to sell fruit trees can not bind his principal beyond the authority conferred on him by the principal..... 334
2. in the absence of special authority a contract made by the agent does not become complete until accepted by the principal 334
PRINCIPAL STREETS—See Street Improvements, 14, 15.
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PERMITTING ASSAULT—See Criminal Law, 87; Instructions, 19.
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PROXY—See Primary Elections, 7.
PURCHASER—See Attachments, 3; Lands, 40.
PURPOSE OF LEVY—See Taxation, 17.
RAILROADS—
1. the weight of evidence in this case shows that deceased was knocked off the car or ladder he was using in the discharge of his duty as extra brakeman, by reason of a cross arm

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attached to a telegraph pole standing near the railroad track, the car he was attempting to climb on being very wide and high it was hardly possible to reach his position on the car, dark as it was, without being hit or pushed off the ladder of car 8
2. under the proof it is reasonable to infer that deceased did not lose his life by falling from the ladder, it being more reasonable to infer that he was knocked from the car by this cross arm than by his becoming dizzy, as he was young, healthy, active and strong and not subject to dizziness 8
3. the fact that the lower court allowed a statement made by one Fossett to be given to the jury as part of the res gestae, which the court afterwards withdrew as incompetent and admonished the jury both by verbal and written instructions to disregard it as evidence, we must presume that the jury obeyed the court's instructions..... 3
4. counsel for appellant having read the petition to the jury and commented on it, we know of no rule of law that would prevent the opposite party from doing likewise..... 3
5. earning capacity of deceased shown by life tables, in comparison with previous wages, may be considered by the jury as likely to be increased with age and promotion.... 4
6. in view of the emergency presented, it was a question for the jury to determine whether appllee exercised reasonable care situated as he was, and whether the injury he received in obeying the orders of his superior was the natural and proximate cause of running a hand car on the freight train's time, or that of the freight train men in failing to give certain signals..... 14
7. while appellee assumes the risks incidental to riding on a hand car he did not assume the risk incidental to the gross negligence of the foreman in running the hand car on the freight train's time, nor that of the freight train in failing to observe the statutory signals at the public crossing 14
8. where a passenger signed a paper releasing the company from liability for putting her and her children off the train at the wrong station, in consideration of $2 paid to her by the conductor, and no fraud was practiced in procuring her signature, she is bound by it and the jury should have been so instructed 19
9. to give Federal court jurisdiction facts must affirmatively appear in the record showing that the case should be removed, and no additional facts can be heard..... 31
10. such facts properly pleaded must be taken as true by the State court 31
11. from a judgment of the State court ordering a removal, an appeal will lie to the Court of Appeals..... 31
12. where jurisdictional facts do not appear on the face of the record, no presumption of their existence will be indulged. It can not be conferred by consent, nor can the lack of it be waived by appearance or motion or even by a trial on the merits 31
13. to make a flying switch is actionable negligence, and a servant thereby injured can recover from the master though the servant voluntarily engaged in making it..... 31
14. but if the servant doing such work was himself guilty of negligence, but for which the injury would not have occurred, he can not recover unless those in charge of the train knew of his danger in time to void it..... 31

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15. but defendant's servants were not bound to anticipate the servant's negligence and not bound to be diligent to ascertain whether, by his negligence, he was in danger..... 31
16. a judgment against appellant for $1,920 damages for delay in the shipment of seventeen head of horses will not be disturbed, where the evidence conduces to show the damages resulted from the negligence and delay of appellant 53
17. in an action against a carrier for damages in the shipment of stock, the rule is that if from the weight of evidence the jury can find the cause of the injury is the carrier's negligence instead of that of some one else or of a mere accident, then the plaintiff's case for recovery is made out 53
18. Stephenson v. I. C. R. R. Co., 25 Ky. Law Rep., 442, overruled so far as it conflicts with I. C. R. R. Co. v. Jones' Adm'r 31
19. a passenger who was drinking and refused to pay his fare, and was put off the train on a mild day, was not entitled to recover damages by reason of being struck by another train while wandering on the track 152
20. where a railroad company has made a switch siding permanent, and proposes to so maintain it in a street, the abutting property owners on such street may have an action for damages to their property by reason thereof..... 216
21. where, shortly before one was killed by a train he was heard to say "I am drunk and don't care what I do, I would as soon be dead as alive," and was then going in the direction of the train where he was found killed, no other evidence appearing, the presumption is he was killed by his own negligence 232
22. in an action for damages against a railroad company for killing a person, the court properly refused to allow an amended petition charging that the defendant did not own the right of way to the road..... 232
23. where a railroad section boss insulted a passenger in the depot waiting room, by cursing and abusing him, the company is liable if it be shown that the agent knew of such insult and failed to protect him 309
24. peremptory instruction properly given where one is injured by the act of a fellow servant when no negligence is shown by the foreman in charge 321
25. not liable for killing a child three years old at a point on the railroad track where its presence was not anticipated or discovered in time to save it 457
26. trainmen are required to keep a lookout for persons on the track at places where their presence may be anticipated, but not elsewhere 457
27. every act of negligence rests on a breach of duty, if there has been no duty broken there has been no wrong and there can be no recovery 458
28. an infant under three years of age, or an idiot, cannot be a trespasser, and cannot be guilty of contributory negligence 458
29. where land has been condemned for a railroad 40 years ago, and damages ascertained, it is competent to show by parol that the damages have been settled..... 474
30. in such case no court would require the surrender of the land or the right to use it for the purposes contemplated, although the judgment fails to describe the land..... 475

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31. in an action against a railroad company for the wrongful killing of plaintiff's intestate, where the residence of the intestate was in dispute, it was error for the court to refuse to allow the filing of an amended answer by the company, asking that one claiming to be the administrator by appointment in another county be made a party to the suit 481
32. the evidence as to the residence of the plaintiff's intestate at the time of his death being conflicting, it should have been submitted to the jury 481
33. one who sat down on a railroad track and fell asleep is a trespasser, to whom the company owes no duty until his peril is discovered 532
34. in an action against a railroad company for injuries to appellant's intestate, statements made by the conductor just after the injuries were inflicted are competent as part of the res gestae, the statement being "let him lay there and go to hell" 666
35. where an employe is injured by the negligence of his superior who, at the time, is engaged in the same work, the company is not liable for the superior's negligence unless it was gross 669
36. in an action against a railroad company for the alleged wrongful killing of a horse, the value of which was alleged in the petition and shown by the proof to be $150, it was error in the court, after the plaintiff's proof was all heard and a motion made by defendant for a peremptory instruction, to allow the plaintiff to file an amended petition claiming $75 additional damages, for the avowed purpose of making the pleading conform to the proof, when it was manifest the purpose was to bring the case within the jurisdiction of the appellate court, and was, therefore, a sham pleading 758
37. the killing of a horse by a section boss which he found fastened in a bridge on the railroad track with one of its legs broken was a humane act, for which the company is not liable 758
38. where the answer to a petition for causing the death of an employe pleads contributory negligence, which is not denied, the defendant is entitled to a peremptory instruction. 761
39. where a brakeman upon a train had left his train to go on another to get a drink of water (both trains having been stopped under orders) an action for damages for his death can not be maintained where his own train by some means started, running into the train he was on, killing him, as he was not in his place of business, or in the discharge of any duty imposed by reason of his employment. In this state of case a peremptory instruction to find for the railroad company was authorized 828
40. in an action against appellant for damages to land by permitting drift to float upon it, an instruction by the court that while appellant had the right to pass timber under or over its line of railroad without liability to adjacent owners, provided the act was done with ordinary care, yet it did not have the right to leave timber upon its own right of way where it was liable to float in large quantities upon adjacent property to its damage, correctly stated the rights of the parties 859
41. negligence of company causing death of licensee at work in defendant's switch yard..... 951
42. negligence of fellow servant and joint tort feasor..... 952

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43. concurring negligence of defendant's servants with negligence of decedent's fellow workman..... 952
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1. under Kentucky Statutes, section 1154, and recent decisions of this court, physical force applied to the person of the female is not necessary to constitute the crime of rape; threats of violence or injury constitute force in the meaning of the law 1229
2. in a prosecution for rape, where from the embarrassment and reluctance of the prosecutrix to state the facts, the indecent character of the transaction, the age and inexperience of the witness, the fact that some leading questions were asked her by counsel and by the court in getting the facts of the outrage, was not improper 1229
3. where the fact of intercourse is admitted by accused; the further evidence that he at once left the neighborhood of his residence for three weeks; that the prosecutrix was in distress the next morning and then complained of the outrage and at once sent the police on his track, and the appearance of the grass where accused concealed himself awaiting the departure of her visitor, afford corroboration of her story 1229
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1. a taxpayer who is a voter has such an interest in the election law affecting registration to entitle him to test its constitutionality 558
2. registration act approved February 11, 1904, is constitutional. 559
3. does not require that all voters shall be registered 930
4. it is in no sense class or special legislation..... 930
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RELIGIOUS BELIEF—See Evidence, 1.
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REMOVAL OF ACTIONS—See Railroads, 9, 10, 11, 12—
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REVIVOR OF ACTIONS—See Judgments, 6.
ROAD DISTRICTS—See Taxation, 16, 18.
ROADS AND PASSWAYS—See Evidence, 26—
1. where a road was changed from one side of a creek to another on account of washes, its use for a long period of years amounts to a dedication and it can not be obstructed. 35
2. where B. conveyed to S. a strip of land 16 feet wide for a passway for S., who agreed not to obstruct it so as to prevent W. S. W. and R. W. from a passing over it, a suit by W. S. W. and R. W., alleging ownership and to recover the title, was properly dismissed, as the deed shows that only a passway and not the land was conveyed..... 485
3. where one has continuously used a passway as a matter of right for thirty years, his right thereto should be confirmed 711
4. in the absence of proof to the contrary, where it is shown that gates were erected at the time the road was established, and have been maintained for thirty years without

ROADS AND PASSWAYS—Continued— Page.
objection, the presumption is that the road was established upon the condition that the owner of the land on which it was established was granted the right to erect and maintain the gates across it 1148
5. under Kentucky Statutes, section 4297, authorizing county courts to abolish gates across a public road, such court has no authority to abolish gates unless it be shown that they were erected by order of the county court 1148
6. where one owned the dower right to a tract of land, the right of a passway to it was appurtenant to the land allotted as dower 1096
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SALE OF LAND—See Taxation, 38.
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2. the purchaser of land who had time and opportunity to inspect it can not complain, though the vendor misrepresented its quantity or value 279
3. the fact that a writing for the sale of land does not show in what county the land lies is immaterial, if it can be shown by parol proof that a farm known as the Vaught farm, containing twenty acres, named in the writing, is in the county 1099
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1. damages for the sale of buggy shown to be inferior and defective in workmanship and material, upheld..... 275
2. motion for judgment "non obstante verdicto" refused..... 275
3. note cancelled for fraud in the sale of an engine 317
4. the fact that the note had been assigned does not prevent its being liable to defense for fraud..... 318
5. in a controversy between the seller and purchaser of a "star engine on trucks," Held—The seller did not prove its allegation that the purchaser's employes were incompetent or unskillful 367
6. the seller waived its right to notice by sending an expert to repair the engine 367
7. the seller by accepting the money paid to its agent, is estopped to deny his right to make the contract with the purchaser binding on the seller 367
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5. the fact that the city exceeded its authority in attempting to guarantee the payment of its bonds voted for street improvement, does not relieve the lot owner of the cost of the improvement 273
6. there was no error in rendering a judgment against the city for ten per cent. of an apportionment warrant, which a former opinion of this court held could not be collected from the property holder 479
7. the court erred in adjudging interest on any amount of the apportionment warrant till the reapportionment was made under the mandate of this court 479
8. the court also erred in adjudging the costs of the former appeal against appellant who was not a party to that appeal 479
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4. failure of the court to instruct the jury that the motorman saw or could have seen the plaintiff's danger in time to avoid injuring him, was not error, as plaintiff was not on the track 359
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2. sections authorizing such taxation are not in violation of sections 171 or 172 of the Kentucky Constitution or of the 14th amendment of the Federal Constitution 23
3. where an adequate remedy is provided for the collection of a tax lawfully imposed, the authority to resort to any other remedy is denied 81
4. but where a tax is imposed and no remedy is provided for its collection, the right to do so is implied, and an action therefor can be maintained 81
5. the payment of a fine imposed for a failure to take out a license, does not discharge the claim for the license tax.. 81
6. an order which fails to recite for what purpose a levy for taxes was made, is void 246
7. a levy made under special acts for the years 1900 and 1901 is valid 246
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19. new bonds issued by the county in lieu of old ones issued in 1890, are valid 431
20. a town does not assume the obligations of unincorporated territory annexed thereto 431
21. section 2991, Kentucky Statutes, providing that whenever by the complaint of the party assessed it appears that property has been assessed in a name other than that of the owner or holder, the city assessor shall, after notice, make

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22. where property was assessed as required by section 2986 of the Kentucky Statutes, a mistake in the name of the person does not vitiate the assessment..... 713
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25. the charter of appellant providing that "should said corporation be dissolved, the funds and property thereof shall, after its debts and obligation be discharged, be paid into the treasury of the State of Kentucky, for the benefit of the common school funds," and the fact that the institution is not operated for gain or profit, and all its income being devoted to purposes of education, it is an educational institution and is exempt from taxation 825
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30. where the city of Frankfort sold its gas plant to a private corporation, receiving in consideration therefor forty bonds of the value of $1,000 each, bearing interest at the rate of 6 per cent. interest per annum, such property is subject to taxation, and not exempt by the provisions of section 170 of the Constitution and by section 4026 of the Kentucky Statutes because it is not "public property used for public purposes," which, by the provisions of the Constitution, is exempt from taxation 957
31. property owned by a city, necessary to the exercise of those duties which are strictly governmental, is exempt from taxation, but not so of that property which is held and

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34. the imposition of a license tax upon an oil depot, where the oil and the building in which it is stored are both already taxed, ad valorem, equal with all other property in the State, would be double taxation, which is not only repugnant to the general rule of construction, but violates the provisions of the Constitution, requiring uniformity of taxation 985
35. in an action by the auditor's agent where the circuit court assessed the land for the year 1892, when it was only charged in the statement to have been omitted from taxation for the years 1893-1902, there being no allegation that the land was omitted from taxation for the year 1892, the judgment was unauthorized 1028
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37. a fund held in trust under a will for the "advancement of the principles of Christianity as taught by the Christian Church,' is a private charity and subject to taxation....1128
38. under Kentucky Statutes, section 4151, as amended May 12, 1897, providing that "no levy or sale of real estate (for taxes) shall be valid * * * until the sheriff shall have made affidavit in writing, and filed the same with the clerk of the county court of the county in which such lands are situated, showing that the persons for whom such taxes are due, and whose real estate is to be sold, have no personal estate out of which said taxes can be made," a sale made by a sheriff of real estate without having filed such affidavit is invalid, although the levy was made before the act took effect requiring such affidavit to be made 1235
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2. although the cutting of timber by the seller after its sale was a violation of the contract, the purchaser could have no claim against ties made from timber sold in the hands of a purchaser of them 115

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3. where timber was cut and removed from land by a trespasser, the owner is entitled to recover the timber with its added value by being converted into saw-logs, neither the trespasser nor his vendee having acquired any title thereto so long as the identity of the timber has not been destroyed 616
4. a fraud practiced by a timber man in buying timber from two ignorant women, who did not know its value, is ground for rescinding the sale 893
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2. a verdict of $675 for nursing an old man 96 or 97 years old for 27 weeks will not be disturbed, although the evidence is conflicting 648
3. verdict for excessive damages for injury by the falling of an elevator set aside 831

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5. the evidence in this action showing that appellee's injuries were serious and painful and his loss of time and medical bill considerable, it can not be said that the verdict was excessive, it being for $800. The court did not err in permitting proof of appellee's suffering after the commencement of the action, because in this class of cases a recovery may be had not only for suffering endured prior to the commencement of the action, but for damages resulting continuously up to the trial, or for which he may suffer from in the future 933
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7. the evidence in this case showing no negligence, the verdict of the jury will not be disturbed 937
8. where there is neither an objection nor exception to the instructions or to the evidence, the court will not set aside the verdict and judgment 1014
9. verdict will not be set aside unless flagrantly against the evidence, or so excessive as to indicate passion or prejudice 1167
10. slight applause of humorous statements of counsel in his argument to the jury and similar manifestations upon and after reading the verdict of the jury, both being rebuked by the court, though highly improper, were not prejudicial to appellant, the first not being hostile and the last coming after the verdict, could not have influenced the jury 1221
11. this court has time and again held that it will not, in the absence of error of law occurring at the trial, disturb the verdict of a jury if there was any evidence to support it..1221
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1. although no notice of the filing of a mandate was given, where it was done in open court, where the trial was not had for six months thereafter, and appellants appeared in open court and made several motions in the action, the acts of making motions were a waiver of the filing of the mandate 784
2. a delay of two and one-half years to transfer an equitable action to the ordinary docket and demand a jury trial is a waiver of such right in the discretion of court.....1078
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1. where a testator provided in his will that the trustee should sell his land whenever a fair price could be obtained for it, it was not incumbent on the trustee to advertise the sale or to obtain the consent of any one before making the sale 50

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2. the court having the power to limit the authority of a trustee appointed under a will and failing to do so, a sale by the trustee in accordance with the provision of the will, will not be disturbed 50
3. in a devise to the wife for life, and remainder to his children at her death, each of the children at her death took, under the will, a vested remainder which might be defeated by their death without children, before the death of the life tenant 157
4. where the remainder interest was sold under execution before the death of the life tenant, such sale will not be disturbed on the ground that the remainderman was entitled to a homestead therein 158
5. in a will contest where the will was written by the testatrix the following instructions are approved:
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Second. if she was not of sound mind when she wrote the said papers, or one or more of them, they should find the paper or papers written by her when she was not of sound mind, not to be her last will..... 160
Third. if she wrote the said papers or any part of either of them under the influence of any other person or persons, as defined in instruction No. 5, the jury should find the paper or papers, or the parts thereof, written under such undue influence, not to be the last will of deceased..... 160
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6. in a will contest the instructions should be so framed as to leave the jury to decide the question on all the evidence without any expression from the court giving prominence to any part thereof 160
7. the wife of one of the contestants is incompetent as a witness for the contestants, the meritorious cause of the action being in him and not in her 160
8. expert testimony as to certain disease considered..... 160
9. where the propounders of a will have proved the due execution of the paper, not irrational in provisions nor inconsistent in its structure, language, or details with the sanity of the testator, the presumption of law makes out for them a prima facie case, and the burden of showing incapacity on the part of the testator is shifted to the contestants 160
10. where a will authorizes the executor to exercise his own judgment in the management of an estate, he had the right to execute a mortgage on the real estate to procure money to pay the indebtedness of the estate 183
11. a devise to "my son, Wm. Young, and my daughter, Ann Marshall, and her bodily heirs forever" vested in the latter the fee to the land owned by the testator..... 199
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13. where a testator by his will directed that the proceeds of his estate should be equally divided between his three daughters, and subsequently gave one of them notes of value of $4,000, Held—That in the distribution of the estate, the other two daughters should be first paid $4,000, and balance distributed equally 253
14. a devise was made to S. K. for life and after his death to his children or grandchildren if there should be any living at his death, but if none living, then to his brother and sister and their children or grandchildren. S. K. died without children. Held—That the property devised vested in his brother and sister, and not in their children..... 312
15. in construing the will of William Payne, deceased, the court holds: where an estate is devised to one for life, with remainder to another, and if the remainderman die without children, then to a third person, the rule is that the words "dying without children, or issue," are restricted to the death of the remainderman before the termination of the particular estate..... 382
16. where there is no intervening estate and no other period to which the words "dying without issue" can be reasonably referred, they are held, in the absence of something in the will evincing a contrary intent, to create a defeasible fee which is defeated by the death of the devisee at any time without issue then living..... 382
17. it must be presumed that testator meant something when he devised part of his estate absolutely, and placed the remainder under elaborate limitation. We, therefore, conclude that the limitation as to the death of any of the grandchildren without issue, can not be restricted to a death in the lifetime of the testator 382
18. the provision of the will allowing the trustee to hand over all or a part of the property to the devisees and free the same from the trust, does not indicate that the testator had it in his mind to empower the trustee to add anything to the title which the devisee took under the will, or to change in any way the plans which he had devised to secure the estate to his own blood..... 382
19. a devise to Mrs. B. of all her real estate to her daughter, with one-third of the rents to her husband, during his life, vested the daughter with an absolute fee simple title to said lands, subject to a charge thereon in favor of her father for one-third of the rents during his life..... 418
20. a subsequent limitation attempted to be placed thereon in case the daughter should die without bodily heirs, is held to be void and the fee remains in the daughter subject to the claim of the father to one-third of the profits of the estate during his life 418
21. a will made by a father to his daughter and her children "of all my property, real, personal and mixed," gave to his daughter a life estate in all the property with remainder to her children living at the death of the testator, and such other children as she might thereafter have.... 445
22. a will devising all of the testator's property to his sister Susan, but should she die without issue and leave any of said property at her death, the same to go to his sister Sallie, invested his sister Susan with the right to appropriate all the estate, real and personal 445
23. a devise to Mrs. W. in trust for four grandchildren of testatrix, subject to certain charges named therein, can-

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not alter the character of the title or obstruct its regular transmission according to the expressed intention of the testatrix, though the charges upon the property may consume it all 454
24. after undertaking to discharge the duties required of her by the will as trustee, Mrs. W. cannot be heard to deny the trust 454
25. the possession of the trustee is the possession of the cestui que trust 454
26. a devise of property in trust for the benefit of aged and infirm persons, does not become inoperative by reason of the death of the beneficiaries 470
27. the fact that the property was in such condition as to yield no income and had to be sold, no one complaining except the purchaser who has been invested with the title, he should be required to comply with the terms of the sale 470
28. where the remaindermen are too young to take the proceeds the chancellor will secure it for them 470
29. judgment construing a will, whether certain children named therein take per stirpes or per capita 625
30. judgment of lower court finding against the will considered and affirmed 650
31. construction of will 736
32. devise to one with remainder to others if living..... 736
33. devise of income in fund for life, bond may be required of devisee 736
34. devise of all the rest of an estate for life, with remainder to others 737
35. restraint upon alienation 737
36. property devised to the Baptist Orphans' Home is exempt from taxation 846
37. extrinsic facts can not be considered in construing the meaning of words used in a will 860
38. where the evidence is directed to show that a will is a forgery, it is not necessary to instruct the jury on the question of incapacity or undue influence 885
39. where a will gives the executrix power to sell and make title to any property necessary to carry out the will, she was authorized to sell and pass complete fee simple title to property necessary to satisfy all the bequests..... 889
40. Elizabeth Bedford died in 1860, leaving a will by which she devised all her land in this State to her son Robert during his life, with remainder to his children, if he left any, otherwise to the State for the poor. Testator, at her death, had a suit pending against the heirs of one Bedinger for 470 acres of land, of which she was the equitable owner. Her son Robert revived the suit by filing an amended petition, claiming that he was the sole devisee of his mother and her heir at law, and asked that the suit be prosecuted in his own name and for his own use, and a judgment was entered whereby the commissioner was ordered to convey the land to him in fee simple, which was done, and this deed was put to record in June, 1863. He died in 1887 childless and testate, leaving his widow, Susan, his sole devisee, who conveyed the land to appellees. This action was brought by the Commonwealth in January, 1902, claiming the land under the will of Elizabeth Bedford. Held—That the judgment of the chancellor dismissing the petition on the ground that it was barred by the fifteen and thirty years' statute of limitation was proper..... 993

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41. as the son Robert acquired and held the legal title to the land by and under the deed of the commissioner from the Bedinger heirs, his title and possession were adverse to the remainderman, who had only an equitable title, and his act in taking to himself the title in fee simple was a repudiation of the trust created by the will and amounted to a renunciation thereof, of which the deed gave notice to the remainderman 998
42. where several wills were in issue and the jury found in favor of a certain one, the appellants were not prejudiced by the introduction of one made elsewhere, it being competent to show that the testatrix had for some time contemplated such disposition of her property as she made in the will which was upheld by the jury 1073
43. the refusal of the lower court to permit an attesting witness to a will to testify as to the declaration of the testatrix at the time to him as to why she disposed of her property in such manner, is not ground for reversal, the bill of exceptions not showing what reasons she gave for thus disposing of her property 1073
44. a father by his will devised to each of his children certain lands for life, with remainder to their children, and provided that the land devised should be valued by two disinterested housekeepers, and such valuation should be the value each child should account for in the final settlement of his estate, and that all the balance of his estate should be converted into money and distributed among his devisees after equalization shall have taken place in the value of the land devised. One of his daughters filed a deed of disclaimer of the will in the office of the county court clerk as provided by Kentucky Statutes, section 2067, and then filed suit for a settlement of the estate. Held—That under the will such daughter is only given a life estate in the land devised to her, and at her death the title passes to her children, and the effect of her disclaimer is to at once vest the title thereto in her children, and she is only entitled to her share of the surplus estate disposed of in the subsequent clause of the will 1130
45. where a testator provided that a certain part of his estate, after three years, should be divided between his two sons, but if both or either should die before that time, or die leaving no heirs, then the portion should go to his sisters as already named, what was meant was that if either died without issue before the period of distribution his share should go to his aunts. The word "or" must be read as equivalent to "and" 1197
46. the purpose of all construction is to arrive at the intention of the testator, and in doing this the court will consider the whole instrument and the circumstances and situation of the testator, that it may read his words in the light of the circumstances attending him 1197
47. Held—Under this will that where the devisee died before the testator the property devised passed under the statute and not to residuary devisee 1237
48. where a testator wills all his property, real and personal, to a trustee for the use of his wife, and at her death the trustee to hold the same for use of his son, there being no devise after the death of the son, on the death of the wife the trust will be vacated on the demand of the son, and the trustee required to convey to him the legal title 1261

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49. where the widow of deceased was one of the executors of his will, it was her duty to endeavor to have probated a codicil to his will, and a reasonable allowance to her attorneys in their effort to probate it is a proper charge against decedent's estate 1277

Ex. No. C.
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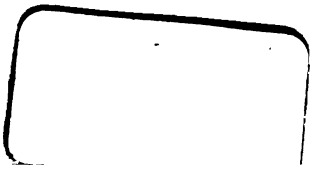
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